

Issue: Qualification – Retaliation (Grievance Activity Participation and Other Protected Right); Ruling Date: January 30, 2008; Ruling #2007-1727;  
Agency: University of Virginia; Outcome: Qualified.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of the University of Virginia  
Ruling Number 2007-1727  
January 30, 2008

The grievant has requested a ruling on whether his March 27, 2007 grievance with the University of Virginia (UVA or the University) qualifies for hearing. For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

On March 19, 2007, the grievant was informed that his position as Associate Director of the Health System Physical Plant (HSPP) was being eliminated and he was being reassigned to a new position as part of a University reorganization. As Associate Director of HSPP, the grievant oversaw the daily performance of HSPP services. The grievant's new job title is Maintenance Programs Manager. The purpose of the grievant's new position is "creating, and adapting an intelligent, systematic process to identify and prioritize facility needs & then plan the expenditures of funds to meet facility needs." The grievant's role title, pay band and compensation did not change as a result of the reorganization; however the grievant asserts that his duties changed dramatically and he lost all his supervisory responsibilities and decision-making authority.<sup>1</sup>

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<sup>1</sup> During this Department's investigation, the grievant asserted the following in a e-mail to the investigating EDR Consultant:

[In my former position] [a]s Associate Director, I was essentially the operations mgr of [my former department]. My responsibilities included management of ~25M in maintenance & utilities budgets; direct supervision of 5 (2 vacant) contract/project mgrs; 1 grounds supv (B&G Supv A, with grounds staff); 1 administrative services mgr (w/service desk staff and receiving staff); 4 B&G Supt Bs (each with trades personnel) corresponding to the 4 maintenance zones into which [my former department's] bldg maint responsibilities are divided; 1 projects supt (B&G Supt B with trades personnel) for projects, renovations, and maintenance support.

My current job manages no projects, programs, budgets or people. I have no decision-making authority. I report to another Associate Director. When I arrived at my new job, my duties were not defined, and it was apparent my arrival was not anticipated. I spent weeks doing nothing, which graduated to very little, then eventually enough to stay busy. A new EWP was created for me, loaded with words but saying nothing and conferring no actual responsibility for anything.

## DISCUSSION

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 a hearing” unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.<sup>2</sup> In this case, the grievant alleges that he was retaliated against when his position was eliminated and he was reassigned.

### *Retaliation*

The grievant claims that he was reassigned/demoted in retaliation for exercising his rights under the Freedom of Information Act (FOIA) and before the Virginia General Assembly<sup>3</sup> and for having filed a grievance.<sup>4</sup> 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;<sup>5</sup> (2) the employee suffered a materially adverse action;<sup>6</sup> and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially 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

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

<sup>3</sup> On April 8, 2005, the grievant requested a market salary survey from UVA under the FOIA. Claiming the information to be exempt under the FOIA, the University denied the grievant’s request on August 10, 2005. The grievant subsequently challenged the University’s denial. The circuit court dismissed the case because it was filed in the wrong venue, and the grievant appealed. On April 13, 2006, the Virginia Supreme Court found “no reversible error in the judgment complained of.” Thereafter, the grievant went to the FOIA Advisory Council (the Council) regarding his case. During the 2007 legislative session, the Council proposed a change to the FOIA statutory provision regarding venue for enforcement of the FOIA provisions. As a result, the FOIA statutory provision regarding where to bring an enforcement suit was changed.

<sup>4</sup> On February 15, 2007, the grievant filed a grievance challenging management’s alleged discriminatory behavior in hiring practices. The grievant later concluded this grievance at the qualification stage of the grievance process.

<sup>5</sup> 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 Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.” *Grievance Procedure Manual* § 4.1(b).

<sup>6</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15 (2006). In *Burlington Northern*, the Court noted that “the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.” 126 S. Ct. at 2415. “A schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.” *Id.* The Court determined that “plaintiff must show that a reasonable employee would have found the challenged action materially adverse, ‘which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’” *Id.* (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

was a mere pretext or excuse for retaliation.<sup>7</sup> Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.<sup>8</sup>

Here, the grievant engaged in a protected activity when he filed his February 15, 2007 grievance and by asserting his rights under the FOIA and before the General Assembly.<sup>9</sup> In addition, the grievant has raised a sufficient question as to whether his reassignment constitutes a materially adverse action such that a reasonable employee might be dissuaded from participating in protected conduct. More specifically, removing all of the grievant's supervisory responsibilities as well as purportedly removing all of his decision-making authority would seem to constitute a "materially adverse" action.<sup>10</sup> The agency denies that the grievant has been retaliated against and has articulated a legitimate, non-retaliatory reason for its actions, i.e., a University reorganization of the HSPP was implemented, at least in part, in order to hire someone with an engineering degree to perform the functions previously performed by the grievant (Associate Director of the HSPP). Thus, the only questions remaining are (1) whether a causal connection exists between his past protected acts and his reassignment; and (2) whether the agency's stated reason for the grievant's reassignment was an excuse for retaliation.

