Issues: Qualification – Retaliation (Other Protected Right) and Work Conditions (Telecommuting); Ruling Date: December 4, 2009; Ruling #2010-2408; Agency: Department of Corrections; Outcome: Qualified for Hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2010-2408
December 4, 2009

The grievant has requested a ruling on whether his July 8, 2009 grievance with the Department of Corrections ("DOC" or "the agency") qualifies for hearing. For the reasons described below, this grievance is qualified for a hearing.

FACTS

The grievant alleges that on or about June 5, 2009, he asked for an alternative work schedule, but that the agency denied his request. He asserts that the denial of his requested work schedule was the result, at least in part, of age and disability discrimination, and that the denial was also part of a larger pattern of retaliation and unequal treatment.

On July 8, 2009, the grievant initiated a grievance challenging the agency's denial of his request for an alternative work schedule.[1] After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and he has appealed to this Department.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[2] Further, complaints relating solely to the methods, means, and personnel by which work activities are to be carried out or scheduling of employees within the agency "shall not proceed to a hearing."[3] Accordingly, challenges to such decisions do not qualify for a hearing unless the grievant presents evidence raising a

[1] In his grievance, the grievant refers to a number of other alleged agency actions, such as a prior performance evaluation. This Department understands those alleged actions to be background evidence offered by the grievant in support of his claim regarding the denied work schedule, rather than challenged management actions for which he is seeking specific relief through the grievance process. However, to the extent the grievant is attempting to grieve and seek relief for any management action occurring more than 30 calendar days prior to the initiation of his grievance, the agency correctly asserts that such claims are time-barred. *See Grievance Procedure Manual* § 2.4.
[2] *See* Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004(C).

sufficient question as to whether the agency misapplied or unfairly applied policy, or discrimination, retaliation or discipline improperly influenced the decision.[4] In this case, the grievant claims retaliation, age and disability discrimination, 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;[5] (2) the employee suffered a materially adverse action;[6] 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.[7] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[8]

The grievant states that the agency's denial of his request for an alternative work schedule was due to a number of work-related actions he took with which his facility head disagreed. Among the actions the grievant identified in this regard was his compliance with repeated subpoenas he apparently received to testify on behalf of a parolee. The grievant's compliance with these subpoenas arguably constitutes protected activity.[9] Further, the grievant has raised a sufficient question of a materially adverse action, as he has shown that the agency denied his requested alternative work schedule.[10] Finally, the grievant has raised a sufficient question of a causal link between his protected conduct and the denial of his requested schedule that warrants further exploration by a hearing officer. In particular, we note the apparent agreement of the grievant's immediate supervisor to the request, prior to the involvement of the facility head. In addition, the reason advanced by the agency for the facility head's denial of the request—that the grievant could not use telecommuting for child care needs—is arguably inconsistent with DHRM Policy 1.61, "Telework," as the grievant has presented evidence that he would not be directly responsible for child care.[11]

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[4] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

[5] *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).

[6] 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.

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

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

[9] *See, e.g.,* Va. S.Ct. Rule 3A:12(d) (failure to comply with subpoena may be deemed a contempt of court).

[10] *See* Brockman v. Snow, 217 Fed. Appx. 201, 207 (4th Cir. Feb. 13, 2007).

[11] The grievant appears to be trying to arrange his schedule so that he can meet his youngest child at the bus during his lunch break and then resume working while his two older children supervise the youngest. Such an arrangement would not necessarily appear to be prohibited by DHRM Policy 1.61, which indicates that where "some other

As the grievant has raised a sufficient question with respect to each of the elements of a claim of retaliation, we find that further review by a hearing officer is required. Accordingly, this claim is qualified for hearing.

Alternative Theories and Claims

The grievant has also asserted additional claims and theories regarding the denial of his request for an alternative work arrangement. 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.

CONCLUSION

For the reasons set forth above, the grievant's July 8, 2009 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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individual" is present to provide care, the presence of children or adults in need of primary care in the alternate work location does not preclude telework. *See* DHRM Policy 1.61, at A.3.