Issue: Qualification – Retaliation (Grievance Activity Participation); Ruling Date: March 10, 2009; Ruling #2009-2224; Agency: Department of Juvenile Justice; Outcome: Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

RECONSIDERED QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling No. 2009-2224
March10, 2009

The Department of Juvenile Justice (DJJ or agency) has asked this Department (EDR) to reconsider and modify its January 22, 2009 qualification decision in Ruling #2008-1968, 2008-1969, 2009-2104, and 2009-2205. The agency states that, as drafted, the January 22nd ruling could be potentially prejudicial. In an effort to eliminate potential prejudice to either party, we provide the following clarification.

FACTS

In the January 22nd ruling, we noted that the "[t]he grievant claims a long history of retaliation by the agency." In the "facts" section of the ruling, we noted that the grievant had pointed to several incidents to support his claim including: (1) two Written Notices that were issued but later rescinded, (2) two Notices of Improvement Needed, also allegedly rescinded, and (3) an alleged comment from a senior member of management that "[grievant] will never get a Sergeant Position as long as I'm here." Also noted in the "facts" section of the ruling was a previous grievance in which a hearing officer concluded that the grievant had been a victim of retaliation. The January 22nd ruling acknowledged that the Circuit Court subsequently overturned the hearing officer's decision on the basis that it was "contradictory to law." As the January 22nd ruling noted, the Court's decision did not state the reason(s) for its conclusion that the hearing decision was contradictory to law.

In qualifying the grievances at issue in the January 22nd ruling (each of which alleged retaliation), this Department concluded that the grievant had:

> rais[ed] a sufficient question as to whether the actions taken by the agency had a nexus with the protected conduct. Although the agency denies that it has engaged in retaliation against the grievant, the circumstances described above, including the previous finding of retaliation and the "[ir]reconcile[able]" nature of the prior testimony of a Major and Captain in Case No. 8460, the ultimately rescinded W[r]itten Notices and NINs, and the alleged comment from a senior member of management that "[grievant] will never get a Sergeant Position as long as I'm here," collectively raise a sufficient question of whether the grieved actions may have been prompted by a retaliatory animus.

The agency asserts that the reference to the "previous finding of retaliation" is potentially prejudicial and requests that the January 22nd ruling be modified to remove all references to a "previous finding of retaliation" from that ruling. The agency also requests that references to previous grievances and allegations of retaliation by the grievant be expunged from the January 22nd ruling.

DISCUSSION

We acknowledge the agency's concern with the January 22nd ruling and offer the following clarification. First, the January 22nd ruling states that "this qualification ruling in no way determines that the agency's actions [as alleged in the grievances qualified for hearing] were retaliatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate." This language routinely accompanies qualification rulings. It serves as a reminder that it is not the function of EDR to pass judgment on the ultimate merits of any particular grievance--that responsibility is reserved for the hearing officer. Rather, when making a qualification determination, EDR's responsibility is to "render a decision on whether the employee is entitled to a hearing upon the grievance record and other probative evidence."[1] In such decisions, we include the grounds upon which our qualification decision is based. The recitation of these grounds is not intended to indicate EDR's opinion as to the ultimate merits of a grievance.

In the instant case, part of the probative evidence considered by EDR was the conflicting and irreconcilable testimony that was found by the hearing officer in Case No. 8460 to have occurred. In Case No. 8460, the hearing officer concluded that:

> The testimony of the Major and Captain P cannot be reconciled. Because the Agency has presented directly conflicting accounts of the reason why Grievant was moved from a favorable to an unfavorable post, the Hearing Officer concludes that the Agency's decision was a pretext or excuse for retaliation. Accordingly, Grievant has established that the Agency retaliated against him by moving him from the sally port post to the Behavior Management Unit post.

As noted above, we expressly acknowledged in the January 22nd decision that the Circuit Court reversed the hearing officer's decision as "contradictory to law."[2] As reflected

[1] Va. Code § 2.2-3004(D).

