

Issue: Qualification/Misapplication of state and agency hiring policies/Retaliation against him for expressing concerns about racial discrimination by management; Ruling Date: March 12, 2004; Ruling #2003-421; Agency: Virginia Department of Transportation; Outcome: qualified for hearing



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation/ No. 2003-421
March 12, 2004

The grievant has requested a ruling on whether his August 4, 2003 grievance with the Virginia Department of Transportation (VDOT) qualifies for a hearing. The grievant claims that VDOT misapplied state and agency hiring policies and retaliated against him for expressing concerns about racial discrimination by management. For the following reasons, this grievance qualifies for a hearing.

FACTS

The grievant is a Transportation Operations Manager I at [Area] Headquarters (AHQ) with VDOT. The grievant has been with VDOT for 15 years and has been the Acting Superintendent for AHQ for the last two years. On June 25, 2003, he interviewed for a Transportation Operations Manager II (Maintenance Superintendent) position before a three-person panel, but was not the successful candidate.

The grievant claims that VDOT violated state and agency hiring policy throughout the interview and selection process. Specifically, he claims that (1) the interview questions did not pertain to the unique function of the Maintenance Superintendent position at one of the facilities under AHQ's control, (2) the interview panel was inappropriate because its members did not have an adequate understanding of the position, (3) the selection process resulted in the selection of a less qualified candidate than the grievant, and (4) no second interview was conducted. The grievant further claims that his nonselection was the result of retaliation by facility management for complaining to agency management about discriminatory practices at the facility.

DISCUSSION

The grievance procedure recognizes management's exclusive right to manage the operations of state government, including the hiring or promotion of employees within an agency.¹ Inherent in this right is the authority to weigh the relative qualifications of job applicants and determine the "best-suited" person for a particular position based on the

¹ See Va. Code § 2.2-3004(B).

knowledge, skills, and abilities required. Grievances relating solely to the contents of personnel policies and the hiring of employees within an agency “shall not proceed to a hearing.”² Accordingly, a grievance challenging the selection process does not qualify for a hearing unless there is evidence raising a sufficient question as to whether discrimination, retaliation, discipline, or a misapplication of policy tainted the selection process.³ In this case, the grievant claims that VDOT retaliated against him and misapplied policy.

Retaliation

The grievant claims that VDOT retaliated against him because of his prior complaints about the acting Maintenance Operations Supervisor, who was on the interview panel, and the Facility Manager. Specifically, the grievant claims that the Maintenance Operations Supervisor had made racially insensitive remarks in the past and that the Facility Manager has failed to act on complaints about the comments. The grievant claims that he has repeatedly complained to VDOT’s EEO Office in Richmond and to the Commissioner about the comments, most recently in September 2003. In support of his retaliation claim, he states that the Facility Director has expressed to another VDOT employee (Employee A) his dissatisfaction about the grievant’s complaints.

During this Department’s investigation, Employee A did verify that there was tension between the grievant and the Maintenance Operations Manager and believed that the reason for the tension was the grievant’s allegations of discrimination. Employee A also claims that the Facility Director stated that the grievant was “making trouble” with his allegations. Moreover, the employee stated that the grievant had complained about the Maintenance Operations Manager’s alleged discrimination in March 2003, just three months prior to the grievant’s interview. The employee, like the grievant, suspects that retaliation played a part in the agency’s decision not to hire the grievant for the Superintendent position.

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;⁴ (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 presents

² Va. Code § 2.2-3004(C).

³ *Grievance Procedure Manual* § 4.1(c), page 10.

⁴ *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.”

sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.⁵ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.⁶

The grievant's complaints to Central Office about a racially insensitive workplace could constitute a protected activity. Furthermore, not being selected for a position could be viewed as an adverse employment action. The agency provided a nonretaliatory business reason for the grievant's nonselection: the successful candidate "had the best interview and demonstrated excellent maintenance work experience."⁷ However, a sufficient question remains, based on the totality of the circumstances, as to the existence of a causal link between the grievant's nonselection and his reports of alleged discrimination to Central Office. The hearing officer, as a fact finder, is in a better position to determine whether retaliatory intent contributed to the grievant's nonselection. As such, this issue qualifies for hearing.

Alternative Theories for Nonselection

The grievant has advanced alternative theories related to the agency's hiring decision, including allegations that the agency misapplied state and agency hiring policy. 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 August 4, 2003 grievance. This qualification ruling in no way determines that the agency's hiring decision 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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Director

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⁵ See *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653 (4th Cir. 1998).

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

⁷ Second Resolution Step Response, dated August 19, 2003. The agency further stated that the grievant did not demonstrate enthusiasm or fully answer questions during his interview.

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