

Issues: Compliance – Grievance Procedure (30 Day Rule and Documents) and Qualification – Discrimination (Other) and Retaliation (Other Protected Right); Ruling Date: August 1, 2008; Ruling #2009-2079; Agency: Department of Corrections; Outcome: Grievant Not In Compliance, Not Qualified for Hearing.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2009-2079
August 1, 2008

The grievant has requested a ruling on whether her May 5, 2008 grievance with the Department of Corrections (the agency) qualifies for a hearing. In addition, the agency has raised the question of whether the grievance was initiated timely. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is a probation and parole officer with the agency. On October 26, 2007, she allegedly engaged in "highly disruptive" conduct in the workplace, as described by a supervisor. The following Monday, October 29, 2007, she was asked by her supervisor to turn in the weapon that had been assigned to her. She also received a memorandum, dated November 6, 2007, regarding a counseling session with her about her conduct on October 26, 2007. The grievant asserts that the agency misapplied policy in taking her weapon and failing to return it to her. She initiated her May 5, 2008 grievance to challenge these issues regarding her weapon.

In addition, the grievant raises a claim of "Harassment/Retaliation/Discrimination." On April 10, 2008, the grievant was advised by a supervisor that she needed to undergo another psychological examination to qualify to carry a weapon again. Additionally, on April 15, 2008, the same supervisor sent the grievant an e-mail asking her to provide a list of all the visits she was conducting that day and the reasons for why she did not take a state car. The agency states that the grievant had not properly itemized her visits on the itinerary log. The grievant was working out of the office that day visiting offenders and had not taken a state car because of a personal appointment that evening. The grievant explained these issues to the supervisor's satisfaction the following day. The grievant alleges that this supervisor is harassing her, as allegedly exemplified by the above actions, and "acting in retaliation because I have asked her to return my weapon to me and have pointed out to her she did not follow policy."

DISCUSSION

Compliance

Timeliness

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance.¹ When an employee initiates a grievance beyond the 30-calendar day period without just cause, the grievance is not in compliance with the grievance procedure, and may be administratively closed.

The grievant was aware that her weapon was taken from her on October 29, 2007. Consequently, she should have initiated her grievance to challenge that action within 30 calendar days, i.e., by November 28, 2007. Because she did not, her grievance to challenge that matter is untimely. The grievant also appears to argue that the agency has misapplied policy by failing to return the weapon to her based on her assumption for why it was taken. However, the grievant states in her grievance materials that the weapon should have been returned by December 6, 2007. The grievant did not initiate her grievance until May 5, 2008, which is well beyond 30 calendar days after December 6, 2007. There is no question that her grievance is untimely to challenge the issues regarding her weapon. The only remaining question is whether there was just cause for her delay.

The grievant states that she was on medical leave due to knee surgery from January 2, 2008 to March 31, 2008. This Department has long held that illness or impairment does not automatically constitute “just cause” for failure to meet procedural requirements. To the contrary, in most cases it will not.² Illness may constitute just cause for delay only where there is evidence indicating that the physical or mental impairment was so debilitating that compliance with the grievance procedure was virtually impossible.³ Here, the grievant’s medical leave did not even arise until after the 30 calendar-day period from October 29, 2007 lapsed. Furthermore, there is no evidence that while she was on medical leave the grievant was incapacitated to the point that she was unable to protect her grievance rights. As such, there is no basis to find that the grievant had just cause for delay as a result of her injury.

Further, this Department has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure.⁴ A grievant’s lack of knowledge about the grievance procedure and its requirements does not constitute just cause for failure to act in a timely manner. Although the grievance is untimely to challenge the issues concerning her weapon, the grievant was timely in asserting her

¹ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.

² See, e.g., EDR Ruling No. 2006-1201; EDR Ruling Nos. 2003-154, 155.

³ *Id.*; see also EDR Ruling No. 2005-1040.

⁴ See, e.g., EDR Ruling No. 2002-159; EDR Ruling No. 2002-057.

“Harassment/Retaliation/Discrimination” claim. The grievant asserts that the alleged acts of harassment/retaliation/discrimination occurred in April 2007. Therefore, because the grievant’s conduct allegedly occurred within the 30 calendar days prior to the initiation of the grievance, the grievance is timely as to those claims. This Department’s rulings on matters of compliance are final and nonappealable.⁵

Qualification

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.⁶ Thus, claims relating to issues such as the method, means and personnel by which work activities are to be carried out 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. The grievant has raised issues regarding harassment, discrimination, and retaliation.

Harassment/Discrimination

For a claim of hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or prior protected activity; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.⁷ “[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”⁸

The grievant must raise more than a mere allegation of harassment or discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. The grievant has not raised a sufficient question that any alleged harassment or discrimination was based on a protected status.⁹ Consequently, this claim does not qualify for a hearing.

⁵ See Va. Code § 2.2-1001(5), 2.2-3003(G).

⁶ Va. Code § 2.2-3004(B).

⁷ See Gilliam v. S.C. Dep’t of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

⁸ Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

⁹ See, e.g., *Grievance Procedure Manual* § 4.1(b).

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;¹⁰ (2) the employee suffered a materially adverse action;¹¹ 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.¹² Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹³

The grievant alleges that she has been retaliated against for requesting that her supervisor return her weapon and for pointing out that her supervisor has failed to follow policy. Assuming without deciding, for the purposes of this ruling only, that the grievant engaged in protected activity, her retaliation claim nevertheless fails to qualify for hearing. The grievant asserts two instances of alleged retaliation: 1) being required to undergo a psychological evaluation as a requirement to carry a weapon; and 2) an e-mail sent to her by a supervisor asking what the grievant was doing at work on a particular day out of the office. As to the first instance, after the grievant's weapon had been taken away, the grievant's supervisor asked her to undergo a psychological evaluation to establish her mental stability before her weapon would be returned. The agency appears to have had a legitimate job-related reason for this action, and there is no evidence that this reasoning was pretext for retaliation. The grievant has not presented sufficient evidence of a causal link between the alleged protected activity (requesting the return of her weapon and pointing out her supervisor's alleged violation of policy) and the request that she undergo another psychological evaluation.

In the second alleged act of retaliation, the supervisor sent an e-mail to the grievant requesting her planned visits for the day. However, this claim does not qualify for a hearing because there is no indication that the grievant suffered a materially adverse action.¹⁴ Because the grievant has not presented evidence raising a sufficient question as to the elements of a claim of retaliation, this grievance does not qualify for hearing.

¹⁰ 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).

¹¹ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); see, e.g., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

¹² See *EEOC v. Navy Fed Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005).

¹³ See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

¹⁴ 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

Documents

The grievant has also raised an argument regarding documents she requested from the agency. However, because the grievance does not qualify for hearing, this issue is moot. If the grievant appeals to a circuit court, the grievant can raise her document needs with the court and/or, if the court qualifies the grievance for hearing, with the hearing officer.¹⁵

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 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 and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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

any given act of retaliation will often depend upon the particular circumstances. Context matters.” 548 U.S. at 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.’” *Id.* at 68 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). In this grievance, the grievant was asked to confirm her travels on a particular day because of a failure to properly itemize the itinerary log and the fact the grievant had not taken a state car. Such a request cannot be viewed as something that would dissuade a reasonable employee from engaging in protected activity.

¹⁵ See *Grievance Procedure Manual* § 6.3; see also Va. Code § 2.2-3004(E).