

Issue: Qualification/Work Conditions/ Supervisory Conflict, Physical-hostile work environment; Retaliation/other protected right; Misapplication of policy; Ruling date: June 27, 2003; Ruling #2003-040; Agency: Virginia Community College System; Outcome: not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Community College System/ No. 2003-040
June 27, 2003

The grievant has requested a ruling on whether his December 9, 2002 grievance with the Virginia Community College System (agency) qualifies for a hearing. The grievant claims that he was a victim of workplace violence and retaliation by his immediate supervisor and worked in a hostile environment.¹ For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is a Security Officer III with the agency. On November 22, 2002, the grievant states that his immediate supervisor entered the room yelling and threw a box containing equipment used to make student IDs at him. The grievant asserts that there were two witnesses to this event.² On the previous day the grievant had reported to his immediate supervisor's supervisor that his immediate supervisor had not responded to previous requests by employees for equipment to make student IDs.

On December 9, 2002, the grievant filed a grievance asking as relief that his supervisor's actions be addressed within state policies and procedures. During the grievance process, the grievant clarified that for relief he was asking that his immediate supervisor be given a suspension for up to 30 days, transferred and demoted and attend classes on anger management and team building.³

Management responded that the grievant's immediate supervisor was suspended for 10 days, that her work performance and professional development were being closely monitored, and that she would receive formal training in anger management and team

¹ The grievant checked the "Discrimination or Retaliation by the Immediate Supervisor" box on his Form A. However, during this Department's investigation, he explained that he is not claiming the supervisor's actions against him were predicated on his membership in any protected class, only that he was the employee, by chance, that went to the immediate supervisor's supervisor with his and co-worker's concerns.

² See Grievance Form A dated December 9, 2002 and statement given to this Department during its investigation.

³ See grievant's email of December 17, 2002 to first step respondent regarding attaching relief to his grievance form.

building.⁴ The agency denied qualification of the grievance and the grievant subsequently requested a qualification ruling from this Department.

DISCUSSION

Misapplication / Unfair Application of Policy

For an allegation of misapplication or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

The applicable policies in this case are the Department of Human Resource Management (DHRM) Policy No. 1.80 Workplace Violence⁵ and DHRM Policy No. 1.60 Standards of Conduct.⁶ DHRM policy No. 1.80 defines workplace violence as “[a]ny physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to . . . an intimidating presence, and harassment of any nature such as . . . stalking, shouting, or swearing.”⁷ Further, this policy states that the perpetrator of such an incident is to be disciplined per the Standards of Conduct policy.⁸ Finally, the Workplace Violence policy states that “[e]ach agency is expected to create and maintain a workplace designed to prevent or deter workplace violence through the development of agency policies and procedures that articulate how this policy will be implemented in their agency.”⁹

In this case, it appears that the grievant, as the alleged victim of his immediate supervisor’s shouting and throwing of a box, could have been involved in an incident of workplace violence as defined by policy.¹⁰ However, the agency appropriately addressed the matter in a manner consistent with DHRM policies. Upon receiving grievant’s report of the incident, management conducted an investigation that led to the disciplining of the immediate supervisor. Moreover, even though not obligated to do so, management told the grievant exactly how the immediate supervisor was being disciplined.

While the grievant may disagree with management’s decision regarding the specific discipline applied to his immediate supervisor, inherent in management’s

⁴ See Third Resolution Step Attachment dated January 27, 2003.

⁵ DHRM Policy No. 1.80 Workplace Violence effective date 5/01/02.

⁶ DHRM Policy No. 1.60 Standards of Conduct effective date 0/16/93 portions amended 9/25/00.

⁷ DHRM Policy No. 1.80 Workplace Violence effective date 5/01/02 Definitions, page 1 of 3.

⁸ *Id.* Policy Violations, page 2 of 3.

⁹ *Id.* Agency Responsibilities page 2 of 3.

¹⁰ *Id.* Prohibited Actions, page 1 of 3.

exclusive right to manage the affairs of state government¹¹ is the responsibility and discretion to administer discipline against employees as it deems necessary and appropriate. Moreover, DHRM policy grants management the authority to mitigate.¹² Thus, management is afforded great discretion when making such determinations. During this Department's investigation, management explained that it based its decision regarding the immediate supervisor's discipline in part on its finding that the statements of the two witnesses to the November 22, 2002 incident differed from each other,¹³ with Witness A supporting the grievant's account and Witness B reporting only that the immediate supervisor had placed the box on the table, similar to the account given by the immediate supervisor.¹⁴ In light of all the above, the grievant has presented insufficient evidence that policy was misapplied or unfairly applied with respect to the agency's resolution of this incident. Accordingly, this issue does not qualify for hearing.

Retaliation

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;¹⁵ (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 engaged in the protected activity.

In this case, even assuming for purposes of this ruling only that the grievant had engaged in a protected activity by reporting his immediate supervisor's actions to her supervisor, the grievant has failed to establish the second element of his retaliation claim.¹⁶ 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."¹⁷ As a matter of law, adverse employment actions

¹¹ "Management reserves the exclusive right to manage the affairs and operations of state government." Va. Code § 2.2-3004 (B).

¹² DHRM Policy No. 1.60, Standards of Conduct: Procedures for Implementing Disciplinary Action VII(E), effective date 9/16/93, amended 9/25/00, page 12b of 19.

¹³ Management's investigation did not find that the grievant had been hit by the box but found that the immediate supervisor was unprofessional in the main lobby where the November 22, 2002 incident occurred and had not properly handled the box containing very sensitive equipment.

¹⁴ See Memorandum to Security Supervisor Ref: Events of Friday, November 22, 2002 from grievant, Memorandum to Security Supervisor Ref: Events of November 22, 2002 from witness A, handwritten statement signed by witness B, and typed statement of immediate supervisor.

¹⁵ See *Grievance Procedure Manual* §4.1(b)(4), page 10. 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 a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law."

¹⁶ 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).

¹⁷ *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

include any agency action that results in an adverse effect *on the terms, conditions, or benefits* of one's employment.¹⁸ As a result of the grievant's reporting his immediate supervisor to her supervisor, the grievant has presented no evidence that he has suffered a loss of pay, position title, or shift, and there is no evidence that promotional opportunities were taken from him. In sum, because the grievant has not suffered an adverse employment action, the claim of retaliation cannot be qualified for a hearing.

Harassment/Hostile Work Environment

A claim of hostile work environment qualifies for a grievance hearing only if an employee presents evidence raising a sufficient question as to whether the challenged actions are based on race, color, religion, political affiliation, age, disability, national origin, or sex.¹⁹ The grievant does not assert, however, that the alleged harassment was based on any of these factors. Rather, his claim essentially describes conflict between the grievant and his immediate supervisor concerning his discussion with her supervisor regarding the student ID equipment and the immediate supervisor's reaction upon learning of this conversation. Such claims of supervisory conflict are not among the issues identified by the General Assembly that may 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 the qualification 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.

Claudia T. Farr
Director

¹⁸ 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)).

¹⁹ Va. Code § 2.2-3004 (A)(iii). *See also* Department of Human Resource Management (DHRM) Policy 2.30, which defines workplace harassment as conduct that "denigrates or shows hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status or pregnancy."

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