

Issue: Qualification/Discrimination/Race, Recruitment/Selection, Retaliation/Other protected right; Ruling Date: November 26, 2003; Ruling #2003-145; Agency: University of Virginia; Outcome: qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of University of Virginia/ No. 2003-145
November 26, 2003

The grievant has requested a ruling on whether her May 8, 2003 grievance (Grievance 1) with the University of Virginia (University or UVA) qualifies for a hearing. The grievant claims that UVA discriminated and retaliated against her and misapplied policy when it granted two of her co-workers "Lead" designations. For the following reasons, this grievance qualifies for a hearing. Moreover, this grievance is consolidated with the grievant's second May 8 grievance (Grievance 2).

FACTS

The grievant is a Human Resource Analyst II with UVA. During the Spring of 2003, the grievant's supervisor decided to create two Lead roles within the division, based on the changing needs of the division. The supervisor allowed the staff "who had a stake in the decision to . . . choose who they believed to have the best vision, direction and leadership characteristics" to function as the Lead roles.¹ On April 17, 2003, the grievant's division held an "election" to determine which two staff members should receive "Lead" designations and additional responsibilities. Any interested employees were asked to prepare an oral presentation of their ideas for the staff who would be making the decision. The grievant, who sought one of the Lead positions, was not selected.

The grievant alleges that the Lead roles are, in essence, promotions, even though they did not result in a change in official role title or pay increase.² Therefore, she argues, the positions should have been open to recruitment under the state's hiring policy

¹ First Step Response, dated May 19, 2003.

² The grievant claims that the individuals in the Lead roles are functioning as the supervisors of the division. Although they are not supervisors "of record," they manage the day to day operations of the office. For example, the grievant states that if she calls in sick, she calls the Lead to whom she reports (not the Lead whose position she competed for). Moreover, she argues that the Leads attend management meetings and provide input to the supervisor of record on employee performance, thus impacting the employees' annual performance evaluations. The grievant compares the Lead positions to the former Assistant Director position, which was in a higher Pay Band. The Assistant Director position has been vacant since November 2000.

and the agency's past practice. Had the selection process complied with the state's hiring policy, the grievant claims that she would have been selected for the Lead position she sought, because she was the most qualified candidate for the position.³ Instead, she states that the "election" process ensured that she was not selected for the Lead role, because it was the result of a "popularity contest" rather than merit.

In addition to her misapplication of state policy claim, the grievant asserts that UVA has discriminated against her based on her race and her advocacy of African-American rights, particularly in the area of hiring and recruitment. She further alleges that she is being retaliated against for her outspokenness on race issues and for her prior use of the grievance procedure.

UVA claims that the state's hiring policy is not implicated in this case because there were no position vacancies nor were hiring decisions made. Rather, UVA asserts that additional duties were assigned to two existing employees. The University further denies the grievant's allegations of discrimination and retaliation, claiming that it supports the recruitment and hiring of minority candidates.

In addition to this grievance (Grievance 1), the grievant filed a second grievance with the University, also on May 8, 2003 (Grievance 2). In Grievance 2, the grievant challenged a written counseling memorandum. The grievant alleged that the counseling was discriminatory and issued in retaliation for the grievant's intention to file Grievance 1. On September 4, 2003, this Department ruled that Grievance 2 did not qualify for a hearing.⁴ However, on October 17, the circuit court disagreed, concluding that the grievant's retaliation claim in Grievance 2 should qualify for a hearing.⁵

DISCUSSION

By statute, grievances relating solely to the methods, means, and personnel by which work activities are to be carried out "shall not proceed to hearing."⁶ For that

³ The additional duties for that Lead position include oversight of one of the division's programs, as well as functioning "as a subject matter expert and internal consultant." See Employee Work Profile, Lead position. The grievant claims she is the most qualified for this role because she originally developed this program 15 years ago. She further states that she holds a college degree while the individual selected does not.

