

Issue: Qualification/Retaliation; Ruling date: June 17, 2003; Ruling #2003-081;  
Agency: J. Sargeant Reynolds Community College; Outcome; qualified.



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

QUALIFICATION RULING OF DIRECTOR

In the matter of J. Sargeant Reynolds Community College/ No. 2003-081  
June 17, 2003

The grievant has requested a ruling on whether his March 12, 2003 grievance with J. Sargeant Reynolds Community College (JSRCC) qualifies for a hearing. The grievant claims that JSRCC retaliated against him when it changed his duties from safety compliance to regular security. For the following reasons, this grievance qualifies for a hearing.

FACTS

The grievant is a Security Officer III with JSRCC. The grievant left the College in February 2002 to accept a Chief position with another state agency. On March 14, 2002, the grievant rescinded his resignation and returned to his former position at JSRCC on April 1, 2002. The grievant claims that as a condition of his return (1) he was promised a 10% in-band adjustment, effective July 1, 2002, to align his salary with that of other security officers and (2) he would spend twenty hours a week on safety/compliance matters. When the salary increase was not approved by July 1, 2002, the grievant claims management assured him that once the increase was approved, it would be retroactive to July 1.

On February 5, 2003, the grievant filed a grievance with the College, challenging the College's failure to grant him the 10% in-band adjustment he was allegedly promised.<sup>1</sup> The grievant further states that he met with the Director of Facilities Management and Planning on March 5, 2003, where he discussed JSRCC's potential violations of the Occupational Safety and Health Act of 1970 (OSHA).<sup>2</sup> The grievant claims that after making these complaints to the Director, the Director began threatening to change his job responsibilities. On March 12, 2003, the grievant received an email informing him that he was being returned to full-time security duties and would no longer

---

<sup>1</sup> On March 21, 2003, JSRCC approved in-band adjustments for several employees. The grievant received an 8% increase, based on internal alignment, retroactive to January 10, 2003. See Memorandum, "In-Band Adjustments for Full-Time and Wage/Hourly Security Staff," dated March 21, 2003. The February 5, 2003 grievance is still pending.

<sup>2</sup> Specifically, the grievant informed the Director that the College was not training security staff as required by OSHA and was not providing the required vaccinations or personal safety equipment.

be responsible for the administrative/compliance duties. The grievant claims that this reassignment amounts to retaliation by the College for his (1) filing a grievance on February 5, 2003 and (2) reporting alleged OSHA violations to the Director.

The agency has advanced two reasons for removing the grievant's administrative responsibilities. First, in his response, the Second Step Respondent (the Vice President of Finance and Administration) cited the College's internal reorganization of its safety and security functions, which assigned all safety and compliance duties to the College's Safety Manager.<sup>3</sup> Second, during this Department's investigation, the Director of Facilities Management and Planning stated that his primary reason for reassigning the grievant was to provide security coverage, following the resignation of another security officer.<sup>4</sup> Management further asserts its authority to assign employees to meet agency operational needs.

### DISCUSSION

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>5</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 non-retaliatory 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>6</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>7</sup>

The grievant engaged in a protected activity when he filed his grievance in February 2003. Moreover, reporting alleged OSHA violations could be a protected

---

<sup>3</sup> Second Resolution Step Response. *See also* e-mail to all JSRCC employees, dated March 4, 2003, "Greater Emphasis on Workplace Safety = Establishment of College Safety Manager Position and Internal Reorganization of College Security Operations." This e-mail outlined the College's plan to divide its safety and security functions into two separate operational areas. Under the reorganization, the College Safety Manager reports to the Director of Financial Operations, while the security personnel reports to the Director of Facilities Management and Planning. *Id.*

<sup>4</sup> The Director cited the sniper attacks of last fall, the "War on Terrorism," and the heightened threat to homeland security as reasons for the need for increased security on campus.

