

Issue: Qualification/Management Actions – Recruitment/Selection;
Retaliation/Grievance Activity Participation; Ruling Date: August 4, 2005; Ruling
#2005-1076; Agency: Department of Juvenile Justice; Outcome: qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice
No. 2006-1076
August 4, 2005

The grievant has requested qualification of his March 17, 2005 grievance. The grievant alleges that the Department of Juvenile Justice (DJJ or the agency) has retaliated against him for previous protected activity and misapplied and/or unfairly applied policy.¹ For the reasons set forth below, this grievance is qualified for hearing.

FACTS

The grievant is employed by the agency as a Senior Juvenile Corrections Officer. In September 2004, the agency advertised three openings for the position of Corrections Sergeant. The three positions were to be filled through a single applicant pool and selection process.

The grievant applied for the three Sergeant positions and received first and second interviews. After the second interview, the hiring panel selected three candidates to fill the vacant positions. The grievant was one of the three applicants selected by the hiring panel. The acting facility superintendent and deputy director approved two of the hiring panel's recommended candidates and those candidates were subsequently offered positions. The recommendation made by the hiring panel with respect to grievant's selection was not approved. The position was subsequently filled by a Sergeant assigned to a facility being closed by the agency.

The grievant states that after learning that he had not been selected for the Sergeant position, he met with the former superintendent to discuss the reasons for the agency's actions. According to the grievant, the former superintendent advised him that he was denied the position because he has an active Group III Written Notice for

¹ In his Grievance Form A, the grievant also charged that the agency had failed to provide him with documents. The grievant has not made a request for a compliance ruling by this Department, however; and during the course of this investigation, his representative indicated that the grievant was not challenging the agency's alleged failure to provide him with documents in conjunction with his qualification request.

threatening a ward. On March 17, 2005, after his meeting with the former superintendent, the grievant initiated a grievance challenging his non-selection. In support of his claim of retaliation and misapplication of policy, the grievant noted in his Form A that he had unsuccessfully applied for promotion on more than 20 consecutive occasions.

The first-step respondent denied the grievant's request for relief on the basis that the grievant's "request to grieve all past Sergeant recruitments is out of compliance with established procedure." The grievant then advanced his grievance to the second step. The grievant states that the second step respondent, who is also the acting superintendent, indicated that he was "at a loss" regarding the reasons the grievant was denied the position and informed the grievant that he would "look into" the reasons for the denial. According to the grievant, the second-step respondent subsequently advised him that the hiring panel had acted in accordance with policy and procedure, and that he was not the best suited candidate for the position. The grievant states that the second-step respondent did not mention the Written Notice as a specific factor in his non-selection; the second-step respondent also did not identify the Written Notice as a basis for the agency's decision in his written response on the Form A.

The grievant advanced his grievance to the third management step, where his request for relief was again denied. In his written response, the third-step respondent (the Deputy Director), explained:

While assessing your grievance I became aware of one particularly compelling reason as to why you probably were not selected for the Sergeant's position in question. You have an active Group III...Just based on this fact alone, it is not difficult to understand why you may not have been selected.

After the parties failed to resolve the grievance in the management resolution steps, the grievant asked the agency head to qualify his grievance for hearing. The agency head denied the grievant's request. The grievant has appealed the agency head's decision to this Department.

DISCUSSION

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

Retaliation

The grievant alleges that he was not selected for the Corrections Sergeant 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

Here, the grievant easily satisfies the first and second of these requirements. He has shown that he engaged in a protected activity when he grieved the Group III Written Notice issued to him on October 24, 2003,⁶ and that he was not selected for promotion to the Sergeant position, which constitutes an adverse employment action. At issue, then, is whether there is sufficient evidence of a causal connection between the grievant's protected activity and his non-selection.

During the course of this investigation, the agency repeatedly stated that after the hiring panel made its recommendations, the acting superintendent and deputy director reviewed those recommendations and made the decision not to offer the grievant the Sergeant position because of the active Group III Written Notice. However, the grievant's Interview Evaluation Worksheet, unlike those of the two successful candidates, indicates that the deputy director did not review the decision. Moreover, the acting superintendent, in his capacity as second-step respondent, did not

² Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1.

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.

identify the Written Notice as a basis for the agency's action, and, according to the grievant, indicated that he was "at a loss" regarding the reasons for the grievant's non-selection. Finally, while mentioning the Written Notice, the deputy director, acting as the third-step respondent, disavowed specific knowledge of the reasons for the decision to deny the grievant the position—rather, he stated that "[w]hile assessing" the grievance, he "became aware" of the Written Notice as "one particularly compelling reason as to why [the grievant] probably w[as] not selected." This arguably contradictory evidence, considered in its totality, raises a sufficient question of a causal connection between the grievant's protected activity and his non-selection.⁷

Moreover, although the agency has stated a nonretaliatory business reason for the grievant's non-selection—the grievant's active Group III for threatening a ward—this Department concludes that, based on the totality of the circumstances, the grievant has presented sufficient evidence that this proffered reason is a mere pretext or excuse for retaliation to qualify 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. Rather, we merely recognize that, in light of the evidence presented, further exploration of the facts by a hearing officer is appropriate, as a hearing officer is in a better position to determine questions of motive and credibility.

We also note that the grievant may not prevail at hearing simply by presenting evidence that the reasons presented by the agency were false: instead, the grievant must present evidence sufficient for the hearing officer to conclude that the agency's explanations were in fact a pretext *for retaliation*.⁸ Further, even if the grievant demonstrates that the agency's actions were motivated at least in part by retaliatory motives, the agency will nevertheless prevail if it establishes by a preponderance of the evidence that its actions were *also* motivated by the active Group III and the grievant would therefore not have been promoted regardless of any improper motivation.⁹

Alternative Theory for Non-Selection

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

⁷ See *Waddell v. Small Tube Products, Inc.*, 799 F.2d 69, 73 (3d Cir. 1986); see also *Brachvogel v. Beverly Enterprises, Inc.*, 173 F. Supp. 2d 329, 331 n.2 (E.D. Pa. 2001) (noting that evidence of pretext may also be used to establish a causal connection).

⁸ *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48 (2000).

⁹ See *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 552 (4th Cir. 1999) (in a "mixed-motive" retaliation analysis, an employer "may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not allowed the illegal factor to play such a role.")

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's March 17, 2005 grievance is qualified. 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.

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Director

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