

Issue: Qualification/claims that agency is participating in “unfair management practices” and creating a hostile work environment; Ruling Date: February 3, 2005; Ruling #2005-955; Agency: Virginia Commonwealth University; Outcome: not qualified



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Commonwealth University  
Ruling Number 2005-955  
February 3, 2005

The grievant has requested a ruling on whether his October 15, 2004 grievance with Virginia Commonwealth University (VCU or the agency) qualifies for a hearing. In his grievance, the grievant claims that the agency is participating in “unfair management practices” and creating a hostile work environment.

FACTS

The grievant is employed in housekeeping with VCU. On September 16, 2004, the grievant’s supervisor was informed by VCU building services management that both day and evening/night shift employees would need to fill out a USCA Custodial Condition Report (the report) at the beginning of their shift. This report seeks the (1) shift of the person filling out the form (i.e. day or evening/night shift); (2) date the form is filled out; (3) location and description of the problem; (4) time the observation was made; and (5) name and signature of the staff member who made the discovery. The grievant claims that requiring him to fill out this report is, in essence, requiring him to “tell on other employees” which has created an “insecure” environment. According to VCU, the report is intended to identify and record major problems found in the normal course of employees checking their areas at the beginning of their respective shift. The agency claims that the report is shared only with the shift supervisor and not with individual custodial staff members.

DISCUSSION

*Unfair Management Practices*

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>1</sup> Thus, claims relating to issues such as the method, means and personnel by which work activities are

---

<sup>1</sup> See Va. Code § 2.2-3004(B).

to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have influenced management's decision, or whether state policy may have been misapplied or unfairly applied.<sup>2</sup> Likewise, complaints relating solely to "work activity accepted by an employee as a condition of employment or which reasonably may be expected to be a part of the content of the job" shall not proceed to a hearing unless there is sufficient evidence of discrimination, retaliation, discipline, or a misapplication or unfair application of policy.<sup>3</sup>

In addition, to advance to a hearing, the grievant must demonstrate that the action being grieved constitutes an "adverse employment action."<sup>4</sup> 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."<sup>5</sup> Thus, for a grievance to qualify for a hearing, the action taken against the grievant must result in an adverse effect on the terms, conditions, or benefits of one's employment.<sup>6</sup>

In this case, there is no evidence that as a result of VCU's requirement that he fill out these reports, the grievant is being fired, demoted, reassigned, disciplined, or otherwise subjected to any material change in the terms and conditions of his employment. Moreover, to the extent that the grievant is challenging having to perform additional work as a result of the previous shift's alleged inadequacies, the amount of work that is required of him does not appear to constitute a significant change in the grievant's employment status. Further, in the absence of formal discipline or a "below contributor" performance evaluation, the grievant's potential concern about not being able to satisfactorily perform his duties because of the additional work does not rise to the level of an adverse employment action. As the grievant has failed to make the threshold showing of an adverse employment action, his challenges to the report and increased workload do not qualify for hearing.<sup>7</sup>

---

<sup>2</sup> Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1 (C).

<sup>3</sup> *Id.*

<sup>4</sup> Va. Code § 2.2-3004(A).

<sup>5</sup> *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

<sup>6</sup> *Von Gunten v. Maryland Department of the Environment*, 243 F.3d 858, 866 (4<sup>th</sup> Cir 2001)(citing *Munday v. Waste Management of North America, Inc.*, 126 F.3d 239, 243 (4<sup>th</sup> Cir. 1997)). *See also* EDR Ruling 2004-596, 2004-597. We note however, that in harassment cases, it is not necessary for a grievant to establish the existence of a tangible employment action to state a claim. Instead, a showing of a hostile work environment is sufficient to satisfy the requirement that a grievant demonstrate that he or she has been subjected to an adverse employment action.

<sup>7</sup> However, this ruling does not limit the grievant's ability to introduce background evidence relating to the conduct challenged in the present grievance in the event such evidence is relevant to a subsequent adverse employment action challenged in a future grievance.

*Hostile Work Environment*

While grievable through the management resolution steps, claims of hostile work environment qualify for a hearing only if an employee presents sufficient evidence showing that the challenged actions are based on race, color, national origin, age, sex, religion, political affiliation, disability, marital status or pregnancy.<sup>8</sup> Here, the grievant has not alleged that management's actions were based on any of these factors. Accordingly, this issue does not qualify for hearing.

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, 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

---

Jennifer S.C. Alger  
EDR Consultant

---

<sup>8</sup> *Grievance Procedure Manual* § 4.1(b)(2); *see also* DHRM Policy 2.30 Workplace Harassment (effective 05/01/02).