

Issues: Qualification – Management Actions (recruitment/selection) and Retaliation (other protected right); Ruling Date: December 14, 2007; Ruling #2007-1710; Agency: Virginia Department of Agriculture and Consumer Services; Outcome: All Issues Qualified.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Agriculture and Consumer Services  
Ruling No. 2007-1710  
December 14, 2007

The grievant has requested a ruling on whether his March 28, 2007 grievance with the Department of Agriculture and Consumer Services (the agency) qualifies for a hearing. For the following reasons, this grievance is qualified for hearing.

FACTS

The grievance in this case is virtually identical to an earlier grievance filed by another employee on March 27, 2007 (Grievance 1), one of two grievances that are the subjects of EDR Ruling Nos. 2007-1649, 1689, and 1726.<sup>1</sup> In Grievance 1, a former agency employee challenged the agency's hiring practices for a Compliance Manager 1 position (position 00350). The employee asserted that the decision to re-advertise the position was a misapplication of policy and that he was denied the position for reporting violations of policy and law. In this grievance, the grievant makes the same allegations. In Ruling Nos. 2007-1649, 1689, and 1726, Grievance 1 was qualified for hearing, and has not yet proceeded to hearing.

DISCUSSION

Qualification

By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair

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<sup>1</sup> EDR Ruling Nos. 2007-1649, 1689, and 1726 can be found on this Department's website at <http://www.edr.virginia.gov/searchedr/2007-1649,%202007-1689,%202007-1726.pdf>.

application of policy.<sup>2</sup> In this case, the grievant claims that the agency misapplied policy during the selection process by pre-selecting a candidate and retaliating against him.

As stated above, in EDR Ruling Nos. 2007-1649, 1689, and 1726, Grievance 1 (which is virtually identical to the instant grievance), was qualified for hearing. Because this nearly identical grievance has already been qualified for hearing, it simply makes sense to qualify the instant grievance as well. Both grievances arise from the same selection process and both share common factual questions relating to the hiring process for position 00350. Sending these related claims to a single hearing (see consolidation discussion below) will provide an opportunity for the fullest development of what may be interrelated facts and issues. Qualification of this grievance in no way determines that the agency's actions in fact violated the hiring policy, only that a further exploration by a hearing officer of the circumstances surrounding the recruitment is appropriate.

#### *Alternative Theories and Claims*

The grievant has also asserted additional claims. Primarily, the grievant claims that he was retaliated against by the agency for reporting violations of policy and law to agency management and elected officials, protected acts<sup>3</sup>. Because the grievant's claim of misapplication qualifies for hearing, this Department deems it appropriate to send all alternative theories and claims raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what may be interrelated evidence and facts. Again, qualification in no way determines that the agency's actions were retaliatory, only that further development of the facts is warranted.

#### *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.<sup>4</sup> EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.<sup>5</sup>

Because the instant grievance and Grievance 1 (from Ruling Nos. 2007-1649, 1689, and 1726) are virtually identical, challenge the same management action, and are both qualified for hearing, this Department finds it appropriate to send both grievances to

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

<sup>3</sup> The following are considered protected acts under the grievance procedure: (1) use of or participation in the grievance procedure, (2) complying with any law of the United States or of the Commonwealth, (3) reporting any violation of such law to a governmental authority, (4) seeking a change in law before the Congress of the United States or the General Assembly, (5) reporting an incidence of fraud, abuse, or gross mismanagement, or (6) exercising any right otherwise protected by law. Va. Code § 2.2-3004 (A).

<sup>4</sup> *Grievance Procedure Manual* § 8.5.

<sup>5</sup> *Id.*

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a common hearing officer to help ensure the fullest exploration of what could be interrelated issues and facts.

### CONCLUSION

For the reasons set forth above, this grievance is qualified for hearing and consolidated for hearing purposes with Grievance 1 from EDR Ruling Nos. 2007-1649, 1689, and 1726. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.

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Claudia Farr  
Director