Issue: Qualification/Recruitment-Selection; claim of retaliation for participation in the grievance procedure; Ruling Date: February 8, 2005; Ruling #2004-923; Agency: Virginia Department of Health; Outcome: qualified for hearing

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Health
No. 2004-923
February 8, 2005

The grievant has requested qualification of his March 24, 2004 grievance. The grievant alleges that the Department of Health (VDH or the agency) has retaliated against him for previous protected activity and misapplied and/or unfairly applied state and agency policy. For the reasons set forth below, this grievance is qualified and consolidated with the grievant's two other pending grievances for hearing.

FACTS

The grievant is employed by the agency as a Field Services Engineer. On January 7, 2004, the grievant applied for a promotion to the position of Technical Services Administrator.

The next day, the grievant's supervisor (hereinafter SP) issued the grievant a "Notice of Intent to Take Disciplinary Action." In this memorandum, SP advised the grievant that he was considering formal disciplinary action for the following alleged conduct by the grievant: (1) sleeping on the job on several occasions "between April 2003-January 9, 2004," (2) reading the newspaper during work hours, and (3) sending an e-mail to other employees critical of his supervisor and openly complaining about management. SP was one of the three members of the hiring panel for the Technical Services Administrator position. The grievant considered the timing of this memorandum to be a signal from SP that he would receive "no consideration" for the position.

The grievant provided his supervisor with a written rebuttal to the charges contained in the January 8th memorandum. In response to the allegations regarding sleeping on the job, the grievant explained that he took medication which could cause him to become drowsy, that he had advised his previous supervisor of this issue and assumed his current supervisor had been made aware of this problem, and that at most he had "dozed off" for only a few minutes on infrequent occasions. He also queried why he had not been promptly disciplined for his alleged conduct when it was first observed in April 2003, rather than approximately nine months later.

With respect to his newspaper reading, the grievant explained that, during work hours, he only quickly reviewed the newspaper's contents for articles related to his job, his agency and state government; if more detailed review were required, he read the newspaper during his lunch hour. He noted that he frequently disseminated work-related articles to his co-workers. In addition, the grievant questioned why he was being singled out for his newspaper reading when he had engaged in the conduct for the previous fifteen years and other employees also engaged in arguable abuses of state time, such as video games, personal e-mail, personal errands, and personal phone calls.

Lastly, in response to the allegations involving his criticism of management, the grievant asserted that his comments to his co-workers had been provoked by SP's own conduct—in particular SP's alleged sarcastic reply to an e-mail sent by the grievant and SP's alleged absences from the office on Fridays. He also denied that his criticisms were as frequent or as wide-spread as the January 8, 2004 memorandum suggested.

On January 30, 2004, while the issue of possible disciplinary action against the grievant was pending, the grievant was interviewed for the Technical Services Administrator position. The grievant states that the hiring committee was comprised of SP, a field director whom the grievant alleges is closely allied with SP, and an assistant in the agency's human resources department. The hiring panel ranked the grievant third among the candidates for the position. After the agency's first choice for the position declined the agency's offer, the position was offered to the agency's second-choice candidate, who accepted. The grievant alleges that the second-choice candidate lacks the technical expertise and experience necessary for the job, and that he was selected by the agency as its second choice in an effort to prevent the grievant from receiving the position.

On February 25, 2004, the agency announced the identity of the individual selected for the Technical Services Administrator position. A few days later, on March 5, 2004, SP notified the grievant that he would not be subject to disciplinary action. In his memorandum to the grievant of that date, SP noted that the grievant had taken "positive steps" to address the concerns raised regarding sleeping and reading the newspaper on the job. With respect to the grievant's alleged "disruptive behavior," SP stated that although the grievant had not taken "as positive an approach" to this issue as desired, no disciplinary action would be immediately forthcoming. SP advised the grievant that he expected "considerable progress" on this issue, however, including "major reductions in [the grievant's] negative attitude," refraining from "publicly airing" complaints about supervisors, "correcting the tone of remarks toward supervisors," and "generally becoming a positive influence instead of exhibiting disruptive behaviors."

On March 24, 2004, the grievant initiated the present grievance, in which he alleges that the agency has retaliated against him for his earlier grievance activity in 2001 and for challenging his performance evaluation in 2003. The grievant argues that the agency's failure to select him for the Technical Services Administrator position was

retaliatory, noting in particular an alleged course of hostile conduct by SP and SP's failure to exclude himself from the hiring panel while he was pursuing disciplinary action against the grievant. The grievant also alleges that SP has created a hostile work environment for the grievant by excluding the grievant from participation in training and conferences, threatening disciplinary actions, filing an inaccurate performance evaluation, failing to share relevant information with the grievant, and failing to act to prevent others from contributing to the hostile work environment.

The resolution of the present grievance was delayed by compliance issues which arose during the management resolution steps. On August 26, 2004, several months after the initiation of the present grievance, the agency issued the grievant two written notices. The first of these was a Group II written notice for failure to report to work as scheduled without proper notification to his supervisor during the period from June 28, 2004 to July 9, 2004; the second was a Group III written notice for sleeping on the job. In connection with the Group III written notice, the agency suspended the grievant for five work days.

