

Issue: Qualification/discrimination, hostile work environment, retaliation for grievance activity; Ruling Date: March 17, 2004; Ruling #2003-523, 2003-541; Agency: Department of Correctional Education; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Correctional Education/ No's. 2003-523, 2003-541
March 17, 2004

The grievant has requested a ruling on whether his June 25, 2002 and July 15, 2002 grievances with the Department of Correctional Education (DCE) qualify for a hearing. In his June 25, 2002 grievance (Grievance 1), the grievant claims discrimination and a hostile work environment. In his July 15, 2002 grievance (Grievance 2), the grievant claims that an observation of his classroom was conducted in retaliation for an ongoing investigation involving the grievant and for Grievance 1. For the following reasons, these grievances do not qualify for a hearing.

FACTS

The grievant is a teacher with DCE.¹ On June 25, 2002, the grievant left his classroom briefly to mail a letter, make copies, and get a drink. In Grievance 1, the grievant states that when he returned, he received a telephone call from the principal (the grievant's supervisor) in which the principal used hostile and intimidating language, and "demanded information that [grievant could] not give."² The grievant further claims that this conversation and the grievant's past evaluations were based on hearsay, and that he is treated differently than other DCE employees with respect to sign-in sheets, attendance, classroom assistance, and opportunities for advancement.

The agency claims that there is no evidence that the principal created a hostile work environment or improperly relied on hearsay in completing the grievant's performance evaluation. The agency further states that other employees' sign-in sheets and attendance

¹ During the course of the investigation of the grievant's ruling requests, this Department attempted several times, unsuccessfully, to contact the grievant by telephone. On February 24, 2004, this Department sent a letter to the grievant informing him that if he failed to contact this Department, we would be required to complete the ruling without the benefit of his input. On February 27, 2004, the grievant contacted EDR, but failed to respond to the investigating Consultant's questions. The grievant stated that he was reluctant to speak with EDR about his grievances without first consulting his attorney. The grievant contacted this office on March 4, 2004, and stated that he would be available to speak to the investigating Consultant on March 5, 2004. However, as of the date of this ruling, the grievant has not responded to EDR's request to speak with him about the issues presented in Grievances 1 and 2. Accordingly, this ruling is issued based on this Department's best interpretation of the information presented in the grievance.

² Grievance Form A, dated June 25, 2002.

is a personnel matter and cannot be addressed in this grievance. Moreover, the agency claims that the grievant has not been denied any promotional opportunities and did not receive a second tutor in his classroom because he has not requested one.

In Grievance 2, the grievant claims that the principal observed his classroom on July 3, 2000 in retaliation for an on-going investigation and for his prior grievance procedure use.³ As evidence, the grievant states that the principal had not observed his classroom since 2000, asked several questions during the observation, and came at a time when very few students were present. Following the classroom observation, the principal completed a Classroom Observation Report of Teacher Performance, rating the grievant an overall "Contributor."⁴ DCE states that annual classroom observations are required in accordance with state policy and that the principal last observed the grievant's classroom in July 2001.⁵ The agency further claims that there is no evidence that the principal's evaluation of the grievant's classroom was retaliatory.

DISCUSSION

Grievance 1

Hostile Work Environment/Discrimination

While all grievances may proceed through the management resolution steps, to qualify for a hearing, claims of supervisory harassment must involve "hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status, or pregnancy."⁶ Here, the grievant has not alleged that management's actions were based on any of these factors. Rather, the facts cited in support of the grievant's claim can best be summarized as describing significant conflict between the grievant and the principal. Such claims of supervisory conflict are not among the issues identified by the General Assembly that may qualify for a hearing.⁷

The grievant also alleges that he is being discriminated against because other DCE employees are treated differently than he is regarding sign-in sheets, classroom assistance,

³ Based on the information presented in Grievance 2, it appears that the "investigation" to which the grievant refers occurred when he obtained, copied, and turned over to management sign-in and sign-out sheets. The agency claims that, in doing so, the grievant failed to follow protocol because he did not have permission to obtain the sign-in and sign-out sheets. See Third Resolution Response, page 2, dated September 13, 2002.

⁴ The grievant received "Below Contributor" markings in three areas: computer usage, protocol, and professional relations. In support of these marks, the principal cited the incident involving the sign-in and sign-out sheets. See Classroom Observation Report of Teacher Performance, dated July 3, 2002.

⁵ The agency cites state compensation policy, which states that agencies must "continuously review[] agency compensation practices and actions to ensure that similarly situated employees are treated the same." DHRM Policy 3.05, *Compensation*, page 6 of 21. The agency stated during this Department's investigation that it is their practice to observe classroom performance annually as part of their review of compensation practices. Furthermore, DCE submitted a Classroom Observation Report of Teacher Performance, signed by the grievant on July 29, 2001.

⁶ Department of Human Resource Management (DHRM) Policy 2.30, *Workplace Harassment*.

