

Issue: Qualification – Retaliation (Other Protected Right); Ruling Date: September 15, 2009; Ruling #2010-2405; Agency: Virginia Department of Agriculture and Consumer Services; Outcome: Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION RULING OF DIRECTOR**

In the matter of the Department of Agriculture and Consumer Services  
Ruling No. 2010-2405  
September 15, 2009

The grievant has requested a ruling on whether his October 9, 2008 grievance with the Department of Agriculture and Consumer Services (“the agency”) qualifies for hearing. For the reasons described below, this grievance is qualified for a hearing.

FACTS

In October 2008, the grievant’s position was selected for layoff as part of the agency’s budget reduction efforts. At the time, the grievant held a “special assignments” position,<sup>1</sup> which the grievant performed out of his home. The grievant had been transferred into this special assignments position on March 1, 2007 from a supervisory field inspector position. His placement in the special assignments position was continued through 2007 and made permanent in January 2008.

The grievant had raised various issues with agency management prior to the March 1, 2007 transfer, including, but not limited to, reporting an incident of alleged workplace violence in November 2006 and reporting his concerns regarding a selection process in October 2006, issues which continued to be discussed thereafter. The grievant also filed a grievance in December 2007. The grievant alleges that these actions led to the removal from his supervisory position in March 2007 and/or eventual layoff in October 2008. The agency states that the grievant’s layoff was based solely on business needs. As the parties failed to resolve the grievance during the management steps, the grievant now requests qualification of his grievance for a hearing.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.<sup>2</sup> Further, complaints relating solely to layoff “shall not proceed to a hearing.”<sup>3</sup> Accordingly, challenges to such decisions do not

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<sup>1</sup> The agency also describes this position as a “Special Projects Coordinator.”

<sup>2</sup> See Va. Code § 2.2-3004(B).

<sup>3</sup> Va. Code § 2.2-3004(C).

qualify for a hearing unless the grievant presents evidence raising a sufficient question as to whether the agency misapplied or unfairly applied policy, or discrimination, retaliation or discipline improperly influenced the decision.<sup>4</sup> In this case, the grievant claims retaliation and that the agency misapplied or unfairly applied policy.

### *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;<sup>5</sup> (2) the employee suffered a materially adverse action;<sup>6</sup> 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.<sup>7</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>8</sup>

The grievant states he has engaged in numerous protected activities, including 1) expressing matters of public concern to an elected official,<sup>9</sup> 2) expressing concerns to management,<sup>10</sup> and 3) filing a grievance in December 2007.<sup>11</sup> Further, the grievant's layoff is a materially adverse action. The question remains whether a causal link exists between the grievant's protected conduct and his layoff.

There are likely many ways to view this case. For instance, on the one hand, the agency states it was under constraints to reduce its budget, identified the grievant's job duties for potential layoff, and that the budget reduction strategy involving the abolishment of the grievant's position was selected for implementation. Because the grievant's assigned job duties at the time concerned special assignments, it is understandable why those duties were selected for elimination because, in some ways, they do not appear to be so central to the agency's business functions. However, the grievant's layoff cannot only be viewed in isolation.

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<sup>4</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

<sup>5</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 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).

<sup>6</sup> *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.

<sup>7</sup> See, e.g., *EEOC v. Navy Fed Credit Union*, 424 F.3d 397, 405 (4<sup>th</sup> Cir. 2005).

<sup>8</sup> See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

<sup>9</sup> See Va. Code § 2.2-2902.1. The grievant states that he informed agency management on July 25, 2008, by email, of his reports of such matters to a state delegate.

<sup>10</sup> See Va. Code § 2.2-3000.

<sup>11</sup> See Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

In late 2006 and continuing into early 2007, the grievant raised various issues with agency management, some of which could arguably be viewed as protected under the Code of Virginia.<sup>12</sup> Shortly thereafter, the grievant was removed from his supervisory role in March 2007 and placed in a special assignments position. The proximity in time between these purported protected activities (late 2006 and early 2007) and his placement into this special assignments position (March 1, 2007) raises a question of a causal link of retaliatory animus. The grievant argues that the “special assignment” nature of his position is precisely what allowed that position to be subject to abolishment in October 2008. The agency extended the initially temporary position through 2007 and made the transfer permanent in January 2008 after allegedly providing the grievant assurances of the need for the “critical special projects” work he performed and assurances that his position would not be abolished. Had the grievant continued in his field supervision role, those duties may well not have been as readily identified for elimination as his special assignments duties. When described in this manner, the facts could at least arguably raise a sufficient question of a causal link between the grievant’s protected activities and his layoff. As such, in light of the disputed facts in this case, and because there is at least a sufficient question raised of the elements of a claim of retaliation, further review by a hearing officer is required.

#### *Alternative Theories and Claims*

The grievant has also asserted additional claims and theories regarding his layoff and misapplication and/or unfair application of policy. Because the grievant’s claim of retaliation qualifies for hearing, this Department deems it appropriate to send all alternative theories and claims raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.<sup>13</sup>

#### CONCLUSION

For the reasons set forth above, the grievant’s October 9, 2008 grievance is qualified for hearing. This 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. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

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Claudia T. Farr  
Director

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<sup>12</sup> See Va. Code § 2.2-3000. These issues included concerns with a selection process and workplace violence. *See supra*.

<sup>13</sup> This ruling has not addressed all the grievant’s theories of retaliation. It was not necessary to consider all such theories once sufficient questions of retaliation had been found for the entirety of the grievance to qualify for a hearing. While this ruling need not address all these claims and theories, the hearing officer will need to consider such issues raised by the grievance and qualified in this ruling.