[2] The court did not state a reason for finding that the decision in Case No. 8460 was contradictory to law. However, because the agency advanced two bases for its appeal when it sought EDR's approval to appeal to the Circuit Court, we must assume that the Court based its reversal on one of those two bases. The first basis raised by the agency was that the hearing officer used the wrong standard for analyzing the retaliation claim when he used a "materially adverse" standard instead of an "adverse employment action" standard. We note, with all due respect to the Circuit Court and its May 4, 2007 order, that this Department uses the "materially adverse" standard in retaliation claims, the reasons for which are explained in depth in EDR Ruling No. 2004-624, 2004-

in its Final Order, the Court, however, did not appear to disturb the hearing officer's findings of fact, as would be consistent with Virginia Court of Appeals precedent.[3] Of particular note in Case No. 8460 was the hearing officer's finding of fact regarding the testimony of two high-ranking officers who had presented directly conflicting and irreconcilable testimony. It was on this basis that the hearing officer concluded that the agency's "decision was a pretext or excuse for retaliation," and the grievant had thus "established that the Agency retaliated against him." The "finding" of retaliation to which we referred in the January 22nd ruling was based on this irreconcilable and contradictory testimony.

We now clarify that the grievant may, as he has during the grievance process,[4] raise as potential background evidence the hearing officer's findings of fact in Case No. 8460, including, but not limited to, the hearing officer's finding of fact regarding the irreconcilable and contradictory testimony. The hearing officer in the instant case will ultimately decide whether any such prior findings of fact are relevant, even if only as background evidence, and if relevant, the weight to give this evidence. Importantly, however, the hearing officer assigned to this case must not base his or her decision on the original hearing decision's legal conclusion that the agency had retaliated against the grievant, as this conclusion of law was reversed by the Circuit Court on appeal.

The agency has also asked this Department to remove all references to "previous grievances and allegations of retaliation." The agency acknowledges that the "grievant is entitled to argue that he has been subjected to a pattern of retaliation within his current claims," but asserts that "it is inappropriate and prejudicial to the agency for the qualification ruling to link [the grievant's] current claims to matters which have been properly concluded." We acknowledge the agency's concerns but, as explained below, believe that mentioning the prior grievances in the January 22nd ruling was neither error nor prejudicial.

In a recent case, a Circuit Court refused on appeal to qualify an unsuccessful applicant's grievance claims that his selection process had been tainted by policy misapplication or discrimination.[5] The Court nevertheless qualified the issue of retaliation based, in part, on the unsuccessful applicant's "long history" of grievances, lawsuits, and EEOC complaints. The Court held that "Grievant's history of filing grievances and his lengthy service and résumé compared with that of the successful candidate raise at least an

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648. As to the second basis for appeal--proximity in time between the protected activity and management action--it is unclear why or even if the court found this argument persuasive.

[3] *See* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002) ("these contemporaneous acts of the General Assembly (revising § 2.1-116.07 and adopting § 2.1-116.07:1) reflect the legislature's intent to create a tripartite review procedure for state employee grievances. These statutes clearly provide the hearing officer is to act as fact finder and the Director of the Department of Human Resource Management is to determine whether the hearing officer's decision is consistent with policy. In the grievance process, neither of these determinations is subject to judicial review, but only that part of the grievance determination 'contradictory to law'.")

[4] In his February 10, 2008 Request for Qualification of the October 19, 2007 Grievance, the grievant asserts that "[my] previous grievance (**2006) did show** that the facts in the hearing confirmed that I was retaliated against. Powhatan Circuit Court Judge reversed the order not the facts in this case." (Emphasis in original.)

[5] August 15, 2008 Order issued by the Circuit Court of the City of Richmond in Case No. CL08-3684.

inference of causal connection," and that "[t]his part of the grievance should be considered at a hearing." While we obviously did not agree with the Circuit Court in that case that a history of grievances, coupled with a comparable résumé and long service, was by itself enough to warrant a hearing,[6] we cannot conclude that a long history of grievances is either irrelevant or prejudicial to a claim of retaliation for having participated in the grievance procedure. Indeed, evidence that prior grievances were filed would appear to be essential to the grievant's case. Moreover, any findings of fact and/or ultimate legal conclusions in those prior grievances could be proffered by either party to support their position in this case. Again, the hearing officer will decide whether any prior grievance findings of fact or conclusions of law are relevant to the instant case.

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Claudia T. Farr
Director

[6] *See* EDR Ruling No. 2008-1823, which had denied qualification of the grievance.