Issue: Qualification/Retaliation/Whistleblowing; Ruling Date: December, 19, 2002; Ruling #2002-153; Agency: Virginia 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. 2002-153
December 19, 2002

The grievant has requested a qualification ruling on whether her grievance, initiated on June 17, 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 a member of the museum's Board of Trustees (the Board) mismanagement by the museum Executive Director (the Director); 2) misapplication of the layoff policy; 3) discrimination based on sex and age[1] and 4) hostile work environment. For the reasons discussed below, the issues of retaliation, misapplication of the layoff policy, and discrimination based on sex and age qualify for hearing.

FACTS

The grievant was employed as a manager at the museum. In December 2001, a Board member began investigating allegations of mismanagement by the Director. The Board member's investigation consisted of contacting museum employees, including the grievant, and inquiring about working conditions at the museum. The grievant asserts that she told the Board member that she had notified the Director that an employee was abusing state time and resources by performing an outside project during state work hours, but that the Director did nothing and later accused her of lying about the reported abuse. On January 23, 2002, in an e-mail to the Chairman of the Board, the Director voiced his disapproval and anger with the Board member's investigation and stated that "this sort of thing undercuts me, irritates staff, and hurts morale."

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.

[1] Grievant's claims of discrimination and hostile work environment were not specifically mentioned on her Grievance Form A, but were raised in an attachment thereto at the time of initiation. This Department has long held that issues contained in any attachments to Grievance Form A at the time of initiation shall be viewed as part of the grievance.

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. 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. Therefore, it was approximately two months from the time the grievant reported the Director's alleged mismanagement to a member of the Board that a plan eliminating her position was endorsed by the Director. Subsequently, department managers were asked for input on additional ways to cut costs. The grievant asserts that financial goals could have been met 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 with an effective date of June 6, 2002. 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 his alleged mismanagement to the Board. 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;[2] (2) 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. Temporal proximity between the protected activity and the adverse action is often enough to raise a sufficient question of a causal link.[3] If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee has presented sufficient evidence that the agency's stated reason was a mere pretext or excuse for

[2] *See* Va. Code § 2.2-3004(A)(v) Only the following activities are protected activities under Va. Code § 2.2-3004(A): "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 incident of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law."

[3] *See* Tinsley v. First Union National Bank, 155 F.3d 435, 443 (4th Cir. 1998) (noting that merely the closeness in time between a protected act and an adverse employment action is sufficient to make a prima facie case of causality).

retaliation.[4] Evidence to establish a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[5]

The grievant's report to the Board of the Director's alleged mismanagement (allegedly allowing another employee's abuse of state time) could be a protected activity.[6] Further, by being laid off, the grievant suffered an adverse employment action.[7] In addition, there was a relatively close proximity in time between the grievant's reports of alleged mismanagement and the Director's endorsement of a plan that eliminated the grievant, approximately two months. Moreover, while this Department is unaware of any direct evidence that the Director actually knew that the grievant had communicated with the Board or knew the content of the communication, under the facts and circumstances of this particular case, a sufficient question remains as to this issue.[8] Therefore, 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.[9] As such, the issue of retaliation is qualified for hearing.

Alternative Theories Regarding Layoff

The grievant has advanced several alternative theories related to the agency's decision to lay her off, including allegations of misapplication of policy and discrimination based on sex and age. Because the issue of retaliation qualifies for a hearing, this Department deems it appropriate to send these alternative claims for adjudication by a hearing officer as well, to help assure a full exploration of what could be interrelated facts and issues.

Hostile Work Environment

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[4] *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).

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

[6] *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).

[7] 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).

[8] In two other closely related grievances previously qualified for hearing by this Department, direct evidence was presented of the Director's knowledge of reports by those two grievants to the Board of alleged mismanagement.

[9] *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'").

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 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 the claimed "hostile work environment" was based on any of these factors, but rather on the poor treatment she alleges she received from co-workers and subordinates as a result of the decision to eliminate her position. Accordingly, her claim of "hostile work environment" does not qualify for hearing. However, this ruling does not prevent the grievant from introducing at hearing as background evidence any 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, misapplication of policy, and discrimination based on sex and age. This qualification ruling in no way determines that the agency's decision to lay off the grievant was retaliatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

If the grievant wishes to appeal to the circuit court this Department's decision regarding the denial of qualification of her hostile work environment claim, 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 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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Claudia T. Farr
Director

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Jennifer S.C. Alger
Employment Relations Consultant

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