

Issue: Qualification/Retaliation/Grievance Activity; Ruling Date: March 6, 2003; Ruling #2003-013; Agency: Department of Motor Vehicles; Outcome: Not qualified



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Motor Vehicles  
No. 2003-013  
March 6, 2003

The grievant has requested a qualification ruling on whether his grievance initiated on November 9, 2002 with the Department of Motor Vehicles (DMV or the agency), qualifies for hearing. The grievant claims he was laid off in retaliation for prior grievance activity. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant was employed as an Engineering Technician III with one of the agency's mobile weigh station units. On July 30, 2001, the grievant initiated a grievance challenging the agency's alleged failure to return him to his former post after his completion of an eighteen-month training period in Richmond. The grievance went through the management resolution steps, but the agency head denied qualification. On May 14, 2002, the grievant appealed to this Department for a qualification determination. The grievant then initiated a second grievance on July 10, 2002, claiming that a supervisor accessed his personnel file and released personal information to another agency. This grievance went through the first resolution step, but relief was not granted. Subsequently, on July 18, 2002, the grievant closed both grievances.

During the 2002 General Assembly, budget cuts for state agencies became necessary because of a revenue shortfall, and DMV's budget for the program in which the grievant worked was reduced by nearly 37 percent.<sup>1</sup> In late May of 2002, management began developing scenarios that would align the program with the new budget authorization, but which would necessitate significant changes to projects, operations and staffing.<sup>2</sup> After the Secretary of Transportation and the Commissioner approved the formal proposal, the plan was discussed with Human Resource Officers in

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<sup>1</sup> See memorandum to Human Resources from the Field Operations Manager for Weigh Stations, dated October 28, 2002.

<sup>2</sup> *Id.*

order to determine how employees would be affected.<sup>3</sup> Each mobile weight station unit lost one employee -- the employee with the least seniority. The agency determined that the grievant had the least seniority in his unit, and he was notified that his Pre-Layoff Leave was effective October 16, 2002.<sup>4</sup> His Leave Without Pay-Layoff (LWOP) became effective November 1, 2002.<sup>5</sup>

### DISCUSSION

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, discipline, and other incidents of state employment."<sup>6</sup> The Department of Human Resource Management (DHRM) Layoff Policy requires that agencies select employees for layoff based on seniority and other objective factors.<sup>7</sup> 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. In this case, the grievant claims that management laid him off in retaliation for prior grievance activity.

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;<sup>8</sup> (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.<sup>9</sup> Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.<sup>10</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> See Department of Human Resource Management (DHRM) Policy No. 1.30 Layoff (effective 9/25/00, revised 8/10/02). Paid leave that allows an agency to continue an employee's compensation for a maximum of two weeks prior to the effective date of layoff.

<sup>5</sup> *Id.* LWOP (Involuntary Separation) extends for twelve months from the layoff effective date, or until the employee is recalled, placed in a full-time salaried position that is in a Pay Band and salary equal to or higher than that of the employee's former position, resigns, or retires, whichever is sooner.

<sup>6</sup> Va. Code § 2.2-2900 (Emphasis added).

<sup>7</sup> See DHRM Policy No. 1.30 Layoff (effective 9/25/00, revised 8/10/02).

<sup>8</sup> 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.

<sup>9</sup> See *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4<sup>th</sup> Cir. 2000); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 656 (4<sup>th</sup> Cir. 1998).

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

The grievant clearly engaged in a protected activity when he filed his prior grievances. Further, by being laid off, the grievant suffered an adverse employment action.<sup>11</sup> Additionally, the action could be deemed sufficiently proximate in time to offer some evidence of causality.<sup>12</sup> The agency, however, has provided a nonretaliatory business reason for the decision to layoff the grievant -- agency-wide budget cuts necessitated by the Commonwealth's revenue shortfall. While not disputing that the agency was subject to significant budgetary constraints, the grievant argues that the agency's justifiable business reason for his lay off was pretextual and an excuse for retaliation.

As evidence of pretext, the grievant cites the agency's failure to transfer him to another position, while transferring other employees prior to layoffs. The grievant claims management knew in July 2002 that layoffs were imminent and, thus, they decided to "maneuver" favored employees that were "similarly situated" to the grievant into positions where they would be protected.<sup>13</sup> In support of this allegation, the grievant specifically notes the transfer of three employees.<sup>14</sup> Additionally, for purposes of this ruling, the grievant provided the names and telephone numbers of six witnesses (agency employees) whom he claimed would support his position and verify conversations concerning management's knowledge of impending layoffs, the transfer of favored employees and retaliation against the grievant for prior grievance activity.

