

Issue: Compliance/consolidation of grievances for purposes of hearing; Qualification/Work Conditions/ Physical-Environmental, OSHA, Safety, Security; Ruling Date: March 3, 2003; Ruling #2003-034; Agency: Department of Transportation; Outcome: qualified and consolidated.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation/ No. 2003-034
March 3, 2003

The grievant has requested a ruling on whether her November 15, 2002 grievance with the Department of Transportation (VDOT or agency) qualifies for a hearing. The grievant claims that the agency has not adequately addressed her safety concerns and that management has discriminated and/or retaliated against her. For the following reasons, the grievance is qualified for hearing and consolidated with her November 22, 2003 grievance challenging her November termination.

FACTS

The grievant was employed by the agency from August 1996 until November 21, 2002, and was a Transportation Maintenance Crew Member when she filed this grievance.¹ On November 12, 2002, the grievant was struck in the arm by a metal bolt thrown by a co-worker.² The grievant informed management that she had been hurt on November 12, 2002 but asserts she was “[n]ot allowed to file out injury form [sic] until 11/14/02.”³ As relief, the grievant asks for a “safe work environment and for people to take responsibility for what they do to others.”⁴

The agency responded to the grievance by stating that the grievant’s supervisor is currently taking the necessary steps to address the matter and to assure that it does not occur again.⁵ Further, the agency stated that steps had been taken to ensure that management at the Area Headquarters was aware of the safety issue and the need to have it promptly addressed.⁶ The agency denied qualification of the grievance and the grievant subsequently requested a qualification ruling from this Department.

On November 21st, six days after the grievant initiated her grievance, she was terminated for alleged unauthorized or misuse of state records. The following day, she initiated a second grievance challenging her discharge, and, in an attachment to this second grievance, made reference to alleged gender discrimination and purported retaliation for (i) initiating an Equal Employment claim, and (ii) the November 15th grievance. The November 22nd grievance has been qualified by the agency for hearing.

¹ The grievant was issued a Group II Written Notice and terminated on November 21, 2003.

² See Employee’s Notice of Injury dated 11/12/02 and signed 11/14/02.

³ See Grievance Form A dated 11/15/02.

⁴ See Grievance Form A dated 11/15/02.

⁵ See First Resolution Step dated 11/18/02.

⁶ See Third Resolution Step dated 12/12/02.

DISCUSSION

Qualification

State policy requires agencies to maintain workplaces that are free of violence. The Department of Human Resources Management (DHRM) Policy 1.80 expressly requires that agency must protect victims of workplace violence and those who report acts of violence.⁷ Federal and state laws also require employers to provide safe workplaces.⁸ Furthermore, under OSHA, employees may ask their employers to correct general workplace hazards that are not violations of specific OSHA standards.⁹ OSHA also protects from retaliation employees who report unsafe working conditions to their employers.¹⁰

The grievant claims that she was initially not allowed to file an injury report for the injury she allegedly suffered as a result of a blow she received from a bolt thrown by another employee. The agency contends that when the grievant reported the situation to her supervisor, he instructed her to seek medical attention if she felt it was necessary and that management was taking the proper steps to make certain that such an incident would not happen in the future.¹¹

The facts in this case are disputed. For instance, contrary to the agency's assertion, the grievant alleges that her supervisor never instructed her to seek medical attention and that "(VDOT) employees were still throwing things that could harm others as of 11/20/02."¹² Furthermore, she claims that alleged statements made by co-workers on November 14, 2002 when questioned about the metal bolt throwing differ from the testimony given by the same co-workers under oath in a court proceeding regarding the same matter.¹³ More importantly, in her November 15th grievance, the grievant alleges that the agency's action (or inaction) was retaliatory and/or discriminatory.¹⁴ The issues of discrimination and retaliation were also raised in the November 22nd grievance¹⁵ and that grievance has been qualified for hearing.¹⁶

When one issue raised in a grievance has been qualified for hearing, it is the practice of this Department to send ancillary issues to hearing as well.¹⁷ In this case, two of the issues raised

⁷ Department of Human Resource Management (DHRM) Policy 1.80, "Workplace Violence." Workplace violence includes threatening behavior, verbal abuse, an intimidating presence, shouting and swearing, among other unacceptable conduct.

⁸ Under the Occupational Safety and Health Act of 1970 (OSHA), an employer must establish "place[s] of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 654(a)(1).

⁹ See <http://www.osha.gov/as/opa/worker/rights.html> <visited December 12, 2002>.

¹⁰ 29 U.S.C. 660 (c)(1). See also <http://www.osha.gov/as/opa/worker/index.html> <visited December 12, 2002>.

¹¹ See First Resolution Step dated 11/18/02.

¹² See Employee comments dated 2/01/03, page 1.

¹³ See documents faxed to this Department dated 2/18/03.

¹⁴ See Grievance Form A, box checked alleging discrimination or retaliation by immediate supervisor.

¹⁵ As discussed above, these issues were raised in the attachment to the November 22nd grievance.

¹⁶ The agency head qualified the November 22nd grievance on 01/29/03.

¹⁷ See EDR Ruling No. 2002-044 issued September 16, 2002.

in the qualified November 22nd grievance are the same raised in November 15th grievance: discrimination and retaliation. Given that the issues raised in the November 22nd grievance (formal discipline, termination, retaliation and discrimination) are qualified for a hearing, this Department deems it appropriate to qualify the November 15th grievance, which also alleges retaliation and/or discrimination, to help assure a full exploration of what could be interrelated facts and claims. (For example, the initiation of November 15th 2002 grievance serves as one of the potential protected activities cited in the November 22nd grievance.) Accordingly, the November 15th grievance is qualified as well.¹⁸ This qualification ruling in no way determines that the agency's handling of the grievant's safety concerns was discriminatory, retaliatory, or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

Compliance: Consolidation of the November 15th and 22nd Grievances

Written approval by the Director of this Department in the form of a compliance ruling is required before two or more grievances are permitted to be consolidated in a single hearing. EDR strongly favors consolidation and will grant consolidation when grievances involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.¹⁹

In this case, this Department finds that consolidation of the November 15, 2002 and November 22, 2002 grievances for hearing is appropriate: the grievances involve the same parties, issues, and there are factual disputes that may be interrelated, therefore, the grievance are consolidated for hearing. This Department's rulings on compliance are final and nonappealable.²⁰

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Director

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¹⁸ In claims regarding discrimination or retaliation where intent is critical to the outcome, the hearing officer, as fact finder, is better positioned to determine whether retaliatory intent played a role in management's action. *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.'").

¹⁹ *Grievance Procedure Manual* § 8.5, page 22.

²⁰ Va. Code § 2.2-1001 (5).