

Issue: Grievance Procedure/Consolidation of grievances for hearing;  
Qualification/Retaliation/other protected right; Ruling Date: December 28, 2006; Ruling  
Nos. 2007-1499, 2007-1508; Agency: Department of Minority Business Enterprise;  
Outcome: Grievances consolidated for hearing; retaliation issue qualified



## *Department of Employment Dispute Resolution*

### **QUALIFICATION AND CONSOLIDATION RULING OF DIRECTOR**

In the matter of the Department of Minority Business Enterprise  
Ruling No. 2007-1495, 2007-1508  
December 28, 2006

The grievant has requested qualification of her October 29, 2006 and November 7, 2006 grievances with the Department of Minority Business Enterprise. For the reasons discussed below, these grievances are qualified and consolidated for hearing.

#### FACTS

The grievant, who is currently employed by the Department of Minority Business Enterprise (DMBE or the agency), applied for a position with the Department of Accounts (DOA). During the selection process for the position, a representative of DOA spoke with the grievant's DMBE supervisor as part of checking the grievant's references. Based on investigation by this Department for purposes of this ruling, the reference provided by the grievant's supervisor appeared largely positive. However, in response to the question, "If applicant applied for another job with your agency/company would you hire them?," it appears from a DOA record that the grievant's supervisor answered, "no." While the grievant's supervisor reportedly acknowledged that the grievant was an excellent employee, she also indicated that the grievant had filed several "EEO complaints," according to the DOA record (notes of the DOA representative). The grievant's interaction with co-workers was also apparently identified by the DMBE supervisor as a problem, and it appears that the grievant's supervisor may have suggested that if the grievant was not selected for the position at DOA that she expected the grievant would file a complaint. In addition, the DOA record also reflects that in response to a question about the grievant's writing skills, the grievant's supervisor identified differences between the grievant's English vocabulary and "American" English.<sup>1</sup> The grievant alleges that DOA's interest in her candidacy diminished as a result of a negative reference from DMBE.

Specifically, the grievant claims on her Form A that the reference provided by her supervisor to DOA as part of the selection process was defamatory, an arbitrary and capricious performance evaluation, and a misapplication or unfair application of state and agency recruitment and selection policies, procedures, rules, and regulations. During the investigation by this Department, she has also suggested that the alleged negative reference

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<sup>1</sup> The grievant is of British national origin.

was part of an ongoing course of discrimination and/or retaliation. The grievant reportedly filed at least one complaint based on race, age, gender, and/or national origin discrimination earlier in 2006 with the Department of Human Resource Management's Office of Equal Employment Services (OEES). After filing this grievance with DMBE on October 29, 2006 ("Grievance #1"), the grievant received formal notice in a November 8, 2006 letter that she did not get the position with DOA.

On the Monday after she initiated Grievance #1, the grievant had a brief meeting with her supervisor at which time she was asked to make corrections to a letter. Accounts of what occurred during this meeting vary greatly depending on the viewpoints of the parties. However, the result was a counseling meeting the following day and an informal counseling memo on November 6, 2006. The grievant challenged the counseling memo in her November 7, 2006 grievance ("Grievance #2"). She alleges in an attachment to her Form A that she received this memo as a result of discrimination and/or retaliation. The grievant also argues that state policy was misapplied.

### DISCUSSION

#### *Grievance #1*

Based on a DOA record, it appears that the reference provided by the grievant's supervisor may have included a statement that she would not rehire the grievant, in part, because the grievant had filed EEO complaints. The Governor's Executive Order 1, incorporated by DHRM Policy 2.05, prohibits "discrimination on the basis of race, sex, color, national origin, religion, sexual orientation, age, political affiliation, or against otherwise qualified persons with disabilities."<sup>2</sup> Moreover, the policy further prohibits "taking retaliatory action against any person making allegations of violations of the Executive Order."<sup>3</sup> As such, if this reference was given in retaliation for the grievant having brought EEO complaints, it could also be a misapplication or unfair application of DHRM Policy 2.05.

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>4</sup> (2) the employee suffered a materially adverse action<sup>5</sup>; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management

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<sup>2</sup> Executive Order 1 (2006); DHRM Policy 2.05, *Equal Employment Opportunity*, p. 1 of 4.

<sup>3</sup> DHRM Policy 2.05, *Equal Employment Opportunity*, p. 1 of 4.

<sup>4</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 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). Here, the grievant appears to have reported an alleged violation of law (Title VII) to a governmental authority, OEES.

<sup>5</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15 (2006).

