

Issues: Qualification – Grievance Procedure (Other Issue) and Retaliation (Grievance Activity Participation); Ruling Date: July 25, 2008; Ruling #2008-1882; Agency: Department of Corrections; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF THE DIRECTOR

In the matter of Department of Corrections
Ruling No. 2008-1882
July 25, 2008

The grievant has requested a ruling on whether his August 8, 2007 grievance with the Department of Corrections (the agency) qualifies for hearing. For the reasons set forth below, this Department determines that the grievance does not qualify.

FACTS

On May 25, 2007, the grievant was issued a Group III Written Notice and demoted for an unprofessional relationship with a subordinate Corrections Officer. The grievant initiated a grievance to challenge the Written Notice and demotion (Grievance 1). Grievance 1 made reference to another purported supervisor/subordinate relationship at the prison where the grievant worked. Grievance 1 progressed through the management resolution steps, and at the second step meeting, the Warden asked the grievant about his allegation of another supervisor/subordinate relationship at the prison and the existence of supporting witness evidence of the relationship. The grievant informed the Warden that he had witnesses that could support his allegation but did not want to disclose the names of those persons at that time. The grievant then requested that the meeting be postponed until he had an opportunity to contact an attorney regarding whether he was required to disclose the names. The meeting was subsequently postponed.

In a later meeting with the Warden when the issue of the identity of supporting witnesses again arose, the grievant repeated that he did not feel comfortable disclosing the identity of his witnesses at that time. The grievant was not required to reveal the identities of his witnesses. Several days later, the grievant was approached by two Internal Affairs Investigators who informed him that they were doing an investigation into his allegation of the supervisor/subordinate relationship mentioned in his grievance. They asked him what he knew about the case and the identities of any others who might have information about the relationship. The grievant responded that the issue of the identities of other witnesses was an issue in his grievance (Grievance 1). The grievant then asked if the Warden would receive a copy of the Internal Affairs Investigators' report. The Investigators informed the grievant that the Warden would receive a copy. The grievant subsequently informed the Investigators that he was uncomfortable disclosing identities at that time. The grievant asserts that he was then

informed that if he did not disclose the names, he would be subject to disciplinary action. The grievant felt that he had no choice other than to reveal the identities so he disclosed the names of his potential witnesses.

On August 8, 2007, the grievant initiated this grievance to challenge the agency's insistence that he disclose the identity of his witnesses (Grievance 2). He further claims that the agency's insistence that he provide the identities of his witnesses was retaliatory and that he should be transferred to another institution to prevent further retaliation. The agency has denied qualification on the basis that (1) the grievant's concerns should have been raised as an issue of noncompliance and (2) no retaliation had occurred.

DISCUSSION

Noncompliance

In Grievance 2, the grievant's primary assertion is that the agency was allegedly noncompliant with the grievance procedure in its handling of Grievance 1. Specifically, the grievant asserts that the grievance procedure does not require that he disclose the identity of his grievance hearing witnesses prior to hearing, thus the agency's insistence that he disclose is noncompliance.

Initiating a new grievance is not the proper means to raise such a noncompliance matter.¹ Rather, issues of noncompliance are generally raised pursuant to Section 6 of the *Grievance Procedure Manual* as part of the related grievance, Grievance 1 in this case. Because the noncompliance matter asserted by the grievant is not a proper subject for a new grievance, it is not qualified for hearing.

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;² (2) the employee suffered a materially adverse action;³ 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.⁴ Evidence establishing a causal connection

¹ See EDR Ruling No. 2008-1984.

² 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).

³ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 66-68 (2006); see, e.g., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

⁴ See, e.g., *EEOC v. Navy Fed Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005).

and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.⁵

Filing a grievance is clearly a protected activity. Assuming without deciding that forced disclosure of a list of potential grievance hearing witnesses at the second step is a materially adverse action,⁶ the grievant's retaliation claim fails to qualify because he has not presented sufficient evidence of a causal link between any alleged protected activity and any materially adverse action. The agency had a legitimate non-retaliatory reason for seeking information, including the names of potential witnesses, relating to the other supervisor/subordinate relationship referenced in the grievant's August 8, 2007 grievance. Once the grievant raised the issue of the other supervisor/subordinate relationship in his grievance, a relationship the grievant himself describes as "inappropriate," the agency had a duty to investigate. The inquiry by the two Internal Affairs Investigators' regarding potential witnesses to the "inappropriate relationship" would appear to be entirely appropriate. Sharing the report with the Warden would also appear to be appropriate given that the Warden is responsible for the operations and management of the facility, and also that the individual implicated in Grievance 1 as allegedly involved in the inappropriate supervisor/subordinate relationship was supervised by the Warden. The fact that these potential witnesses might have some bearing on Grievance 1 did not divest from the Warden the authority and duty to review the Internal Affairs Investigators' final report regarding alleged misconduct by an individual in his chain of supervision. Accordingly, we cannot conclude that the Warden's actions here were retaliatory.

CONCLUSION

For the reasons discussed above, Grievance 2 is not qualified for hearing. 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 the qualification determination to the circuit court, the grievant should 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 wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

⁵ See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

⁶ A materially adverse action is one that might dissuade a reasonable employee in the grievant's position from participating in protected conduct. In *Burlington Northern*, the Court noted that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." 548 U.S. 69. "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 schoolage 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.'" 548 U.S. at 68, (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).