

Issue: Qualification/Retaliation/Whistleblowing; Ruling Date: December 4, 2002,
Ruling #2002-078; Agency: Museum of Natural History; Outcome: Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Museum of Natural History
No. 2002-078
December 4, 2002

The grievant has requested a qualification ruling on whether her grievance, initiated on June 18, 2002 with the Virginia Museum of Natural History (the museum or the agency), qualifies for hearing. The grievant claims: 1) she was laid off in retaliation for reporting to members of the museum's Board of Trustees (the Board) alleged mismanagement by the museum Executive Director (the Director); 2) the museum reorganization was a pretense to lay her off in retaliation for reporting alleged inappropriate actions by the Director; 3) misapplication of the layoff policy; 4) hostile work environment; and 5) "harassment and scapegoating" by the agency Director. For the reasons discussed below, only the issues of retaliation and misapplication of the layoff policy qualify for hearing.

FACTS

The grievant was employed as a Public Relations manager at the museum. In July 2001, the grievant reported to the Chairman of the Board the Director's alleged misapplication of personnel policies, including a failure to investigate reports of sexual harassment by, and preferential treatment of, certain male employees. In August 2001, the Director became aware of the complaints to the Chairman of the Board. Thereafter, in an e-mail to a museum employee, the Director referred to the complaints as a "debacle" and indicated his knowledge of grievant's possible involvement in these allegations of mismanagement. From then on, the grievant maintains that she was the victim of ongoing antagonism by the Director and labeled a "troublemaker" at the museum. Subsequently, due to a strained relationship between the Chairman of the Board and the Director following the Chairman's exploration of the Director's alleged inappropriate activities, the Chairman of the Board resigned.

In January 2002, another Board member began investigating the allegations set forth by the grievant and other employees. The Board member's investigation consisted of contacting museum employees and inquiring about working conditions at the museum. On January 23, 2002, in an e-mail to the new Chairman of the Board, the Director voiced his disapproval of the Board member's investigation and stated that "this sort of thing undercuts me, irritates staff, and hurts morale." This e-mail also identified the grievant as the possible "pipeline" which prompted the January investigation.

In mid-February of 2002, the Chairman of the Board asked for volunteers from the museum staff to serve on a museum Structure Committee that would bring recommendations for restructuring the museum to the Director, and through him, to an *ad hoc* Management Committee of the Board. Of those volunteers, five were selected by the Board Chairman to serve on the Structure Committee. The Structure Committee was asked to recommend a scenario in which there would be not more than three direct reports to the Executive Director and in which there would be sufficient savings overall to compensate for the budget cuts. According to the agency, with only three direct reports, the Director would have more time to focus on fundraising activities.

After the Structure Committee submitted its initial recommendation, the Director selected four additional museum employees to review the recommendation and serve on the Structure Committee. The grievant had previously reported allegations of sexual harassment by one of those chosen by the Director to serve on the Structure Committee. Thereafter, on March 6, 2002, the Director submitted a proposed reorganization plan, dated February 26, 2002, to the *ad hoc* Management Committee of the Board for review. This plan eliminated the grievant's position. Subsequently, department managers were asked for input on additional ways to cut costs. The grievant asserts that several plans were set forth that would have accomplished the goal of reducing expenses without sacrificing positions. The Director bore the ultimate responsibility of deciding which reorganization plan or cost-cutting measures would be recommended to the Board for implementation.

After a number of meetings, the final plan for reorganization was presented at the May 2002 Board meeting. Like the initial recommendation, the final plan eliminated the grievant's position. On May 22, 2002, the grievant was given notice of layoff. None of the initial volunteers or additional staff members chosen by the Director to serve on the Structure Committee were laid off as a result of the reorganization process. Moreover, all employees laid off as a result of the reorganization had reported alleged inappropriate actions by the Director.

DISCUSSION

Retaliation

The grievant claims that the Executive Director laid her off in retaliation for reporting to members of the Board his alleged mismanagement.