On September 24, 2004, the grievant initated grievances challenging these disciplinary actions. He alleges that the written notices are unjustified and are part of a continued pattern of retaliation against him by the agency.[1] In particular, the grievant claims that he followed his customary practice in requesting and taking leave and notes that his supervisor signed his request for leave prior to June 28, 2004, the date on which he is first charged with an unapproved absence. The grievant also argues that his "dozing" while at work was caused by his use of medication, and that management had been advised of this issue and had previously accepted his explanation. After the parties failed to resolve these grievances during the management resolution steps, they were qualified for hearing.

DISCUSSION

Non-Selection

By statute and under the grievance procedure, management has the authority to determine who is best suited for a particular position by determining the knowledge, skills, and abilities necessary for the position and by assessing the qualifications of the candidates. Accordingly, a challenged non-selection does not qualify for a hearing unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced the process, or whether policy may have been misapplied.[2]

[1] The grievant also alleges that the written notices constitute a misapplication and/or unfair application of policy.
[2] Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1.

Retaliation

The grievant alleges that he was not selected for the Technical Services Administrator position in retaliation for his previous protected activity. 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;[3] (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 sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[4] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[5]

The grievant engaged in a protected activity when he filed a grievance on November 20, 2001.[6] Furthermore, not being selected for a position constitutes an adverse employment action. Here, the agency provided a nonretaliatory business reason for the grievant's non-selection: the candidate selected for the position demonstrated the necessary knowledge, skills and abilities and was the best suited for the job. However, after careful review of the evidence, this Department concludes that, based on the totality of the circumstances, the grievant has demonstrated that sufficient questions of fact exist with respect to his retaliation claim. The hearing officer, as a fact finder, is in a better position to determine whether retaliatory intent contributed to the grievant's non-selection. As such, this issue qualifies for hearing. We note, however, that this qualification ruling in no way determines that the agency's actions with respect to the grievant were retaliatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

Alternative Theory for Non-Selection

The grievant also claims the agency misapplied or unfairly applied state and agency policy in deciding not to select him for the Technical Services Administrator position. Because the issue of retaliation qualifies for a hearing, this Department deems

---

[3] *See Grievance Procedure Manual* §4.1(b)(4). 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."

[4] *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).

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

[6] Because the initiation of a grievance constitutes a protected activity, we do not need to reach the question of whether the grievant's challenge to his performance evaluation in 2003 constitutes protected activity.

it appropriate to send this alternative theory for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

Hostile Work Environment

In addition to his claims regarding non-selection, the grievant also claims he was subjected to a hostile work environment because of his previous protected activity. For a claim of retaliatory harassment to be qualified, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on her prior protected activity; (3) sufficiently severe or pervasive so as to alter his conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[7]

Although it is a close call, we conclude that, considering the totality of circumstances presented in this case, the grievant has demonstrated a sufficient question as to whether he has been subjected to retaliatory hostile work environment to warrant further exploration of this claim by a hearing officer. We again caution, however, that this qualification ruling in no way determines that the agency's actions with respect to the grievant was retaliatory or otherwise improper, but only that further exploration of the facts by a hearing officer is appropriate.

Consolidation

This Department has long held that this Department may consolidate grievances with or without a request from either party whenever more than one grievance is pending involving the same parties, legal issues, and/or factual background.[8] EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.[9]

In this case, the grievant argues that he has been subjected to a continuing course of retaliation which includes both the conduct alleged in the present grievance as well as that at issue in his two subsequent grievances now scheduled for hearing. In light of this common thread, this Department finds that consolidation of these three grievances is appropriate. The grievances involve the same parties and share a common factual

---

[7] *See generally* Von Gunten v. State of Maryland, 243 F.3d 858, 865, 869-70 (4th Cir. 2001); Morris v. Oldham County Fiscal Court, 201 F.3d 784, 791-92 (6th Cir. 2000); Ray v. Henderson, 217 F.3d 1234, 1245-46 (9th Cir. 2000); Gunnell v. Utah Valley State College, 152 F.3d, 1253, 1264 (10th Cir. 1998).
[8] *Grievance Procedure Manual* § 8.5.
[9] *Id.*

background. Consolidation of these grievances should provide an effective and efficient means of resolving the related disputes at hand. Accordingly, the grievant's three pending grievances are consolidated and will be heard together by a single hearing officer at a single hearing.

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's March 24, 2004 grievance is qualified and shall advance to hearing with his other two pending grievances to be heard by a single hearing officer at a single hearing. By copy of this ruling, the grievant and the agency are advised that the agency has five workdays from receipt of this ruling to request the appointment of a hearing officer.

This Department's rulings on matters of compliance are final and nonappealable.[10]

Claudia T. Farr
Director

Gretchen M. White
EDR Consultant

[10] Va. Code § 2.2-1001(5).