

Issue: Qualification/discrimination on basis of age, religion/national origin, family status/retaliation for previous grievance activity; Consolidation/with pending grievance for purposes of hearing; Ruling Date: January 6, 2006; Ruling #2006-1194; Agency: George Mason University; Outcome: qualified and consolidated



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND CONSOLIDATION
RULING OF DIRECTOR

In the matter of George Mason University
Ruling No. 2006-1194
January 6, 2006

The grievant has requested qualification of his June 17, 2005 grievance. The grievant alleges that George Mason University (GMU or the agency) has discriminated against him on the basis of his age, religion/national origin and/or his family status, and has retaliated against him for previous protected activity. For the reasons set forth below, this grievance is qualified and consolidated with the grievant's pending May 18, 2005 grievance for hearing.

FACTS

The grievant was employed by the agency as a Manager. On April 19, 2005, the grievant was issued a Group I Written Notice for "[i]nappropriate supervisory conduct, unsatisfactory job performance, and failure to accept guidance concerning performance issues." On May 18, 2005, the grievant initiated a grievance challenging the Group I Written Notice as procedurally improper as well as "inaccurate, misleading and unfair." In addition, the May 18th grievance alleges discrimination on the basis of age, religion/national origin and family status.¹

On June 17, 2005, the grievant initiated a grievance challenging his reassignment to Classroom Technology Specialist. He alleges that his reassignment constitutes a demotion, and that the agency took this action for the same reasons cited in his April 19, 2005 grievance, as well as in retaliation for his "complaint" and his "continued opposition" to management's alleged wrongful conduct.

The agency administratively closed the June 17th grievance on the grounds that it was untimely and sought to add new claims to his May 18th grievance. In Ruling 2006-1095, this Department rejected the agency's arguments and ruled that the grievance was in compliance with the grievance procedure. After the parties subsequently failed to resolve the grievance during the management resolution steps, the grievant asked the

¹ The agency has qualified the May 18th grievance for hearing.

agency head to qualify his grievance for hearing. The agency head denied the grievant's request, and the grievant has appealed to this Department.

DISCUSSION

Qualification

Retaliation

The grievant alleges that he was reassigned to the Classroom Technology Specialist 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;² (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.³ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.⁴

The grievant easily satisfies the first two of these requirements. He engaged in a protected activity when he initiated a complaint of age discrimination, harassment, and retaliation with the agency's Office of Equity and Diversity Services on March 25, 2005. He also engaged in protected activity when he filed a grievance on May 18, 2005. Furthermore, although the agency argues that the reassignment was not a demotion as it did not involve a reduction in the grievant's pay, a change in his pay band, or a change in his state job classification, the agency admits that the reassignment has resulted in a complete loss of supervisory responsibility for the grievant. Such a significant change in responsibility is sufficient to constitute an adverse employment action.⁵

Whether the grievant has presented evidence raising a sufficient question of a causal link between the adverse employment action and his protected activity is a closer question. Here, the agency provided a nonretaliatory business reason for the grievant's

² 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."

³ 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).

⁴ See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10, 101 S. Ct. 1089 (Title VII discrimination case).

⁵ See *Burke v. Gould*, 286 F.3d 513, 522 (D.C. Cir. 2002); see also *MacGregor v. Mallinckrodt, Inc.*, 373 F.3d 923, 929 (8th Cir. 2004).

reassignment: the grievant's department was restructured and his prior position no longer exists. However, because the grievant's June 17th grievance shares common claims of discrimination and retaliation with the grievant's qualified May 18th grievance, this Department concludes that qualification of the June 17th grievance is warranted. The hearing officer, as a fact finder, is in a better position to determine whether retaliatory intent contributed to the grievant's reassignment. 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 discriminated against him on the basis of his age, his religion/national origin and/or his family status. Because the issue of retaliation qualifies for a hearing, this Department deems it appropriate to send the grievant's alternative theories of age, religion, and national origin discrimination for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues. However, because family status is not a prohibited basis for discrimination under applicable law or policy, the grievant's claim of family status discrimination is not qualified for hearing.

Consolidation

This Department has long held that it 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.⁶ EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.⁷

In this case, the grievant argues that he has been subjected to a continuing course of discrimination and retaliation which includes both the conduct alleged in the present grievance as well as that at issue in his May 18th grievance awaiting hearing. In light of this common thread, this Department finds that consolidation of these two grievances is appropriate. The grievances involve the same parties and share a common factual background. Consolidation of these grievances should provide an effective and efficient means of resolving the related disputes at hand. Accordingly, the grievant's two pending grievances are consolidated and will be heard together by a single hearing officer at a single hearing.

CONCLUSION

⁶ *Grievance Procedure Manual* § 8.5.

⁷ *Id.*

For the reasons discussed above, this Department concludes that the grievant's June 17, 2005 grievance is qualified and shall advance to hearing with his May 18, 2005 pending grievance 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.⁸

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Director

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⁸ Va. Code § 2.2-1001(5).