

Issue: Qualification/Retaliation/Whistleblowing; Ruling Date: December 4, 2002;
Ruling #2002-155; 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. 2002-155
December 4, 2002

The grievant has requested a qualification ruling on whether her grievance, initiated on June 10, 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) misapplication of the layoff policy; 3) sex, disability and age discrimination in implementation of layoffs; and 4) hostile work environment. For the reasons discussed below, the issues raised in her grievance are qualified for hearing.

FACTS

The grievant was employed in a management role at the museum and, as such, reported directly to the Director. In December 2000, and again in July 2001, the grievant reported to the Chairman of the Board the Director's alleged mismanagement, including spending restricted funds for purposes other than those for which they were intended, and misapplication of personnel policies, specifically, his failure to investigate claims of sexual harassment and preferential treatment of male employees. In August 2001, the Director became aware of the complaints to the Board Chairman. Thereafter, in e-mail to the grievant, the Director referred to the complaints as a "debacle" and further indicated his knowledge of the grievant's possible involvement in the allegations of mismanagement. The e-mail requested a meeting with the grievant to discuss the situation. At that meeting, the grievant claims that she was told that policy prohibited staff and Board members from talking with one another.¹

From then on, the grievant maintains that she was the victim of ongoing antagonism and false accusations by the Director. In October 2001, the grievant disclosed to the Director that she was suffering from Post-Traumatic Stress Disorder. 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.

¹ According to the then Chairman of the Board, however, staff and Board members may communicate freely.

Sometime in December 2001 or January 2002, the grievant claims that she contacted the State Fraud, Waste and Abuse Hotline regarding the Director's alleged misuse of museum funds. In addition, 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 stated that two museum employees identified the grievant as the possible "pipeline" which prompted the January investigation. On February 7, 2002, one of those employees accused the grievant of trying to "destroy [the] museum". This employee further asserted that he had no choice but to inform the Director of the grievant's intentions and suggested that the grievant permanently suspend her harmful efforts.

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, the Board Chairman selected five. Both of the employees that named the grievant as the "pipeline" for the Board's investigation were selected to serve on the Structure Committee. Although the agency maintains that no one person headed the Structure Committee, the Director instructed the Board to contact either one of these two employees if any questions should arise. 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. The Director bore the ultimate responsibility of deciding which reorganization plan or cost-cutting measures would be recommended to the Board for implementation.

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's staff 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 and several meetings of the entire group were held to discuss these options. The grievant asserts that several plans were set forth at these meetings that would have accomplished the goal of reducing expenses without sacrificing positions. A participant in these meetings claims that the grievant was verbally attacked and criticized for not doing her job by the two

employees that accused her of reporting to the board. On April 17, 2002, the grievant was placed on short-term disability due to stress.

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 10, 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 to members of the Board and to the State's Fraud, Waste and Abuse Hotline 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;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. 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.³ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.⁴

Reporting to the State's Fraud, Waste and Abuse Hotline is a protected activity.⁵ Reporting to the Board the Director's alleged mishandling of funds, and alleged misapplication of personnel policies, including the failure to investigate claims of sexual harassment, and preferential treatment of male employees, could also be a protected activity.⁶ Further, by being laid off, the grievant suffered an adverse employment action.

² 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, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

³ 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).

⁴ See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

⁵ See Va. Code § 2.2-3004(A); see also Va. Code § 2.2-1001(4)(iii).

⁶ See Va. Code § 2.2-3004(A)(v) (reporting an incident of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law is protected from retaliation).

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 and/or to the State Fraud, Waste and Abuse Hotline. The hearing officer, as a fact finder, is in a better position to determine whether retaliatory intent contributed to the grievant's layoff.⁷ As such, the issue of retaliation is qualified for hearing.

Alternative Theories to Layoff/Other Claims

The grievant has advanced several alternative theories related to the agency's decision to lay her off, including allegations of misapplication of policy, and sex, age and disability discrimination. Further, the grievant claims she was subjected to a hostile work environment due, in part, to a disclosed disability. Because the issue of retaliation qualifies for a hearing, this Department deems it appropriate to send these alternative claims, as well as the related claim of hostile work environment, for adjudication by a hearing officer as well, to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons discussed above, this Department qualifies the grievant's June 10, 2002 grievance. 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.

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Director

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⁷ 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.’”)