

Issue: Qualification/Retaliation-Grievance Activity; Discrimination; Ruling Date: October 8, 2002; Ruling #2002-157; Agency: Department for the Blind and Vision Impaired; Outcome: Not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department for the Blind and Vision Impaired
Ruling No. 2002-157
October 8, 2002

The grievant has requested a ruling on whether her June 10, 2002 grievance with the Department for the Blind and Vision Impaired (agency) qualifies for a hearing. The grievance challenges various alleged actions by her supervisor as discrimination. For the reasons set forth below, this grievance does not qualify for a hearing.¹

FACTS

The grievant is a Rehabilitation Teacher who has worked for the agency for over 17 years. The grievant received a mid-year performance evaluation on May 14, 2002 and a May 22, 2002 written notification of a forthcoming disciplinary action.² On June 10, 2002, she challenged the interim performance evaluation and the May 22 notification by initiating a grievance. Throughout the course of the grievance resolution steps, management has upheld its actions. The agency head denied qualification of the grievance and the grievant subsequently requested that the Director of this Department qualify it for hearing.

DISCUSSION

All claims relating to issues such as the means, methods, and personnel by which work activities are undertaken, or the contents of personnel policies, procedures, rules and regulations generally may proceed through the resolution steps set forth in the grievance statute (thereby allowing employees to bring their concerns to management's attention). However, such claims do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state

¹ While this ruling does not discuss with particularity each argument advanced by the grievant in her June 10, 2002 grievance, each of those arguments has been reviewed and carefully considered.

² During this investigation, the grievant clarified that the "due process notice" referred to in her Form A was this notification. A Written Group Notice was eventually issued and is currently being challenged through a separate grievance.

policy may have been misapplied.³ In this case, the grievant asserts that her supervisor's actions demonstrate a pattern of discrimination.

Discrimination

Under the grievance procedure, a claim of discrimination arising from membership in a protected class (in other words, on the basis of race, color, religion, political affiliation, age, disability, national origin, or sex) may qualify for a hearing.⁴ The grievant's complaint of discrimination, however, is not premised upon membership in any of those protected classes, but rather on a long history of supervisory conflict and her perception that she is being treated differently than others in her work area. Consequently, because the grievant has not alleged membership in a protected class as the basis for differing treatment, the issue of discrimination does not qualify for hearing as a claim for which relief may be granted.⁵

Managerial Conflict/Adverse Employment Action

While grievable through the management resolution steps, claims of managerial conflict are not among those issues identified by the General Assembly as ones that may..... qualify for a hearing. Furthermore, interim evaluations and communications regarding a *forthcoming* disciplinary action cannot be qualified for hearing unless there are facts that management misapplied or unfairly applied policy, engaged in retaliation or discrimination, or otherwise took an "adverse employment action"⁶ against the grievant affecting the terms and conditions of her employment.⁷ Without more, neither an interim evaluation or a mere notice of a *future* disciplinary action have a significant detrimental effect on the terms, conditions or benefits of employment.⁸ Certainly any subsequently issued formal disciplinary action, such as a written group notice, automatically qualifies for a hearing⁹, as would an involuntary termination based upon an annual performance evaluation as set out by state policy.¹⁰ Both of these latter

³ Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual*, §4.1, pages 10-11.

⁴ *Grievance Procedure Manual*, § 4.1(b), page 10.

⁵ During this investigation, grievant confirmed she is relying on Webster's dictionary definition of discrimination and not the definition according to the grievance procedure.

⁶ An adverse employment action is defined as a "tangible employment act constituting 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." *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

⁷ *Grievance Procedure Manual*, § 4.1, pages 10-11. *See also* EDR Rulings #2002-007 and #2001-096.

⁸ *Boone v. Golden*, 178 F.3d 253 (4th Cir. 1999).

⁹ E.g., an accumulation of written notices can lead to job termination. *See* DHRM Standards of Conduct Policy No. 1.60 (VII)(D), effective date 9/16/93.

¹⁰ *See* DHRM Policy No. 1.40 (Performance Planning and Evaluation). Should the interim evaluation later serve to support an adverse employment action against the grievant, e.g., a "Below Contributor" performance rating, the grievant may offer evidence as to the merits of the interim evaluation through a subsequent grievance challenging the annual performance evaluation. *See* EDR Ruling #2002-069.

actions clearly have a significant detrimental effect on the grievant's employment, unlike the interim evaluation and the mere notice of forthcoming discipline that are the subject of this grievance. Therefore, this grievance does not qualify for a hearing.

APPEAL RIGHTS AND OTHER INFORMATION

This ruling has no bearing on the parties' ability to present, at the hearing on the separate grievance challenging the subsequently issued Written Group Notice, any testimony or exhibits related to the subject of this grievance.

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 this determination to the circuit court, she should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this 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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