

Issue: Qualification/discrimination/age; discrimination/national origin; management actions/recruitment/selection; retaliation/grievance activity participation; Ruling Date: October 27, 2006; Ruling #2006-1368; Agency: Department of Conservation and Recreation; Outcome: all issues qualified for hearing



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Conservation and Recreation
Ruling No. 2006-1368
October 27, 2006

The grievant has requested a ruling on whether his March 24, 2006 grievance with the Department of Conservation and Recreation (DCR or the agency) qualifies for a hearing. The grievant claims that the agency has misapplied policy, retaliated against him for previous protected activity, and discriminated against him on the basis of age, color and national origin. For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

The grievant is employed with DCR as an Accountant Senior. In November 2005, he applied for a promotion to the position of Financial & Auditing Services Manager I. The agency interviewed the grievant for this position, but he was not selected. The agency notified the grievant of its decision by letter dated February 24, 2006. On March 24, 2006, the grievant initiated a grievance challenging the agency's selection decision. The grievant alleges that the agency misapplied state and agency selection policies by failing to appropriately consider his educational background and experience, retaliated against him for his prior initiation of grievances and filing of charges with the Equal Employment Opportunity Commission (EEOC) and the Office of Equal Employment Services (OEES),¹ and discriminated against him on the basis of age, color and national origin.²

In this case, there were three people on the interview panel for the position of Financial & Auditing Services Manager I.] Each panel member completed an "Interview Worksheet" for each applicant. The "Interview Worksheet" contains the questions to be asked of each applicant and under each question the panel member recorded the applicant's response to that particular question. Upon completion of all the interviews,

¹ According to the grievant, he has initiated nine EEOC complaints and one OEES complaint. The EEOC complaints were allegedly initiated between 1990 and 2000 while the OEES complaint was initiated in 1992

² The grievant is a 67 year old male of East Indian origin while the selected applicant is a 51 year old white female.

the interview panel prepared a summary of each applicant's responses and performance during the interview. The panel summarized the grievant's interview as follows:

[Grievant] could not elaborate on his previous grant experience, e.g. He could not recall how many grants he was responsible for or the dollar value of these grants. [Grievant] did not indicate that he prepared an indirect cost proposal. [Grievant] did not elaborate his relevant experience in accounts receivables or cash management to the interview panel. He stated that he had many years of experience, but offered no details such as the type of receivables, or the key elements of cash control procedures. [Grievant] stated that he has training in Access, but has not used it in his current job.³

Accordingly, the agency claims that its decision not to select the grievant for the position of Financial & Auditing Services Manager I was based upon his poor performance during the interview process and not discriminatory or retaliatory animus.

In support of his claim that his non-selection was motivated by discriminatory and retaliatory intent, the grievant identifies a long history of alleged retaliatory acts committed by one of the panel members for the position of Financial & Auditing Services Manager I (Panel member #1). According to the grievant, Panel member #1 directly and/or indirectly supervised him from 1988 to 1996 and during this time, the grievant claims he was subjected to numerous discriminatory and retaliatory acts. In particular, on October 28, 1988, Panel member #1 issued the grievant a Group I Written Notice for inadequate and unsatisfactory job performance. The grievant subsequently grieved the disciplinary action and on April 13, 1989, a grievance procedure panel ordered the agency to remove the Group I Written Notice and accompanying memorandum from the grievant's personnel file because "external factors may have prevented [the grievant] from fulfilling his duties."

Moreover, on February 17, 1989, Panel member #1 issued the grievant a Group II Written Notice with ten-day suspension without pay for "[f]ailure to follow a supervisor's instruction, perform assigned work or otherwise comply with applicable established written policy." The grievant subsequently grieved the disciplinary action and on July 11, 1989, a grievance procedure panel ordered the agency to reduce the Group II Written

³ The panel summarized the selected applicant's interview as follows:

[Applicant] demonstrated, verbally and in writing, all the KSAs required for the position. However, [applicant] has some exposure to federal grant. [Applicant] had excellent experience with accounts receivable, financial reporting and cash management. She also displayed excellent knowledge of the accounting principles of grant accounting (i.e., Cash management principles, indirect cost rate preparation). [Applicant] has limited Access experience, using Access to maintain a Workforce Investment Act database in her current position, but she has a strong computer programming background, taking annual programming classes to stay current. [Applicant] also displayed good oral communication skills. [Applicant's] work sample was well written.

