

Issues: Qualification – Work Conditions (supervisor/employee conflict), Discrimination (Race), Retaliation (Grievance Activity Participation), and Consolidation of grievances for purpose of hearing; Ruling Date: March 14, 2008; Ruling #2008-1860, 2008-1940, 2008-1941; Agency: Department of Health Professions; Outcome: Qualified for Hearing and Consolidation Granted.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND CONSOLIDATION RULING OF DIRECTOR

In the matter of Department of Health Professions
Ruling No. 2008-1860, 2008-1940 and 2008-1941
March 14, 2008

The grievant has requested a ruling on whether her July 2, 2007 grievance with the Department of Health Professions (DHP or the agency) qualifies for a hearing. The grievant claims that she has been the victim of workplace harassment, discrimination on the basis of race¹ and retaliation, all of which have created an allegedly hostile work environment. Moreover, the grievant claims that the agency has misapplied and/or unfairly applied policy and procedures. Finally, should this Department qualify the July 2nd grievance for hearing, both the grievant and the agency have requested that the July 2nd grievance be consolidated for purposes of hearing with the grievant's November 19th grievance. For the following reasons, the July 2, 2007 grievance is qualified for hearing and consolidated with the November 19, 2007 grievance.

FACTS

Prior to her termination, the grievant was employed with DHP as an Assistant Accounting Director. On July 2, 2007, the grievant initiated a grievance which states:

[s]ince filing my original grievance in December 2006, I have been reduced to a lame duck Assistant Accounting Director. I am berated and chastised whenever I disagree with [my immediate supervisor] regarding staff. I have been threatened to be demoted, give [sic] a verbal counseling for another staff member's work performance, that I don't supervise, and most egregious, ordered to apologize to my subordinate for a merited disciplinary action.

The grievant's July 2, 2007 grievance proceeded through the management resolution steps and ultimately to the agency head for a qualification determination. The agency head did not qualify the July 2nd grievance and as such, the grievant asks this Department to qualify for hearing her July 2, 2007 grievance.

¹ It appears that the grievant's claim of race discrimination was added during the management resolution steps.

While the grievant's July 2, 2007 grievance was pending, the grievant was terminated from her employment with DHP. More specifically, on October 13, 2007, the grievant received a Group III Written Notice with termination for "failure to follow established state and agency written policy, unauthorized use and misuse of state property in the operation of a personal business, and abuse of state time."² The grievant subsequently challenged the disciplinary action by initiating a grievance on November 19, 2007. In her November 19, 2007 grievance, the grievant claims that the discipline is "excessive" and that she was terminated in retaliation for her July 2, 2007 grievance. On February 25, 2008, the agency head qualified the grievant's November 19, 2007 grievance for hearing and requested the appointment of a hearing officer on March 3, 2008.

DISCUSSION

Qualification

In this case, the issue of retaliation was raised in both the qualified November 19th grievance and the July 2nd grievance. Given that the issues raised in the November 19th grievance (formal discipline, termination, retaliation) are qualified for a hearing, this Department deems it appropriate to qualify the July 2nd grievance, which also alleges retaliation, to help assure a full exploration of what could be interrelated facts and claims. (For example, the initiation of July 2, 2007 grievance serves as one of the potential protected activities cited in the November 19th grievance.) Accordingly, the July 2, 2007 grievance is qualified as well.³ This qualification ruling in no way determines that the agency's actions were retaliatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

Consolidation of the July 2, 2007 and November 19, 2007 Grievances

Written approval by the Director of this Department in the form of a compliance ruling is required before two or more grievances are permitted to be consolidated in a single hearing. EDR strongly favors consolidation and will grant consolidation when grievances involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.⁴

² The issuance date of the written notice and the effective date of the grievant's termination is October 12, 2007. However, according to agency records, the grievant did not receive the written notice until October 13, 2007.

³ In claims regarding discrimination or retaliation where intent is critical to the outcome, the hearing officer, as fact finder, is better positioned to determine whether retaliatory intent played a role in management's action. *See* *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364-365 (4th Cir. 1985), abrogated on other grounds, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) quoting *Morrison v. Nissan Motor Co., Ltd.*, 601 F.2d 139, 141 (4th Cir. 1979) ("[r]esolution of questions of intent often depends upon the 'credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination.'").

⁴ *Grievance Procedure Manual* § 8.5.

This Department finds that consolidation of the July 2, 2007 grievance with the November 19, 2007 grievance is appropriate. The grievances involve the same parties and likely many of the same witnesses. In addition, they share a related factual background. Finally, both parties have requested consolidation and consolidation is not impracticable in this instance.

This Department's rulings on compliance are final and nonappealable.⁵

Claudia T. Farr
Director

⁵ Va. Code § 2.2-1001(5).