

Issue: Qualification/grievant claims retaliation for reporting concerns about supervisor, job abolished; Ruling Date: January 7, 2004; Ruling #2003-179; Agency: Department of Alcoholic Beverage Control; Outcome: qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Alcoholic Beverage Control/ No. 2003-179
January 7, 2004

The grievant has requested a ruling on whether her July 30, 2003 grievance with the Department of Alcoholic Beverage Control (ABC) qualifies for a hearing. The grievant claims that the agency's decision to abolish her position was arbitrary and capricious and was in retaliation for reporting concerns about her supervisor to an ABC Board member. For the following reasons, this grievance qualifies for a hearing.

FACTS

The grievant was employed as the Education Manager at ABC until her position was abolished on June 17, 2003. Prior to February 2000, the Education Section, including the grievant, reported to the Director of Management Services. In February 2000, the reporting structure for the Education Section moved to ABC's Bureau of Law Enforcement; however, its budget remained with ABC Administration.¹

In 2003, the General Assembly mandated budget cuts in ABC's Bureau of Law Enforcement Operations.² On March 4, 2003, the grievant and her staff met with one of the Commissioners of ABC's Board.³ During this meeting, the grievant and her staff discussed concerns about the Education Division's reporting structure. Specifically, they "raised issues regarding [grievant's supervisor] as well as his supervisor, [Enforcement Director]. The issues raised included: the lack of interest in the Education section; lack of knowledge about [the Education program]; unresponsiveness to any issues concerning Education . . .; lack of communication and direction given to Education; and the issue of power and control."⁴ On March 27, the grievant met with the Enforcement Director. In that meeting, the grievant claims that the Director stated several times that "someone got

¹ As one ABC employee described during this Department's investigation, the departments included in Enforcement's budget are coded numerically in the 800s. However, the Bureau of Law Enforcement is also responsible for other areas *not* under the 800 budget line. The ABC employee stated that these sections get their money from other areas, such as Administration. For example, although the Education Section was part of Enforcement's reporting structure, its budget code was in the 700s.

² See Second Step Response, dated August 25, 2003.

³ The Board is the governing body of ABC and is comprised of a chairman and two members (Commissioners). See www.abc.state.va.us <last visited December 3, 2003>.

⁴ Grievance Form A, Attachment, dated July 30, 2003.

to the Board from Education.”⁵ On June 17, the grievant learned that, as a result of the budget cuts mandated by the General Assembly, her position was being abolished.

The grievant claims that her layoff from ABC was arbitrary and capricious. Further, she asserts that this action was taken in retaliation for her meeting with the Commissioner. Specifically, she claims that the Enforcement Director was upset with her for going “over his head” to express concerns about the management of the Education Section. She further claims that because Education was not part of Enforcement’s budget, it should not have been part of Enforcement’s budget cuts. Moreover, she asserts that ABC has engaged in gender discrimination in its layoff practices.

The agency asserts that because the Education Section is part of the Bureau of Law Enforcement, “it was appropriate that it contribute to the budget reductions.”⁶ ABC further stated that management and clerical functions of Education could be shared with other units in Law Enforcement while avoiding “the elimination of sworn positions impacting core services.”⁷

It appears that at some point prior to July 1, 2003, the budget code for the Education Section shifted from the 700 budget accounting line to the 800 budget accounting line, thus bringing it under Law Enforcement’s budget. The grievant claims that the budget shift allowed the agency to target her individually for layoff, in retaliation for her complaints to the Board. During this Department’s investigation, an ABC employee reported that the Enforcement Director stated that he wanted to change the accounting line codes so he could lay off the grievant.⁸ The same employee also claims to have heard the Enforcement Director comment on more than one occasion that he was upset with the grievant for going to the Board and for causing trouble for her supervisor. However, another employee stated during this Department’s investigation that the decision to shift Education’s budget under Law Enforcement was made primarily to avoid cuts in the Tax Management Section of ABC.⁹ As a result, the agency “swapped” the accounting lines of Tax Management and Education so that the cuts could come from the Education Section.¹⁰

DISCUSSION

Retaliation

⁵ *Id.* The grievant claims that in response to the Director’s statement, she volunteered to him that she and her staff had met with a Board member.

⁶ Second Resolution Step, dated August 29, 2003.

⁷ *Id.*

⁸ The employee stated that the grievant was the only employee mentioned specifically as a potential for layoff.

⁹ The employee explained that a core responsibility of ABC under statute is to collect tax revenues and that it was impossible to make any cuts in this already-stretched area.

¹⁰ In other words, Tax Management’s accounting code was formerly in the 800s, but is now in the 700s, while Education’s accounting code is now in the 800s. This “swap” brought Education’s budget under Law Enforcement.

The grievant claims that the agency laid her off in retaliation for reporting allegations of mismanagement to a Commissioner of the ABC Board. 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;¹¹ (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.¹² Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹³

The grievant's reporting to a Board member of her perception of mismanagement by the Director and by her supervisor could be a protected activity.¹⁴ Further, by being laid off, the grievant suffered an adverse employment action. While the agency has provided nonretaliatory business reasons for the layoff – budget reductions in the Bureau of Law Enforcement and its desire to avoid the elimination of sworn officers – a sufficient question remains, based on the totality of the circumstances, as to the existence of a causal link between the grievant's layoff and her reports of alleged mismanagement to the Board. The hearing officer, as a fact finder, is in a better position to determine whether retaliatory intent contributed to the grievant's layoff (as well as whether her report of mismanagement rose to the level of a protected activity). As such, this issue qualifies for hearing.

Alternative Theories to Layoff/Other Claims

¹¹ 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.

¹² 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).

¹³ See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10, 101 S. Ct. 1089 (Title VII discrimination case).

¹⁴ See Va. Code § 2.2-3004(A)(v) (reporting allegations of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law is protected from retaliation). Moreover, the grievant's voicing of her concerns could possibly be protected by the First Amendment of the U.S. Constitution, because the Education Section's mission ("to promote responsible consumption and distribution by licensees of alcoholic beverages to those of age and zero tolerance for underage consumption through the use of prevention initiatives that focus on environmental, educational and information dissemination strategies") and the grievant's perception that its mission was being hampered could be matters of public concern. See *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (holding that a government employee does not have an absolute right to freedom of speech. Rather, "the speech must be a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by an injury the speech could cause to the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employee.") (internal quotation marks and citations omitted).

The grievant has advanced alternative theories related to the agency's decision to lay her off, including allegations of arbitrary and capricious application of policy and gender 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 grievance. This qualification ruling in no way determines that the agency's decision to lay off the grievant 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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