

Issue: Qualification – Retaliation (Grievance Activity Participation); Ruling Date: May 20, 2013; Ruling No.2013-3576; Agency: Department of Alcoholic Beverage Control; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Alcoholic Beverage Control
Ruling Number 2013-3576
May 20, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) on whether his January 3, 2013 grievance with the Department of Alcoholic Beverage Control (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant has been employed with the agency for approximately 36 years as a special agent. On July 12, 2012, he filed a grievance with the agency, challenging a Written Notice he received for damaging state property as a result of an automobile crash occurring during his operation of a state vehicle. On or about November 16, 2012, the grievant received a letter from the agency indicating that the agency was in the process of reassigning him to a different position that would not require him to operate a state-issued vehicle. On or about December 10, 2012, the grievant was told by agency management that he was to report to the agency’s central office location to begin his new assignment. On January 3, 2013, the grievant initiated a second grievance, challenging his reassignment to a civilian position with the agency, which he alleges was done in retaliation for his filing of the July 12 grievance.

The January 3, 2013 grievance proceeded through the management steps of the grievance process without resolution and the agency head denied the grievant’s request for hearing. The grievant now seeks a qualification determination from EDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.¹ Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.² Thus, claims relating to issues such as to the methods, means, and personnel by which work activities are to be carried

¹ See *Grievance Procedure Manual* § 4.1 (a), (b).

² See Va. Code § 2.2-3004(B).

out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.³ Here, the grievant exclusively alleges that agency management retaliated against him for his prior use of the grievance procedure by reassigning him to a civilian position within the agency. As such, retaliation is the only issue that is being addressed in this ruling.

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;⁴ (2) the employee suffered an adverse employment action;⁵ and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.⁶ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.⁷

In this case, the grievant alleges agency management retaliated against him for prior use of the grievance procedure by reassigning him to a civilian position within the agency. The initiation of a grievance is clearly a protected activity.⁸ However, the grievance does not raise a sufficient question as to whether there was a causal link between the protected activity and the grieved actions.

Even if EDR assumes for purposes of this ruling only that the grievant's reassignment was an adverse employment action,⁹ the agency has offered a reasonable explanation as to why the grievant was reassigned. The agency indicates that its consideration of the grievant's driving record following the most recent incident in which he was involved led to the conclusion that it was in the best interest of the agency and the Commonwealth if the grievant's position did not require him to routinely operate a state vehicle. Although the grievant alleges that the agency's

³ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

⁴ See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

⁵ Although for the past six years EDR has used the "materially adverse action" standard for retaliation claims, we are returning to the "adverse employment action" standard for the assessment of all claims, including retaliation, as to whether they qualify for hearing. See Va. Code § 2.2-3004(A).

⁶ *Merritt v. Old Dominion Freight Line, Inc.* 601 F.3d 289, 294 (4th Cir. 2010); *Holland v. Wash. Homes, Inc.* 487 F.3rd 208, 214-15 (4th Cir. 2007).

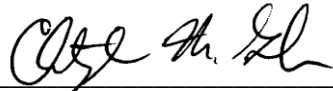
⁷ See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981).

⁸ See Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

⁹ A reassignment or transfer with significantly different responsibilities, or one providing reduced opportunities for promotion can constitute an adverse employment action, depending on all the facts and circumstances. See *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371 (4th Cir. 2004); *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999); see also *Edmonson v. Potter*, 118 Fed. Appx. 726 (4th Cir. 2004) (unpublished opinion).

actions were retaliatory, he has not provided any indication that the agency's explanation for its actions was mere pretext or given as an excuse for retaliation. While he points to the temporal proximity of his initiation of a grievance and the agency's actions in reassigning him, generally there must be some evidence, in addition to the close proximity in time, that would raise a sufficient question as to whether the adverse action was taken as a result of the grievant's engaging in protected activity.¹⁰ In this instance, it appears that the agency reassigned the grievant as a result of a multitude of driving incidents on his record. The fact that the most recent incident led to disciplinary action that was the subject of a grievance does not preclude the agency from considering such an occurrence in the agency's management of the affairs and operations of state government. As such, the grievant's claims of retaliation do not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.¹¹



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Office of Employment Dispute Resolution

¹⁰ See EDR Ruling No. 2007-1727; *see also* EDR Ruling Nos. 2008-1755, 2008-1831; EDR Ruling No. 2007-1538.

¹¹ Va. Code § 2.2-1202.1(5).