Issue: Qualification/Retaliation/Other protected right; Ruling Date: December 29, 2006; Ruling #2007-1469; Agency: Department of Veterans' Services; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Veterans Services
Ruling Number 2007-1469
December 29, 2006

The grievant has requested a ruling on whether her August 24, 2006 grievance with the Department of Veterans Services (or the agency) qualifies for hearing. The grievant claims that the agency laid her off (1) due to lack of sufficient General Fund Appropriations, and/or (2) in retaliation for (i) certain e-mail communications, (ii) audit results, and/or (iii) her refusal to implement an allegedly fraudulent payroll plan.

FACTS

Prior to her layoff, the grievant was employed as a Financial Services Manager III with the agency. On July 25, 2006, the grievant was informed that management had concluded that her position would be eliminated based on (1) a lack of general fund appropriations to cover the current program, (2) the opening of a new care center in Richmond next summer, and (3) the long-term goal to centralize oversight of the Financial Services in the Richmond central office.[1] On August 24, 2006, the grievant challenged her layoff as retaliatory and as unwarranted informal discipline.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the method, means and personnel by which work activities are to be carried out, including layoffs, generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[3] Here, the grievant alleges that her layoff was retaliatory and/or essentially informal discipline for her agency's having received audit points.

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[1] Letter from Commissioner to grievant, July 25, 2006.
[2] *See* Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (c).

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 a materially adverse action;[5] 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.[6] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[7]

As to the first element of her retaliation claim, only one of the activities cited by the grievant could potentially constitute a protected activity -- the refusal to implement an allegedly fraudulent payroll plan.[8] The remaining acts -- emailing and having the agency receive audit points -- under the facts of this case, cannot be viewed as protected acts.[9]

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[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 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).

[5] 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 have adopted the materially adverse standard for all claims of retaliation.

[6] *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).

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

[8] *See* EDR Ruling 2005-1064, 2006-1169, 2006-1283 in which this Department held that because the alteration of child support obligations is governed by a legal and regulatory framework, the alleged refusal to alter records of child support obligations could reasonably be viewed as the protected activity of "complying with any law."

[9] The e-mails in question are communications from the grievant to her superiors in which the grievant, among other things, challenges her immediate supervisor's management style. They do not constitute protected speech under the law. *See* Garcetti v. Ceballos, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (When public employees make statements pursuant to their official duties, such employees are not speaking as private citizens for First Amendment purposes, and thus the First Amendment does not prohibit managerial discipline of such employees for such speech.). Likewise, the audit points assigned to the agency by the Auditor of Public Accounts (APA), do not serve as protected activity. To the contrary, an agency would be within its authority to take appropriate corrective measures against an employee who had responsibility for areas receiving audit points. Of course, such actions would have to be in accord with the Standards of

Accordingly, the two retaliation claims based on the e-mails and audit points fail. As to the remaining claim -- alleged retaliation for refusing to implement a fraudulent payroll accounting system -- this claim also fails because the grievant has provided no evidence linking her refusal to implement the purportedly fraudulent payroll system with her layoff. The grievant presented no evidence that she ever expressed to management her concerns regarding the payroll accounting, either before or after she received notice that she would be laid off. In addition, while she apparently expressed concerns over the accounting system to an auditor, she did so only *after* she was laid off. When a protected activity occurs after the adverse action, there can be no inference of a causal link between the two.[10]

Informal Discipline

For state employees subject to the Virginia Personnel Act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the policies and procedures promulgated by DHRM.[11] For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.[12] These safeguards are in place to ensure that disciplinary action is appropriate and warranted.

Where an agency has taken informal disciplinary action against an employee, a hearing cannot be avoided for the sole reason that a Written Notice did not accompany the disciplinary action. Rather, even in the absence of a Written Notice, a hearing is required where the grieved management action resulted in an adverse employment action against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance).[13]

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment.[14] A layoff is clearly an adverse employment action. However, the evidence fails to raise a sufficient question as to

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Conduct, DHRM Policy 1.60 and Performance Planning and Evaluation DHRM policy 1.40. See the *Informal Discipline* section of this ruling for further discussion.

[10] *See* Duncan v. Washington Metropolitan Area Transit Authority, 2006 U.S. Dist. LEXIS 15335 (D.C. Cir. 2006) (Where the employer decided on a course of action before it could possibly have known about the employee's protected activities, no causation can be inferred.). *See also* Carter v. Greenspan, 304 F. Supp. 2d 13, 39 (D.D.C. 2004) ("Because his supervisors' ...intentions to terminate him predated his protected activity, his retaliatory discharge claim is illogical and must be dismissed."); and Trawick v. Hantman, 151 F. Supp. 2d 54, 63 (D.D.C. 2001) (noting that plaintiff could not establish causation where "the termination process had already been initiated" before his protected activities began);` Spadola v. New York City Transit Authority, 242 F. Supp. 2d 284, 294-95 (S.D.N.Y. 2003) (same); Holmes v. Long Island R. R., 2001 U.S. Dist. LEXIS 10431 (E.D.N.Y. 2001) (same).

[11] Va. Code § 2.2-2900 *et seq.*

[12] DHRM Policy No. 1.60, "Standards of Conduct" (effective 9/16/93).

[13] *See* EDR Ruling Nos. 2002-227 & 230.

[14] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. Of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

whether the agency's primary intent was to correct or punish perceived poor performance (audit points that the agency received). First, the agency head expressly stated that the layoff was not related to performance. Secondly, while the grievant does not dispute that the agency received audit points in areas for which she had responsibility, the agency did not appear to penalize her in her annual performance evaluation for those points. She received a "Contributor" rating for each core responsibility and an overall "Contributor" rating, which would have entitled the grievant to a 4% pay increase in November of 2006. Moreover, the evaluation specifically lauded her audit efforts noting: "Thanks for staying on top of our audit issues and offering solutions." In addition, it appears that the agency was considering a fiscal restructuring long before the issuance of the audit report that contained the audit points at issue here.[15] Indeed, the undisputed facts suggest that the agency is well on its way to accomplishing its goals of streamlining fiscal management and reducing expenses -- the majority of the duties performed by the grievant have been divided between two other positions, both of which are in lower pay bands.

For all of the above reasons, this grievance is not qualified for hearing.

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 this determination to the circuit court, please 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 notifies the agency that she does not wish to proceed.

Claudia T. Farr
Director

[15] An employee with Department of Human Resources Management confirmed that the agency had been exploring fiscal restructuring during the prior administration.