

Issue: Compliance/actions occurring to others/Qualification/Retaliation/Other protected right; Ruling Date: April 8, 2003; Ruling #2002-185; Agency: George Mason University; Outcome: grievant out of compliance; not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of George Mason University
Ruling Number 2002-185
April 8, 2003

The grievant has requested a ruling on whether his May 13, 2002 grievance with George Mason University (GMU) qualifies for a hearing. The grievant claims that the Chief of Police (Chief) issued an order that misapplied state and agency policy, failed to comply with law, and abused the authority of his position. The grievant further claims that after he questioned that order, the Chief subjected him to a hostile work environment, retaliation, and informal discipline. For the reasons stated below, this grievance does not qualify for hearing.¹

FACTS

The grievant is employed as a Law Enforcement Officer. While performing his duties on April 11, 2002, the grievant observed what he believed to be the unlawful uttering of a bomb threat by a student demonstrator. On April 12, 2002, the grievant obtained a warrant for the student's arrest. Upon his return to campus, however, he was informed that the Chief had ordered that the warrant not be served. The grievant claims that the Chief later chastised him for his exercise of judgement in obtaining the warrant.

Although the grievant has requested a qualification ruling, this Department must first address a compliance issue raised by the Third-Step Respondent: namely, that the issues of the grievance do not pertain directly and personally to the grievance's own employment.

DISCUSSION

Compliance

Under the grievance procedure, an employee's grievance must "[p]ertain directly and personally" to the employee's employment.² This grievance alleges in part that another employee, the Chief, issued an order that misapplied policy, failed to comply

¹ While not every issue and point raised in the grievance has been expressly addressed in this ruling, they nevertheless have been carefully considered.

² Va. Code § 2.2-3004 (A); *Grievance Procedure Manual* § 2.4, page 6.

with law, and abused his authority. The Chief's decision not to enforce a warrant, however, does not pertain "directly and personally" to the grievant's employment -- for example, the Chief's order itself neither disciplined the grievant, denied him compensation or an employment benefit, transferred him or reassigned his job responsibilities. Although the grievant asserts that the Chief's order inhibits his ability to perform his assigned duties, it appears that the grievant's challenge is merely an attempt to substitute his judgement for that of his superior on police enforcement policy. The parties are advised that the issue of the alleged impropriety of the Chief's order may be marked as concluded due to noncompliance, and no further action is required. This Department's rulings on matters of compliance are final and nonappealable.³

Qualification

Hostile Work Environment

The grievant claims that in response to his questioning of the Chief's order, management created a hostile work environment. Under the grievance procedure, a hostile work environment claim qualifies for hearing only if it is based on alleged discrimination arising from the grievant's membership in a protected class (i.e., race, color, religion, political affiliation, age, disability, natural origin, or sex).⁴ Because this grievance neither claims nor presents evidence that the alleged hostile work environment is based on the grievant's membership in a protected class, this issue cannot qualify for a hearing.

Retaliation

In his grievance, the grievant requests that he be allowed to work in an environment free of retaliation. In his comments to the Third Step Respondent, the grievant indicates that he was retaliated against for complying or attempting to comply with a law of the Commonwealth and for reporting "gross mismanagement" by obtaining the warrant and then questioning the Chief's decision not to have the warrant served.⁵

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) 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,

³ Va. Code § 2.2-1001 (5).

⁴ Va. Code §2.2-3004(A)(iii).

⁵ In his Third Step comments, the grievant also claims that in retaliation for initiating *this grievance*, management decided not to select him for additional duty positions as Field Training Officer and Baton Instructor. Once a grievance has been initiated, however, additional claims may not be added. *Grievance Procedure Manual* §2.4, page 6. This claim of non-selection is an additional claim for relief, arising *after* the filing of this grievance, and thus will not be addressed for qualification purposes.

the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.⁶

Adverse Employment Action

In this case, even if the grievant had engaged in a protected activity, this grievance provides no evidence of an "adverse employment action."⁷ 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."⁸ As a matter of law, adverse employment actions include any agency action that results in an adverse effect *on the terms, conditions, or benefits* of one's employment.⁹ The Chief's order not to serve the warrant and his subsequent actions preceding the filing of this grievance (such as directing the grievant to cease sending agency-wide emails challenging the Chief's decision on the warrant) had no significant detrimental effect on the grievant's employment status. The grievant was neither demoted, fired, denied a promotion nor given significantly different responsibilities. Nor were his compensation or benefits affected. Accordingly, although the grievant disagrees with the Chief's actions regarding the warrant, his retaliation claim cannot qualify for a hearing.¹⁰

Protected Activity

Even if an adverse employment action had been taken, it appears that the grievant's retaliation claim could not be qualified for hearing because there is insufficient evidence that he engaged in a "protected activity." Under the grievance procedure, "protected activities" are limited to (1) the use or participation in the grievance procedure; (2) complying with any law of the United States or the Commonwealth; (3) reporting any violation of a law to a governmental authority; (4) seeking to change a law before Congress or the General Assembly; (5) reporting an incident of fraud, abuse, or gross mismanagement; or (6) exercising any right otherwise protected by law.¹¹

Contrary to the grievant's assertions, the evidence regarding the Chief's decision not to enforce the warrant and his related actions is insufficient to support a finding that the Chief had failed to comply with state or federal law; had prohibited the grievant from

⁶ See *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653 (4th Cir. 1998).

⁷ The General Assembly has limited those issues that may qualify for hearing to those that involve adverse employment actions. Va. Code § 2.2-3004(A). The statute states that "a grievance qualifying for a hearing shall involve a complaint or dispute by an employee relating to . . . adverse employment actions" (emphasis added).

⁸ *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

⁹ *Von Gunten v. Maryland Department of the Environment*, 243 F.3d 858, 866 (4th Cir. 2001)(citing *Munday v. Waste Management of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997)).

¹⁰ Because there is no "adverse employment action," grievant's claim of informal discipline cannot be qualified either. See *Grievance Procedure Manual* § 4.1(b), page 11.

¹¹ Va. Code § 2.2-3004(A)(v) and (vi).

complying with state or federal law; had engaged in "gross mismanagement," or had deprived the grievant of his constitutionally protected right to free speech.¹²

APPEAL RIGHTS AND OTHER INFORMATION

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, the grievant 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 wishes to conclude the grievance and notifies the agency of that desire.

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Director

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¹² The law alleged by the grievant to have been violated by the Chief's actions classifies as a Class 3 misdemeanor, the willful and "corrupt" refusal by an officer to execute lawful process. There is no evidence that the Chief barred service of the warrant as a result of corruption or other wrongful motive. On the contrary, the evidence suggests that the Chief's decision was a legitimate exercise of his judgement, which was apparently endorsed by the Assistant Commonwealth's Attorney. Further, because the evidence suggests that the grievant's speech was made primarily in his role as an employee embroiled in a workplace dispute rather than in his role as a citizen, his speech concerning the Chief's decision on the warrant is not "protected speech" for First Amendment purposes. See *Harris v. City of Virginia Beach*, 1995 U.S. App. LEXIS 30912 (4th Cir. 1995).