Notice to a Group I for inadequate or unsatisfactory job performance. The agency was further ordered to reinstate all pay that was withheld as a result of the suspension.

According to the grievant, on August 15, 1990, Panel member #1 secretly placed a Group I Written Notice for inadequate or unsatisfactory job performance in the grievant's personnel file. The grievant claims that Panel member #1 took such action in retaliation for the grievance that successfully challenged the October 28, 1998 Group I Written Notice. According to the grievant, he did not know about the August 15, 1990 Group I Written Notice until 1994 and thus, did not have an opportunity to grieve the disciplinary action.

On October 16, 1990, Panel member #1 issued the grievant yet another Group II Written Notice with suspension for "[f]ailure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable written policy." The October 16, 1990 Group II Written Notice was later rescinded "due to mitigating circumstances" and the grievant was provided backpay and benefits for the period of suspension.

In addition to the above disciplinary actions, the grievant claims that Panel member #1 inaccurately rated his job performance in 1989, 1990, 1991, 1992, 1994 and 1995. More specifically, the grievant claims that he received a rating of "2" in 1989, but he asserts that his performance should have resulted in a rating of "3". Further, the grievant claims that Panel member #1 gave him an overall rating of "performed at the proficient standard" on his 1990 performance evaluation. However, according to the grievant, Panel member #1 was later forced by management to change the rating to "substantially exceeded the proficient standard." In 1991, Panel member #1 allegedly rated the grievant's performance as "meets expectations." The grievant disagreed with the rating as other staff supervised by Panel member #1 got an overall rating of "exceeds expectations." Panel member #1 allegedly rated the grievant's overall performance in 1992 as "fair but needs improvement." Likewise, in 1994, the grievant claims Panel member #1 gave him an overall rating of "fair but needs improvement." The grievant subsequently grieved the 1994 performance evaluation and Panel member #1 changed the rating to "meets expectations." The grievant asserts however that Panel member #1 made the change to his 1994 performance evaluation on a photocopy only and did not change the original performance evaluation contained in the grievant's personnel file. Finally, the grievant claims that Panel member #1 inaccurately rated his job performance in 1995 as "meets expectations."

Additionally, the grievant offers the following as examples of retaliatory and discriminatory acts by DCR in support of his claim that it misapplied policy and retaliated and discriminated against him by not selecting him for the position of Financial & Auditing Services Manager I: his position of Accountant Senior was abolished in 1994, which he subsequently grieved. The grievance panel determined that the abolition of the grievant's position was based upon "valid business reasons," however it found that the agency misapplied the layoff policy by not offering the grievant assignment to at least

two other positions, both of a higher grade than that position accepted by the grievant in lieu of layoff.

Moreover, the grievant claims that he applied for numerous jobs and promotions within DCR between 1990 and 1999 and was not the successful candidate. For instance, in 1990, the grievant was denied selection for the positions of State Park Administrative Services Supervisor and Business Manager B. The grievant filed a charge with EEOC as a result of his non-selection for these positions. The EEOC found no evidence of discrimination. In 1994, the grievant was denied selection for the position of Budget Analyst, Sr. Again, the grievant filed a charge with EEOC alleging that his non-selection was discriminatory and retaliatory. The EEOC's investigation revealed that neither discrimination nor retaliation were factors in the grievant's non-selection for the Budget Analyst, Sr. position. In 1997, the grievant allegedly applied for the position of Economist, which he was denied, prompting him to initiate another charge with EEOC. Again, the EEOC found no evidence of discrimination or retaliation.

The grievant also applied for the position of Accountant Senior in 1997. When he was not selected for the position, the grievant attempted to invoke his recall rights under the layoff policy. The agency declined to recall the grievant because he was "not sufficiently competent and able to perform the duties required" of the position. The grievant initiated a grievance and at the third management resolution step, the agency determined that the decision regarding the grievant's competency was not supported by written documentation. However, at that time, the agency could not provide the grievant with his requested relief (that he be placed in an Accountant Senior position) because the position he sought was already filled and there were no other vacancies. Approximately one month later, the grievant was recalled to an Accountant Senior position within DCR.

