

Issue: Qualification/Retaliation for other protected right; Ruling Date: April 13, 2005;
Ruling #2005-999; Agency: Virginia Community College System; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Rappahannock Community College
Ruling Number 2005-999
April 13, 2005

The grievant has requested a ruling on whether her December 16, 2004 grievance with Rappahannock Community College (RCC or the college) qualifies for hearing. She alleges that she has been subjected to retaliatory harassment. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant was employed by the agency as a manager. In September 2004, the grievant became aware of problems with the funding of several scholarships. She claims that after she confronted the college administration regarding these problems, the college undertook a course of retaliation against her. In particular, the grievant charges that the college wrongly included with her 2004 performance evaluation an addendum mischaracterizing the dispute over the scholarship funding and her actions with respect to that dispute. In addition, the grievant alleges that following the dispute, the college administration began to exclude her from meetings and conversations involving her primary job functions and began to make plans to eliminate her position.

On December 16, 2004, the grievant initiated a grievance challenging the agency's actions. At the first management resolution step, the college agreed to rescind the performance evaluation addendum challenged by the grievant. The grievant accepted this offer by the college and the addendum was removed from the grievant's performance evaluation.¹ The grievant continued to advance her remaining claim of retaliatory harassment through the remaining resolution steps. After the college denied qualification of her grievance for hearing, the grievant appealed to this Department.²

DISCUSSION

¹ During the course of this Department's investigation, the grievant indicated that satisfaction by the college of its offer to rescind the addendum resolved that portion of her grievance challenging her performance evaluation.

² Effective February 28, 2005, RCC abolished the position held by the grievant, and, as a consequence, the grievant was laid off from employment. The grievant has not grieved her layoff.

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.³ Thus, all claims relating to issues such as the methods, means, and personnel by which work activities are to be carried out generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or applied unfairly.⁴

In this case, the grievant alleges that after she challenged the college administration regarding the use of scholarship funds, she was subjected to a course of retaliatory harassment. For a claim of retaliatory harassment to be qualified for hearing, 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 her conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.⁵

Here, even if we were to assume that the grievant could satisfy the remaining elements of this test, her request for qualification would nevertheless fail because she has not shown that the alleged retaliatory harassment was the result of a previous protected activity. While we do not question the importance of the issues allegedly raised by the grievant, not all complaints to management constitute protected activity. Rather, 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."⁶ Although the grievant has presented evidence that she complained to the college administration about conduct she considered to be a misappropriation of scholarship funds, she admits that she has not reported the alleged misappropriation to any third party, such as a governmental agency, and she has not presented evidence that she engaged in any other protected activity, including her constitutionally protected right to free speech.⁷ For this reason, the grievant's request for qualification of her grievance for hearing is denied.

³ Va. Code § 2.2-3004(B).

⁴ Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b) and (c).

⁵ 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).

⁶ See *Grievance Procedure Manual* §4.1(b)(4).

⁷ For speech by a public employee to be protected under the First Amendment, the speech must be "that of a private citizen speaking on a matter of public concern." *Kirby v. City of Elizabeth City*, 388 F.3d 440, 446 (4th Cir. 2004). "Speech involves a matter of public concern when it involves an issue of social, political or other interest to a community. The public-concern inquiry centers on whether 'the public or the community is likely to be truly concerned with or interested in the particular expression.'" *Id.* (citations omitted). In expressing her concerns to the administration, the grievant did not speak as a private citizen about a matter of "public concern." Thus, we conclude that her conduct did not constitute "protected speech" under the First Amendment.

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.

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