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.<sup>6</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>7</sup>

Reporting alleged violations of state equal employment policies to OEES is clearly a protected activity.<sup>8</sup> Further, it is well accepted that negative references can be adverse employment actions under Title VII,<sup>9</sup> thus they could clearly meet the materially adverse standard. For the grievance to qualify for hearing under the materially adverse standard, the action taken against the grievant must have been such that a reasonable employee might be dissuaded from participating in protected conduct.<sup>10</sup> Here, it is possible that a fact-finder could conclude that the prospects of a negative reference could very well dissuade a reasonable employee from filing a complaint of alleged discrimination with OEES.<sup>11</sup> Finally, the grievance raises a sufficient question as to whether there was a causal link between the alleged reference remarks and the grievant's filing of an EEO complaint. For example, the positive manner in which the grievant's supervisor appeared to have described the grievant's skills and abilities could be viewed as revealing a possible retaliatory animus in that, notwithstanding those good characteristics, the grievant's supervisor appears to have indicated that she would choose not to rehire the grievant because of the EEO complaints. Grievance #1 is therefore qualified for hearing.

#### *Grievance #2*

Grievances challenging counseling memos generally do not qualify for hearing.<sup>12</sup> However, in a case like this, where the grievant will be afforded a hearing to challenge the alleged retaliation and violation of policy against her, it simply makes sense to send

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<sup>6</sup> See, e.g., *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4<sup>th</sup> Cir. 2000); *Dowe v. Total Action Against Poverty*, 145 F.3d 653, 656 (4<sup>th</sup> Cir. 1998).

<sup>7</sup> See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (Title VII discrimination case).

<sup>8</sup> Executive Order 1 (2006); DHRM Policy 2.05, *Equal Employment Opportunity*, p. 1 of 4; see also Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4). In this instance, reporting an alleged violation of the Commonwealth's EEO policy on the basis of race, gender, and/or national origin is coextensive with reporting a violation of Title VII. See 42 U.S.C. § 2000e-2 (prohibiting discrimination based on an individual's race, color, religion, sex, or national origin). Title VII also prohibits retaliation against an employee who has made a charge of discrimination. 42 U.S.C. § 2000e-3(a).

<sup>9</sup> See, e.g., *Brown v. Chicago Transit Auth.*, 115 Fed. App'x 865, 867 (7<sup>th</sup> Cir. 2004); *Hillig v. Rumsfeld*, 381 F.3d 1028, 1033-35 (10<sup>th</sup> Cir. 2004); *Collin v. Rectors & Visitors of Univ. of Va.*, No. 96-1078, 1998 U.S. App. LEXIS 21267, at \*10 (4<sup>th</sup> Cir. Aug. 31, 1998); *Harris v. Prince George's County Pub. Schs.*, No. 96-2785, 1998 U.S. App. LEXIS 7703, at \*7 (4<sup>th</sup> Cir. April 20, 1998); *Hashimoto v. Dalton*, 118 F.3d 671, 674-76 (9<sup>th</sup> Cir. 1997); *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1266 (8<sup>th</sup> Cir. 1997).

<sup>10</sup> See *Burlington N.*, 126 S. Ct. at 2415.

<sup>11</sup> See *Hashimoto*, 118 F.3d at 676.

<sup>12</sup> E.g., EDR Ruling No. 2007-1449.

Grievance #2, which alleges the same retaliatory intent, to hearing as well. Indeed, the alleged retaliation challenged in Grievance #2 occurred about two weeks after the alleged retaliation that is the subject of Grievance #1. Moreover, sending these related claims to a single hearing (see consolidation discussion below) would provide an opportunity for the fullest development of what may be interrelated facts and issues.

We note, however, that this qualification ruling for Grievances #1 and #2 in no way determines that the agency's actions with respect to the grievant were discriminatory, retaliatory or otherwise improper, but only that a further exploration of the facts by a hearing officer is warranted, as a hearing officer is in a better position to determine questions of motive and credibility.

### *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>13</sup> EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.<sup>14</sup>

The October 29, 2006 and November 7, 2006 grievances share common allegations, involve the same parties, potentially many of the same witnesses, and a common factual background. Accordingly, this Department deems it appropriate to send both grievances together for adjudication by a hearing officer to help ensure a full exploration of what could be interrelated facts and issues.

### *Alternative Theories and Claims*

Because the grievant's claims of retaliation and misapplication or unfair application of policy qualify for hearing, this Department deems it appropriate to send all alternative theories raised by the grievances for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues. While there appears to be limited relief that a hearing officer could order as to Grievance #1 if the grievant successfully proves her case at hearing, the hearing officer could find that her supervisor's conduct was retaliatory, contrary to Executive Order 1 and DHRM Policy No. 2.05, and order that such acts cease.

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<sup>13</sup> *Grievance Procedure Manual* § 8.5.

<sup>14</sup> *Id.*

CONCLUSION

For the reasons set forth above, the grievant's October 29, 2006 and November 7, 2006 grievances are qualified for hearing. 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 T. Farr  
Director