In 1999, the grievant applied for the position of Grants Program Administrative Manager, but was not the selected candidate. The grievant challenged his non-selection through the grievance process alleging discrimination, retaliation and a misapplication of policy. This Department subsequently qualified his grievance for hearing and while the hearing officer did not make an express finding of discrimination or retaliation, she did find that the grievant's "scores were not an accurate reflection of his strengths and his scores were deflated."⁴

Finally, the grievant states that (1) his previous experience and educational background make him more qualified for the position than the selected candidate; and (2) he performed well when working for the grants and accounts receivable section from 1985 to 1994.

DISCUSSION

⁴ See Decision of Hearing Officer, February 24, 2000.

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, claims relating to a selection process do 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.⁵ Here, the grievant alleges that the agency retaliated against him for previous protected activity, misapplied state and agency selection policies, and discriminated against him on the basis of age, color and national origin.

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;⁶ (2) the employee suffered a materially adverse action;⁷ 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 was a mere pretext or excuse for retaliation.⁸ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.⁹

In this case, the grievant's prior participation in the grievance process as well as his filing of numerous complaints of discrimination and/or retaliation constitutes protected activity. Moreover, not being selected for a promotion constitutes a materially adverse action. Further, the agency has presented a nonretaliatory business reason for not selecting the grievant for the Financial & Auditing Services Manager I position, i.e., the grievant performed poorly in his interview. However, this Department concludes that the

⁵ Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1.

⁶ 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." *Grievance Procedure Manual* §4.1(b)(4).

⁷ *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2414-15 (2006). In previous rulings, this Department has described this element of the grievant's burden as requiring the grievant to show an "adverse employment action." See, e.g., EDR Ruling No. 2006-1284. However, in its recent *Burlington Northern* decision, the United States Supreme Court held that in a Title VII retaliation case, a plaintiff was not required to show the existence of an adverse employment action, but rather only that he or she had been subjected to a materially adverse action. Accordingly, we adopt the materially adverse standard for all claims of retaliation.

⁸ 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).

⁹ See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

grievant has presented evidence that raises a sufficient question as to (1) whether a causal connection exists between his past protected acts and his non-selection; and (2) whether the agency's stated reason for the grievant's non-selection was an excuse for retaliation.

More specifically, while certainly not dispositive, one cannot ignore the long history of discord between the grievant and Panel Member #1 in this case. Additionally, and more importantly, the panel interview summaries and "Interview Worksheets" raise some factual questions regarding the agency's stated business reason for the grievant's non-selection. In particular, Question #2 on the "Interview Worksheet" asks the applicant to "[p]lease describe your experience with the management and reporting of federal grants. What types of grants were they? Please include the number of grants and their approximate dollar value in your response." The grievant appears to have indicated during his interview that he has experience with management and reporting of federal grants, but because it had been more than 10 years since he performed this function, he could not recall the number of federal grants or the approximate value of the grants. In the interview panel summary, the agency appears to downgrade the grievant's federal grant experience merely because he could not remember a specific dollar value for the grants he reported more than a decade earlier.

Further, Question #5 on the "Interview Worksheet" asks: "[d]o you have experience creating an indirect cost proposal? If so, please describe your methodology for calculating an indirect cost rate." According to the "Interview Worksheets," the grievant indicated in the interview that he had experience creating an indirect cost proposal. However, in the summary of the grievant's interview, the panel wrote "[Grievant] did not indicate that he prepared an indirect cost proposal." Finally, it should be noted that one of the "Interview Worksheets" for the selected applicant was purportedly lost and never found by the agency.

Therefore, after careful review of the evidence, 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. The hearing officer, as a fact finder, is in a better position to determine whether retaliatory intent contributed to the grievant's nonselection. As such, this issue qualifies 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.

Alternative Theories for Non-Selection

The grievant has advanced alternative theories related to the agency's decision not to select him for the Financial & Auditing Services Manager I position, including allegations that the agency misapplied or unfairly applied policy and discriminated against him on the basis of national origin, color and age. Because the issue of retaliation

qualifies for a hearing, this Department deems it appropriate to send all alternative theories advanced for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's March 24, 2006 grievance is qualified and shall advance to 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.

Claudia T. Farr
Director