⁴ See EDR Ruling 2003-144. This Department held that a necessary element of a discrimination or a retaliation claim is an *adverse employment action*. See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981) and *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 656 (4th Cir. 1998). In Grievance 2, the only employment action taken against the grievant was a written counseling memorandum, which this Department has long held is not an adverse employment action because it does not have a significant detrimental effect on the grievant's employment status. See EDR Ruling 2002-169 and *Grievance Procedure Manual* § 4.1(c), page 11. As such, EDR did not qualify Grievance 2 for a hearing.

⁵ The circuit court interpreted Va. Code § 2.2-3004(A) to mean that *any* retaliatory act -- whether or not it has a significant detrimental effect on the grievant's employment status -- is *itself* an adverse employment action to be qualified for hearing. On that basis, the circuit court qualified Grievance 2.

⁶ Va. Code § 2.2-3004(C).

reason, a grievance challenging management's assignment of duties does not qualify for a hearing unless there is evidence raising a sufficient question as to whether discrimination, retaliation, or a misapplication of policy has occurred.⁷ Here, the grievant claims that the agency's decision to offer the "Lead" designation to another employee was an act of retaliation and discrimination, as well as a misapplication of policy.

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;⁸ (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.⁹ 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.¹⁰ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹¹

Grievant's prior participation in the grievance process is a protected activity.¹² Moreover, reporting allegations of racial discrimination to University officials could also be a protected activity.¹³ Further, the grievant may have suffered an adverse employment action when she was denied the Lead position.¹⁴ Moreover, the grievant's other May 8 grievance (Grievance 2), which the circuit court has qualified for hearing, claims

⁷ *Grievance Procedure Manual* § 4.1(b) and (c), pages 10-11.

⁸ 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.

⁹ *Dowe v. Total Action Against Poverty*, 145 F.3d 653, 656 (4th Cir. 1998).

¹⁰ See *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 656 (4th Cir. 1998).

¹¹ See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

¹² See Va. Code § 2.2-3004(A); see also Va. Code § 2.2-1001(4)(iii).

¹³ See Va. Code § 2.2-3004(A)(v) (reporting an incident of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law is protected from retaliation).

¹⁴ 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." *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998). Accordingly, a "decrease in compensation, job title, level of responsibility, or opportunity for promotion" could constitute an adverse employment action. *Boone v. Goldin*, 178 F.3d 253, 256-57 (4th Cir. 1999). The University's choice not to assign the grievant additional responsibilities could be viewed as adversely affecting her future promotional opportunities. For that reason, it could be concluded that the grievant suffered an adverse employment action when the Lead designation was awarded to another employee.

retaliation. This Department has long held that this Department may consolidate grievances whenever more than one grievance is pending involving the same parties, legal issues, and/or factual background.¹⁵ EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.¹⁶ In this case, although the grievances arose from two separate circumstances, the events giving rise to the grievances are closely related: for example, both grievances challenge the same management action – retaliation based on past grievance activity. In addition, where the issue of retaliation is grieved, and where the alleged retaliation is based on an earlier grievance, consolidation of the grievances is often appropriate.¹⁷ Consolidation of these grievances should provide an effective and efficient means of resolving the related disputes at hand. As such, the issue of retaliation in Grievance 1 qualifies for a hearing and is consolidated with Grievance 2.

Alternative Theories/Other Claims

The grievant has advanced alternative theories related to the agency's decision to offer the Lead designation to another employee, including allegations of misapplication of policy and discrimination. Because the issue of retaliation qualifies for a hearing, this Department deems it appropriate to send these alternative claims for adjudication by a hearing officer as well, to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons discussed above, this Department qualifies the grievant's May 8, 2003 grievance for a hearing and consolidates this grievance with the other May 8, 2003 grievance. This qualification ruling in no way determines that the agency's decision to grant the Lead designation with additional responsibilities to another employee was retaliatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

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¹⁵ *Grievance Procedure Manual* § 8.5, page 22.

¹⁶ *Id.*

¹⁷ See EDR Ruling 2002-043.

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