⁷ See Va. Code § 2.2-3004 (A).

and opportunities for promotion. Based on the agency's written responses to the Grievance Form A, we can infer that the grievant specifically claims that (1) other employees are permitted to "abuse" the sign-in sheets while the grievant is held accountable, (2) the grievant has only one tutor in his classroom, while the other teachers have two, and (3) the grievant was not assigned special projects to coordinate, such as graduation, and did not receive appropriate credit for his organization of Black History Month.

Again, however, there is nothing in the grievance record to indicate that the grievant's claim is one of discrimination based on membership in a protected class.⁸ Rather, his claim can best be described as a claim that management misapplied or unfairly applied the Commonwealth's general policy that personnel actions be "based on merit principles and objective methods" of decision-making.⁹

The General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."¹⁰ The threshold question then becomes whether or not the grievant has suffered an adverse employment 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."¹¹

A misapplication or unfair application of policy may constitute an adverse employment action if, but only if, the misapplication results in an adverse effect *on the terms, conditions, or benefits* of one's employment.¹² Assuming without deciding that other employees are permitted to misuse sign-in sheets, it does not appear that it caused the grievant to suffer an adverse employment action because there was no significant detrimental effect on the grievant's employment status. With respect to the grievant's claim that he has only one classroom tutor while other teachers have two, the agency stated that the grievant never requested a second tutor. Moreover, DCE acknowledged in the second and third management resolution steps the grievant's performance during Black History Month and stated that the grievant is not treated differently than other teachers with respect to special projects. The grievant failed to respond to this Department's numerous requests for information and has presented no evidence to the contrary. Because the grievant has presented no evidence that the alleged differential treatment amounted to any adverse employment action or resulted from discrimination, retaliation, or a misapplication of policy, these issues do not qualify for a hearing. Again, the grievant's

⁸ See DHRM Policy 2.05, *Equal Employment Opportunity*, which states that "all aspects of human resource management be conducted without regard to race, color, religion, gender, age, national origin, disability, or policy affiliation."

⁹ Va. Code § 2.2-2900.

¹⁰ Va. Code § 2.2-3004(A).

¹¹ *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

¹² *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)).

allegations and facts cited in support of his claims can best be described as evincing interpersonal conflict and dissatisfaction with the operations of his workplace.

Performance Evaluations Based on Hearsay

The grievant claims that his supervisor improperly relies on hearsay. The agency acknowledges that some inmate students and aides had complained about the grievant in the past, but denied that the principal relied on information from others in completing performance evaluations.

Assuming for purposes of this ruling only that the supervisor did rely on hearsay information in the completion of the grievant's performance evaluations, that would not appear to be a misapplication of state or agency policy. Indeed, DHRM Policy 1.40, *Performance Planning and Evaluation* states that "[i]n addition to the observations of the immediate supervisor, performance evaluation information can come from other sources, including the employee, peers, customers, subordinates, supervisors, and work products."¹³ Accordingly, it appears that it would not be improper for a supervisor to consider information from third parties in completing employee performance evaluations, along with his own observations.

Grievance 2

Classroom Observation/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;¹⁴ (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, did management take an adverse action because the employee engaged in the protected activity. If any of these three elements is not met, then the grievance may not qualify for a hearing.

It is doubtful that the grievant engaged in a protected activity when he turned over sign-in and sign-out sheets to agency management, although he certainly engaged in a protected activity by filing Grievance 1.

¹³ DHRM Policy 1.40, *Performance Planning and Evaluation*, page 8 of 16.

¹⁴ *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."

However, the grievant has not suffered an adverse employment action.¹⁵ He has not demonstrated that the July 3, 2003 classroom observation had a significant detrimental effect on his employment status. Moreover, the Classroom Observation Report of Teacher Performance that followed the July 3, 2002 observation was only as an “interim performance evaluation.”¹⁶ Under the grievance procedure, an interim evaluation does not qualify for hearing because it, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.¹⁷ Therefore, Grievance 2 does not qualify for a hearing.

This Department has long held, however, that should an interim evaluation later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a “Below Contributor” annual performance rating, the grievant may offer evidence as to the merits of that interim evaluation through a subsequent grievance challenging the adverse employment action.¹⁸

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 the qualification determination to the circuit court, the grievant 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 appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

¹⁵ For a claim of retaliation to qualify for a hearing, the action taken against the grievant *must* result in an adverse employment action. See *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 656 (4th Cir. 1998).

¹⁶ See DHRM Policy 1.40, *Performance Planning and Evaluation*, page 5 of 16, which states that interim evaluations “may be conducted at any time during the performance cycle . . . to advise an employee of his or her progress toward meeting performance measures or to document performance problems.”

¹⁷ *Grievance Procedure Manual* § 4.1, pages 10-11. See also EDR Ruling Nos. 2002-007 and 2001-220; *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999).

¹⁸ See e.g. EDR Ruling Nos. 2002-220 and 2003-175. In this case, it appears that the interim evaluation may have later been used to support a “Below Contributor” rating on the grievant’s October 2002 annual performance evaluation. However, the grievance addressed in this ruling does not challenge (and was filed three months prior to) the annual performance evaluation. Accordingly, this ruling does not address the October 2002 annual performance evaluation or to what extent the interim evaluation may have contributed to the annual performance rating.

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