

Issue: Qualification/retaliation/grievance activity participation; Ruling Date: March 1, 2006; Ruling #2006-1161; Agency: Department of Corrections; Outcome: not qualified



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2006-1161
March 1, 2006

The grievant has requested a ruling on whether her June 1, 2005 grievance with the Department of Corrections (DOC or the agency) qualifies for hearing. She asserts that her transfer from night shift to day shift was retaliatory and created a hostile workplace. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed with the agency as a Corrections Office Senior. A co-worker filed a grievance asserting that the grievant had created a hostile work environment. Upon receiving the grievance, the Warden determined the matter needed to be investigated. Because he would not be at work for the next few days, the Warden assigned the Major and the Assistant Warden the responsibility of investigating the matter and reporting their findings when he returned to work.

On May 19, 2005, the Major met with the grievant to question her as to the assertions raised in her co-worker's hostile workplace grievance. Initially, the grievant answered several of the Major's questions but then refused to answer further questions until she could have a representative present. The Major informed the grievant that the interview was confidential and of a sensitive nature and that no one else could attend the meeting. He told her that she must answer his questions and that she did not have the authority to refuse to answer his questions. The Major then proceeded to question the grievant, and again the grievant refused to respond. The Major asked the grievant if she intended to answer any of his questions and she replied "no." The Major then ended the interview with the grievant. As a result of her failure to respond to the Major's questions, the Warden issued the grievant a Group II Written Notice for failure to follow supervisor's instructions. The grievant was also transferred from night shift to day shift. The grievant grieved the Group II Written Notice in a separate June 1, 2005 grievance, and challenged the shift change in the instant June 1st grievance.¹

¹ Both grievances are dated June 5, 2005 but indicate that they were received by the agency on June 1, 2005.

Prior to initiating the June 1st grievances, the grievant initiated several other grievances. For example, on November 6, 2002, the grievant initiated a grievance in which she asserted that a male Lieutenant approached her in a threatening manner and made inappropriate sexual contact. On January 2, 2003, the grievant initiated another grievance asserting that she was reassigned from day shift to night shift in retaliation for reporting alleged sexual harassment and/or engaging in prior grievance activity. Neither the November 6, 2002 nor the January 2, 2003 grievances were qualified for hearing by the agency head, this Department, or the Circuit Court.²

DISCUSSION

The grievance statutes and state personnel policy reserve to management the right to establish workplace policy governing the assignment and transfer of employees, and to provide for the most efficient and effective operation of the facility.³ Accordingly, the transfer or reassignment of an employee generally does not qualify for a hearing unless there is evidence raising a sufficient question as to whether it resulted from a misapplication of policy, discrimination, retaliation, or discipline. The grievant asserts that her shift change was an act of 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;⁴ (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.⁵ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.⁶

The grievant engaged in protected activity when she initiated past grievances. However, the issue of whether her transfer constituted an adverse employment action need not be resolved because, as explained below, the grievant has not presented

² The November 6th sexual harassment grievance concluded with the circuit court denying qualification and the January 2nd grievance was concluded after this Department denied qualification.

³ See Va. Code § 2.2-3004 (B) & (C).

⁴ See Va. Code § 2.2-3004(A). 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 an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

⁵ See *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000); *Dowe v. Total Action Against Poverty*, 145 F.3d 653, 656 (4th Cir. 1998).

⁶ See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

evidence linking her transfer to her prior grievances. The agency asserts that it transferred the grievant not as a retaliatory measure but in response to the grievant's failure to follow the Major's order to respond to his questions. The grievant has provided no evidence to suggest that the agency's stated reason for the transfer is pretextual. Accordingly, this Department has no basis to qualify the June 1st grievance.⁷

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

William G. Anderson, Jr.
EDR Consultant, Sr.

⁷ We note that in Case No. 8172, a hearing officer upheld the Group II Written Notice issued to this grievant for not answering the Major's questions. The decision held that the grievant had presented no policy showing that she cannot be questioned during an administrative investigation without permitting her to obtain a representative. In a February 21, 2006 ruling, the DHRM Director's designee affirmed the hearing officer's decision, finding that the "application and interpretation by the hearing officer of the relevant policy are correct."