<sup>5</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 Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>6</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>7</sup> *See* *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

activity. Under OSHA, employers 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.”<sup>8</sup> OSHA also protects employees who report unsafe working conditions to their employers against retaliation.<sup>9</sup> Therefore, under OSHA, it would appear that the grievant engaged in a protected activity when he reported his concerns to his supervisor.

The grievant may have also suffered an adverse employment action when the College removed his compliance responsibilities. 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.”<sup>10</sup> As a matter of law, adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>11</sup>

In this case, the grievant, although hired as a Security Officer, performed several administrative duties in the area of safety and compliance, duties generally reserved for security managers.<sup>12</sup> The grievant claims that responsibilities in his former administrative capacity included conducting legal research and drafting College safety policies. Moreover, the grievant stated that in that capacity, he had more opportunities for training, including classes in workplace safety, OSHA compliance, and forensic investigation. He claims that those training opportunities do not exist in his current capacity as a Security Officer. While the grievant has suffered no loss of pay or position title, it appears that the grievant has experienced a decrease in his level of responsibility, which could have an affect on his promotional opportunities. Therefore, because JSRCC’s action (taking away administrative functions that the grievant had been performing) could be found to have some significant detrimental effect on the grievant’s level of responsibility or opportunity for promotion, this grievance raises a sufficient question as to whether the grievant has suffered an adverse employment action.<sup>13</sup>

The College has advanced a legitimate, non-retaliatory business reason for its action, the origins of which lie in the College’s reorganization of its security and safety functions. Furthermore, it appears that the College was planning this reorganization as

---

<sup>8</sup> 29 U.S.C. 654(a)(1).

<sup>9</sup> 29 U.S.C. 660 (c)(1). *See also* <http://www.osha.gov/as/opa/worker/index.html> <visited May 13, 2003>.

<sup>10</sup> Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

<sup>11</sup> Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4<sup>th</sup> Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4<sup>th</sup> Cir. 1997)).

<sup>12</sup> *See generally*:<http://www.dhrm.state.va.us/services/compens/careergroups/pubsafe/SecurityServices69110.htm> <visited May 14, 2003> (discussing the Commonwealth’s Public Safety Career Group, including descriptions of security officer and manager positions).

<sup>13</sup> The grievant further claims that he suffered an adverse employment action because he left his Chief position (a management position) to return to the College in a safety/compliance position, not to be a full-time security officer. He claims that the compliance job is more prestigious than a security job and is a “bolster” to his resume.

early as December 2002, months before the grievant engaged in any protected activity. As a result of the restructuring, the grievant's position fell under a new supervisor whose vision of security operations at JSRCC differed from that of the grievant's former supervisor.<sup>14</sup> However, based on (1) the grievant's allegations that he was the only employee to be reassigned following the reorganization,<sup>15</sup> and (2) and the close proximity in time between the protected activity (participation in the grievance procedure and/or reporting alleged OSHA violations to management) and the claimed adverse employment action (removal of administrative duties), a significant question remains as to the existence of a casual link. The hearing officer, as a fact finder, is in a better position to determine the questions of fact and retaliatory intent presented in this grievance.<sup>16</sup>

### CONCLUSION

For the reasons discussed above, this Department qualifies the grievant's March 12, 2003 grievance for hearing. This qualification ruling in no way determines that the agency's actions were retaliatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. The agency is directed to request the appointment of a hearing officer within five workdays unless the grievant notifies them that he does not wish to proceed. For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

---

Claudia T. Farr  
Director

---

Leigh A. Brabrand  
EDR Consultant

---

<sup>14</sup> As noted above, the grievant's new supervisor, the Director of Facilities Management and Planning, saw a need for more security officers at the JSRCC campuses.

<sup>15</sup> At the conclusion of this Department's investigation, the evidence provided by management did not clearly refute this allegation.

<sup>16</sup> See *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364-65 (4<sup>th</sup> 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 (4<sup>th</sup> 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’”).

June 17, 2003  
Ruling #2003-081  
Page 6