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;¹ (2)

¹ See Va. Code § 2.2-3004(A)(v). 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,

the employee suffered an adverse employment action; 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 action, the grievance does not qualify for a hearing, unless the employee's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.² Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.³

The grievant's reports to Board members of the Director's alleged mismanagement and misapplication of personnel policies, including the failure to investigate claims of sexual harassment, and preferential treatment of male employees, could be a protected activity.⁴ Further, by being laid off, the grievant suffered an adverse employment action.⁵ While the agency has provided nonretaliatory business reasons for the layoff -- reorganization and budgetary constraints -- this Department concludes, based on the totality of the circumstances, that a sufficient question remains as to the existence of a causal link between the grievant's layoff and her reports of alleged mismanagement to the Board. The hearing officer, as a fact finder, is in a better position to determine whether retaliatory intent contributed to the grievant's layoff.⁶ As such, the issue of retaliation is qualified for hearing.

Misapplication or Unfair Application of Layoff Policy

In the present case, the grievant challenges the agency's application of Department of Human Resource Management (DHRM) Layoff Policy.⁷ It is the Commonwealth's policy to ensure "a system of personnel administration based on merit principles and objective methods of appointment, promotion, transfer, *layoff*, removal,

reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

² See *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 656 (4th Cir. 1998).

³ See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

⁴ See Va. Code § 2.2-3004(A)(v) (retaliation for reports of gross mismanagement and/or exercising any right otherwise protected by law are protected activities).

⁵ An adverse employment includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. See *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001).

⁶ See *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364-365 (4th Cir. 1985), abrogated on other grounds, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) quoting *Morrison v. Nissan Motor Co., Ltd.*, 601 F.2d 139, 141 (4th Cir. 1979) ("[r]esolution of questions of intent often depends upon the 'credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination'").

⁷ See DHRM Policy No. 1.30 Layoff (effective 9/25/00). The Layoff Policy was revised 6/10/02, however, because the former policy was in effect at the time of the events that form the basis of this grievance, the former policy will be applied in this ruling.

discipline, and other incidents of state employment.”⁸ The Department of Human Resource Management (DHRM) Layoff Policy requires that agencies select employees for layoff based on seniority and other objective factors.⁹ Factors such as race, religion, political affiliation, age, disability, national origin, sex or improper retaliatory motives may not form the basis for selecting an employee for layoff. Thus, if retaliation played a role in the implementation of layoffs, rather than the uniform criteria established by DHRM’s Layoff Policy, that policy would have been misapplied. Because the issue of retaliation qualifies for a hearing, this Department deems it appropriate to send grievant’s related misapplication of policy claim for adjudication by a hearing officer as well, to help assure a full exploration of what could be interrelated facts and claims.

Hostile Work Environment/Harassment

Although all complaints initiated in compliance with the grievance process may proceed through the three resolution steps set forth in the grievance statute, thereby allowing employees to bring their concerns to management’s attention, only certain issues qualify for a hearing. For example, while grievable through the management resolution steps, claims of hostile work environment and harassment qualify for a hearing only if an employee presents sufficient evidence showing that the challenged actions are based on race, color, national origin, age, sex, religion, political affiliation, disability, marital status or pregnancy.¹⁰ In this case, the grievant has not alleged that her layoff was based on any of these factors. Accordingly, her claims of “hostile work environment” and “harassment” do not qualify for hearing. However, this ruling does not prevent the grievant from introducing at hearing as background evidence instances of alleged general animosity or poor treatment by the Director to demonstrate her charge of retaliatory intent.

CONCLUSION

For the reasons discussed above, this Department qualifies the issues of retaliation and misapplication of policy for a hearing. This qualification ruling in no way determines that the agency’s decision to lay off the grievant was retaliatory, contrary to policy or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

If the grievant wishes to appeal to the circuit court this Department’s decision regarding the denial of qualification of her harassment and hostile work environment claims, she should notify her Human Resources Office, in writing, within five workdays of receipt of this ruling. If the court should qualify the grievance, within five workdays of

⁸ Va. Code § 2.2-2900, (Emphasis added).

⁹ See DHRM Policy No. 1.30 Layoff (effective 9/25/00).

¹⁰ Grievance Procedure Manual § 4.1(b)(2), page 10; see also DHRM Policy 2.30 Workplace Harassment (effective 05/01/02).

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receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that she does not wish to proceed.

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