The grievant has presented this Department with a number of assertions in support of his claim that UVA has retaliated against him because of his previous protected acts and the University reorganization was an excuse to effectuate such retaliation. First, the grievant points out that his reassignment came "on the heels of" his February 15, 2007 grievance and coincides with remedial legislation purportedly directed at UVA as a result of the grievant's activism. The grievant was notified of his reassignment a mere 32 days after he filed his February 15<sup>th</sup> grievance and the reassignment was effectuated 39 days after the filing of his February 15<sup>th</sup> grievance. Moreover, the grievant's reassignment occurred during the 2007 legislative session during which the General Assembly considered, and ultimately passed, legislation addressing the appropriate venue for enforcement of FOIA rights and privileges.<sup>11</sup> This statutory change was allegedly precipitated by the grievant as a result of his previous unsuccessful attempt to enforce the FOIA provisions against UVA. Based on the foregoing, there appears to have been a close proximity in time between the grievant's protected acts and his reassignment.<sup>12</sup>

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<sup>7</sup> See *EEOC v. Navy Fed Credit Union*, 424 F.3d 397, 405 (4<sup>th</sup> Cir. 2005); *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4<sup>th</sup> Cir. 2000).

<sup>8</sup> See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

<sup>9</sup> See Va. Code § 2.2-3004(A); Va. Code § 2.2-3700 *et seq.*; and *Grievance Procedure Manual* §4.1(b).

<sup>10</sup> See EDR Ruling 2007-1511; 2007-1548. See also *Burlington Northern*, 126 S. Ct. at 2416-17.

<sup>11</sup> As a result, Va. Code § 2.2-3713 now clarifies that venue for the enforcement of FOIA rights and privileges against state public bodies, including state institutions, may be brought in general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond.

<sup>12</sup> See *Tinsley v. First Union National Bank*, 155 F.3d 435, 443 (4<sup>th</sup> Cir. 1998) (noting that merely the closeness in time between a protected act and an adverse employment action is sufficient to make a prima facie case of causality). See also *Jaudon v. Elder Health, Inc.*, 125 F. Supp. 2d 153, 165 (D. Md. 2000)

In order to qualify for a hearing, generally there must be some evidence, in addition to the close proximity in time, that would raise a sufficient question as to whether the University took the materially adverse action as a result of the grievant's engaging in protected activity.<sup>13</sup> Here, there is such additional evidence warranting qualification of this grievance for hearing. Namely, in this case, the grievant has offered factual evidence that, if true, could potentially support a finding that his reassignment was causally linked to his protected activities and thus, retaliatory. In particular, the grievant claims that despite the agency's stated intentions to the contrary, the grievant is not permitted to use his extensive knowledge, skills and abilities in his new position, "did vastly more" of the identified duties of his new position while working as an Associate Director and spends his days engaging in menial tasks. Further, the grievant argues that his position was eliminated, but a new position was created to encompass the key elements of his position that was eliminated. The grievant is also claiming that his reassignment was sudden and unexpected as evidenced by his lack of advance notice of his reassignment and his not having anything to do in his new position for approximately two weeks. Finally, the grievant claims that his reassignment is inconsistent with the grievant's extensive and devoted experience to UVA; he was scheduled for a baseless disciplinary meeting 32 minutes after filing his February 15<sup>th</sup> grievance; the reassignment is not consistent with the agency's stated goals of the reorganization; and the University Facilities Management department has a history of transferring/reassigning employees who file grievances against its directors and that he is aware of this occurring to two other managers besides himself.

However, the agency has also presented this Department with legitimate business reasons for its actions in response to the grievant's assertions. The University asserts that the reassignment "takes best advantage of [the grievant's] experience, knowledge and abilities"; that the newly created Deputy Director of Operations position is significantly different than the grievant's former Associate Director position; and that policy does not require that agency initiated reassignments within the pay band be discussed with the affected employee in advance of the reassignment and the grievant, as well as all others affected by the reassignment, were notified one week prior to implementation of the reorganization via e-mail. Additionally, in response to the grievant's assertion that he did not have anything to do upon arriving in his new position, the agency claims that the grievant's "arrival to his new job was not unexpected, but the timing was such that specific duties had not been finalized upon his arrival." In response to the grievant's assertions that the grievant's reassignment is inconsistent with the stated goals of the reorganization, the agency claims that at least one of the stated goals of the reorganization was to hire someone with an engineering degree to fulfill the grievant's former responsibilities and the grievant's reassignment is consistent with this stated goal. Further, according to the agency, the pre-disciplinary meeting noted by the grievant was scheduled earlier in the day prior to the grievant's filing of his February 15<sup>th</sup> grievance.

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(indicating that temporal proximity and ongoing antagonism can be a sufficient basis to establish a causal link.)

<sup>13</sup> See *e.g.*, EDR Ruling Nos. 2008-1755, 2008-1831; and EDR Ruling No. 2007-1538.

This Department concludes that, based on the totality of the circumstances, the grievant has demonstrated that sufficient questions of fact exist with respect to his retaliation claim. A hearing officer, as a fact finder, is in a better position to determine questions of fact, motive and credibility and decide 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. Rather, we merely recognize that, in light of the evidence presented, further exploration of the facts by a hearing officer is appropriate.

#### CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's March 27, 2007 grievance is qualified for a 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.

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Claudia T. Farr  
Director