For the following reasons, we find no merit to the grievant's argument. First, the agency has indicated that these employees were transferred based solely upon the employees' qualifications and the business need of the agency.<sup>15</sup> Two employees were permanently transferred to weigh stations where they had already been performing technician functions, filling positions that were vacant because of retirement. Both stations were deemed high volume interstate facilities and required additional staffing to maintain adequate operations. Additionally, the third employee was not transferred out of the position he held -- his job function was reassigned to Technical Services. Furthermore, the witnesses interviewed during this Department's investigation failed to corroborate any of the grievant's allegations.<sup>16</sup> Moreover, the named employees do not

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<sup>11</sup> An adverse employment action 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 (4<sup>th</sup> Cir. 2001).

<sup>12</sup> *See Tinsley v. First Union National Bank*, 155 F.3d 435, 443 (4<sup>th</sup> Cir. 1998)(closeness in time between a protected activity and an adverse employment action can be sufficient to make a prima facie case of causality). Here, at the time management was developing scenarios to bring the agency's budget in line with the new budget authorization, the grievant had one grievance at the qualification phase, and he had initiated a second.

<sup>13</sup> Attachment to Grievance Form A.

<sup>14</sup> *Id.*

<sup>15</sup> *See* memorandum to Human Resources from the Field Operations Manager for Weigh Stations, dated October 9, 2002.

<sup>16</sup> During the investigation for this ruling, the investigating consultant attempted to reach all six of the grievant's witnesses. However, not all of the witnesses could be reached at the telephone numbers provided by the grievant. The investigating consultant was able to contact and interview three of the grievant's witnesses, none of whom claimed to have any knowledge of improper actions by management.

appear “similarly situated” to the grievant as he claims. While the three employees had the same Role Title as the grievant (Engineering Technician III), they were not in the grievant’s work unit (the Mobile unit). Nor did they have the working title of Mobile technician. Two of the employees named by the grievant were technicians for the IRIS unit and one was with the NOMAD unit.<sup>17</sup> Although all three units were in the Motor Carrier Group, they were separate work units, requiring different knowledge, skills and abilities.<sup>18</sup>

During the investigation for this ruling, the grievant also made statements that suggest the agency’s stated business reason for his layoff was mere pretext because the Director against whom he initiated his July 2002 grievance was in the position to use the budget crisis to have him removed. While this Director was one of the administrative managers who reviewed agency functions to determine core functions and also identified Roles to be abolished, there were two other managers on the panel. The grievant has not presented any evidence of a conspiracy among these managers to remove him. Significantly, no specific individuals were designated at this level for layoff, only Roles. Human resource management had the responsibility of applying the layoff policy to determine which individual employees would be designated for layoff. Additionally, prior to implementation, the recommendations of the panel were reviewed at a higher level for approval. Furthermore, there is no evidence that the grievant was singled out for removal by management during the layoff process – the panel’s decisions affected all eleven mobile units in the Motor Carrier Group, not just the grievant’s work unit.<sup>19</sup> Each mobile unit lost one employee--the individual with the least seniority.<sup>20</sup>

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<sup>17</sup> The grievant was in the Mobile unit which uses portable scales to weigh trucks. The IRIS unit is an infrared screening unit that screens for possible equipment problems of motor carriers. The NOMAD unit maintains the accurate performance of all types of weighing equipment.

<sup>18</sup> During the investigation for this ruling, the agency provided the Employee Work Profile (EWP) for the technician position for each of these three units. The Core Responsibilities, Competencies and Certifications required for the NOMAD technician position differ significantly from those of a Mobile technician. While the EWP for the position of technician in the IRIS unit is very similar to that of a technician in the Mobile unit, the purpose of the IRIS unit is to perform infrared screening, which requires knowledge and skills about the scanning equipment that not required for the position of Mobile technician.

<sup>19</sup> The mobile unit group was originally part of VDOT; however, this function was transferred to DMV in 2000. At the time of the transfer to DMV, there were fewer employees on many of the mobile units. Management, therefore, was aware that the mobile units could be operational with fewer employees.

<sup>20</sup> During the investigation for this ruling, the grievant indicated that the agency may not have calculated his seniority correctly. Although this allegation could be viewed as a new issue not alleged at the time of the initiation of his grievance (which is not permitted under rules of the grievance procedure), it could also be considered a fact that, if true, could support his claim of pretext by the agency (conspiracy by the agency to improperly remove him from state service). Therefore, this Department investigated his allegation. Under the DHRM Policy No. 1.30 Layoff (effective 9/25/00, revised 8/10/02), seniority is calculated based on total continuous salaried state service, computed from the last employment or re-employment date into a classified position. It is undisputed that the grievant was re-employed as a full-time salaried employee by VDOT on January 25, 1999. Thus, that is the date from which to calculate his seniority, and the date DMV used.

In sum, the grievant's evidence has not presented a sufficient question as to whether management's action was motivated by retaliation or that the business reason given was pretextual. Accordingly, this grievance does not qualify for a hearing.

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 notifies the agency that he wishes to conclude the grievance.

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Claudia T. Farr  
Director

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Susan L. Curtis  
Employment Relations Consultant