Issue: Qualification – Retaliation (grievance activity); Ruling Date: May 30, 2013; Ruling No. 2013-3622; Agency: Department of Alcoholic Beverage Control; Outcome: Not Qualified.

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

RECONSIDERED QUALIFICATION RULING

In the matter of the Department of Alcoholic Beverage Control
Ruling Number 2013-3622
May 30, 2013

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") reconsider its decision in Ruling Number 2013-3576, in which EDR determined that his January 3, 2013 grievance with the Department of Alcoholic Beverage Control (the "agency") does not qualify for a hearing. For the reasons discussed below, EDR stands by its determination that this matter does not qualify for a hearing.

FACTS

The grievant's January 3, 2013 grievance concerns his reassignment to a civilian position within the agency, which he alleges was done in retaliation for a prior grievance filed in July 2012. In EDR Ruling Number 2013-3576, we determined that the grievance did not qualify for hearing. The grievant now disputes EDR's analysis and conclusions in that ruling.

DISCUSSION

EDR does not generally reconsider its qualification rulings and will not do so without sufficient cause. For example, EDR might reconsider a ruling containing a mistake of fact, law, or policy where the party seeking reconsideration has no opportunity for appeal. However, there must be clear or convincing evidence of such a mistake for reconsideration to be appropriate.[1] Here, the grievant alleges no such mistake. Rather, he challenges EDR's determinations with respect to whether (1) the grieved action was adverse, and (2) he presented sufficient evidence that the agency's stated reason for his reassignment was a pretext for retaliation.

To the extent that the grievant argues that his reassignment constituted an adverse employment action, EDR Ruling Number 2013-3576 did not find otherwise. Indeed, 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.[2] However, whether the challenged action was adverse is simply one part of the required analysis in determining whether a grievance qualifies for a hearing. Pursuant to the *Grievance Procedure Manual*, to qualify for hearing, the adverse action must have

[1] *See* EDR Ruling Nos. 2010-2502, 2010-2553.
[2] *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).

occurred *as the result of* one or more of the factors listed in Section 4.1(b) of the *Grievance Procedure Manual.*[3]

In this instance, 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. Thus, the required analysis to determine whether the grievance qualifies for a hearing examines 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. Here, EDR determined that the grievance fails to present sufficient evidence regarding the third factor, specifically whether management took the action because the grievant had engaged in protected activity.

EDR concluded that the agency offered a reasonable explanation for the grievant's reassignment. Unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation, the grievance will not qualify for a hearing.[6] EDR Ruling Number 2013-3576 found that the grievant had not presented such evidence. In his request for reconsideration, the grievant has submitted nothing that would alter EDR's findings. The grievant re-asserts his argument that the temporal proximity of his initiation of a grievance and the agency's actions in reassigning him show pretext. However, as stated previously, there must generally be some evidence, in addition to any 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.[7] In this case, when compared to the ample evidence underlying the agency's nonretaliatory basis for the grieved action, the asserted proximity in time alone is not sufficient to indicate pretext. While the grievant may disagree with EDR's prior ruling, he presents nothing in his request for reconsideration indicating that a mistake of fact, law, or policy led to an incorrect result. As such, the January 3, 2013 grievance does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.[8]

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[3] Retaliation for participating in the grievance process is a specified factor.
[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] *See* 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* EDR Ruling No. 2007-1727; *see also* EDR Ruling Nos. 2008-1755, 2008-1831; EDR Ruling No. 2007-1538.
[8] Va. Code § 2.2-1202.1(5).