

Issue: Qualification/race discrimination; Ruling Date: April 23, 2004; Ruling #2003-509, 2003-510; Agency: Department of Transportation; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULINGS OF DIRECTOR

In the matter of Virginia Department of Transportation
Ruling No. 2003-509 & 2003-510
April 23, 2004

The grievant has requested rulings on whether his grievances initiated on June 25, 2003 and August 5, 2003 with the Virginia Department of Transportation (VDOT or the agency) qualify for a hearing. He claims (i) the agency's investigation into allegations made by a Caucasian female employee and (ii) the subsequent issuance of a written investigative report subjected him to harassment and racial discrimination. For the reasons set forth below, these grievances do not qualify for a hearing.

FACTS

The grievant is an African American employed as a Bridge Tunnel Patrol Supervisor with a VDOT facility. A Caucasian female employee supervised by the grievant accused him of showing preferential treatment to two other African American female employees. On May 5th, at the request of management, the agency's Human Resource department (HR) began an investigation. The HR investigator, an African American female, interviewed employees who work the same shift as the grievant. The interviews ended by May 15th. By June 25, 2003, the grievant had not received any information from management concerning the outcome of the investigation, other than being advised it remained ongoing.

Consequently, he initiated a grievance, challenging the investigation as "unjustifiable, tormenting and humiliating" and an attempt to deprive him of his position based upon his race.¹ As evidence in support of this claim, the grievant asserts the investigation itself was discriminatory and harassing because of its length and the number of individuals interviewed. Additionally, the grievant claims he was investigated only because he is an African American, asserting that, in the past, when

¹ See Grievance Form A, Section I, dated June 25, 2003.

African Americans have lodged such claims against Caucasian supervisors, management has failed to investigate. Specifically, the grievant claims a female African American employee at the same facility filed a complaint of discrimination against Caucasian supervisors, but management allegedly told her they did not believe her and failed to ask HR to conduct an investigation into the matter.

On July 7, 2003, the HR investigator issued a report concerning the allegations against the grievant. The investigator concluded that the grievant's communication style is perceived as intimidating and confrontational and that the interviewed employees feel the grievant shows favoritism toward women, especially African Americans. Consequently, the investigator recommended that senior management address the staff on the grievant's shift and reiterate management's expectations. No disciplinary action was taken against the grievant. After the issuance of the report, the grievant initiated a second grievance alleging that the report was inaccurate and was intended to subject him to harassment and discrimination. He claims the investigator was predisposed to find error on his part, which was reflected in the written report.²

In response to both the June 25th and August 5th grievances, management maintains that neither the investigation nor the report constitute harassment or discrimination. Management denies grievant's charge that claims of discrimination are handled differently based upon the race of the parties involved, and asserts that all such claims are referred to either the agency's Civil Rights Division or HR for investigation. With respect to the instance cited by the grievant where a female African American lodged a complaint of discrimination against a Caucasian supervisor, management notes that while the matter was not referred to HR for investigation (as was the case with the grievant), the Civil Rights Division did investigate and determined that no discrimination had occurred.³

Furthermore, the HR investigator disputes the grievant's claim that the length and scope of the investigation were intended to harass him. During the investigation for this ruling, the HR investigator stated that the report was issued as expeditiously as possible (approximately two months after the start of the investigation), considering the number of employees interviewed, the documentation reviewed (leave records, timesheets, shift

² The grievant had previously filed a grievance and the same HR employee who had served as the agency representative at his hearing conducted this investigation.

³ During the investigation for this ruling, the grievant supplied the name of this woman to the investigating consultant and the investigating consultant interviewed her to confirm the facts. In that case, an African American female was issued a Written Notice by her supervisor, a Caucasian female, in 2001. She subsequently challenged the Written Notice through the grievance process and alleged racial discrimination by her supervisor. This female employee also advised the investigating consultant she had discussed the alleged discriminatory actions of other supervisors with management on several occasions during the period 1998 to 2001. However, to her knowledge, no investigations were initiated. In response, the manager with whom this female employee allegedly spoke has no recollection of any specific claims of discrimination raised by this employee, other than the grievance in 2001.

sheets, etc.), the time required to draft the written report, and the demands of her schedule. Also, the investigator indicated that she followed standard practice when she interviewed all the employees on the grievant's shift to determine whether the employee's allegations had merit.⁴ Lastly, the investigator denies that her knowledge of the grievant's prior grievance activity impacted the contents of the investigative report. In support, she notes the report indicated only that the employees *perceived* favoritism by the grievant, but that no wrongdoing by the grievant was found and, thus, no corrective action was taken.

DISCUSSION

The General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."⁵ Therefore, the threshold question becomes whether or not the grievant has suffered such an action. 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."⁶ Thus, for a claim of discrimination to qualify for a hearing, the action taken against the grievant must result in an adverse effect on the terms, conditions, or benefits of his employment.⁷

In this case, the grievant has presented no evidence that he has suffered an adverse employment action. The investigation and report had no significant detrimental effect on the grievant's employment status.⁸ In fact, the report supported the grievant's position that he did not engage in favoritism, and management took no corrective action. Although the grievant disagrees with management's decision to conduct an investigation, there was no adverse effect on the terms, conditions, or benefits of his employment.

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 this determination to the circuit court, he 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

⁴ According to the HR investigator, no policy provisions or guidelines address how such investigations must be handled, but she followed standard practice by interviewing the grievant's subordinates to determine their perceptions as to whether favoritism was an issue.

⁵ Va. Code § 2.2-3004(A).

⁶ Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257, 2268 (1998).

⁷ 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)).

⁸ See Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 869 (4th Cir. 2001).

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appointment of a hearing officer unless the grievant notifies the agency that he does not wish to proceed.

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