

Issues: Qualification – Retaliation (Waste, Fraud & Abuse, and Grievance Activity Participation), and Discrimination (Age and Other); Ruling Date: June 3, 2013; Ruling No.2013-3613; Agency: Department of Motor Vehicles; 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 Motor Vehicles
Ruling Number 2013-3613
June 3, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) on whether his October 10, 2012 grievance with the Department of Motor Vehicles (the “agency”) qualifies for a hearing.¹ For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In September 2012, the grievant contacted certain elected officials regarding issues with the agency that he considered to be matters of public concern. The agency became aware of the grievant’s conduct several days later, and met with the grievant to discuss the situation on September 28, 2012. As part of an ongoing, and unrelated, internal investigation the agency attempted to interview the grievant on October 9, 2012. The grievant apparently refused to participate in this interview. He subsequently requested information from the agency about matters related to the investigation; the agency did not respond or provide the information that the grievant desired. On October 10, 2012 the grievant filed a grievance challenging these management actions.

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.² Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.³ Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to

¹ This grievance has previously been the subject of a compliance ruling by EDR. *See* EDR Ruling No. 2013-3464. In that compliance ruling, EDR held that several of the grieved management actions were improperly raised in the grievance as it was originally initiated. This qualification ruling will address only those claims that were permitted to proceed in the compliance ruling.

² *See* *Grievance Procedure Manual* § 4.1.

³ Va. Code § 2.2-3004(B).

whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.⁴

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁵ Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁷

Retaliation

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;⁸ (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity;⁹ 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.¹⁰ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹¹ Here, the grievant claims that the agency has retaliated against him because of his protected conduct, including, for example, participation in the grievance process, reporting allegations of fraud, waste, or abuse, and/or contacting elected officials. Specifically, the grievant argues that the agency forced him to meet with a supervisor regarding his contact with elected officials about matters of public concern, and also attempted to intimidate him in his capacity as a law-enforcement officer and witness to a crime.

On September 28, 2012 the agency asked the grievant to meet with several of its representatives to discuss his communications with public officials about alleged misconduct by

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

⁵ See *Grievance Procedure Manual* § 4.1(b).

⁶ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁷ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁸ 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).

⁹ 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).

¹⁰ *E.g.*, *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005); *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000).

¹¹ See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981).

the agency. The grievant initially declined the agency's request, and the agency then insisted that the meeting take place. The grievant claims that he felt threatened by the representatives' statements and conduct during the meeting, though he also acknowledges that the agency stated clearly that he had the right to contact elected officials throughout the meeting. While the grievant has engaged in protected activity, EDR cannot conclude that an agency seeking to meet with an employee or investigate workplace issues is, in itself, an adverse employment action. Furthermore, upon reviewing a recording of the meeting, EDR cannot find that the agency's statements, questions or audible behavior during the meeting had an adverse impact on the terms, conditions, or benefits of the grievant's employment. Accordingly, the grievance does not qualify for a hearing on this basis.

In addition, the grievant argues that the agency has retaliated against him by requesting to interview him on October 9, 2012 regarding a contemporaneous, but unrelated, administrative investigation. The grievant claims that by October 9 the investigation had been concluded, that he had no further information to provide, and that the agency's investigator wanted to interview the grievant again for disingenuous purposes. The grievant also states that he requested information from the agency regarding this administrative investigation and received no response from the agency.

For the same reasons as those discussed above, EDR cannot conclude that the grievant has suffered an adverse employment action merely because the agency wanted to interview him as part of an investigation into workplace issues. Although the grievant argues that the agency is attempting to intimidate him with "continued intrusions and questioning," he has not presented any evidence that the agency's conduct has had an adverse impact on the terms, benefits, or conditions of his employment. While the grievant may disagree with the agency's decision to continue to investigate the issues in question, this alone should not prevent the agency from conducting an investigation into potential wrongdoing if it so desires. As a result, the grievance does not qualify for a hearing on this basis.

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination.¹² To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.¹³ In this case, the grievant asserts that he has experienced discrimination based on his gender and his status as a veteran. He has not, however, presented any evidence in support of these allegations, and there is no evidence in the grievance record to indicate that such discrimination actually occurred. Nor is there any indication of an adverse employment action, as described above, to support a

¹² See *Grievance Procedure Manual* § 4.1(b).

¹³ See *Hutchinson v. INOVA Health System, Inc.*, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. Apr. 8, 1998).

qualifiable claim of discrimination. As a result, the grievant's claims of discrimination do not qualify for a hearing.

Nothing in this ruling is meant to indicate that EDR condones or approves of any of the actions alleged. This ruling only determines that under the grievance statutes this grievance does not qualify for a hearing because an adverse employment action has not occurred as to these specific challenged management actions. Furthermore, nothing in this ruling prevents the grievant from presenting these issues as background evidence, if determined to be relevant, in any other grievances that proceeds to hearing. EDR's qualification rulings are final and nonappealable.¹⁴



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¹⁴ See Va. Code § 2.2-1202.1(5).