

Issues: Qualification – Work Conditions (Safety/Security) and Retaliation (Grievance Activity); Ruling Date: July 9, 2010; Ruling #2010-2631; Agency: Department of Corrections; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2010-2631
July 9, 2010

The grievant has requested a ruling on whether his February 26, 2010 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant made a remark to his supervisor that it was “good that we have the grievance procedure because we have armed officers.” Although the supervisor states he did not feel that the grievant was a threat, the incident was reported to human resources. The agency’s human resources department directed that the grievant be referred to EAP and he was placed on administrative leave. The grievant completed all EAP recommendations and was cleared to return to work, which was honored by the agency, but only after removing the grievant’s approval to carry a weapon. The removal of the grievant’s weapon was approved by the agency’s Mental Health Clinical Supervisor and management. The agency has indicated that the grievant may reapply to obtain the approval to carry his weapon again in one year. The grievant has submitted this grievance to challenge the referral to EAP and removal of his weapon.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.¹ Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.² 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. In this case, the grievant raises misapplication and/or unfair application of policy and retaliation.

¹ See *Grievance Procedure Manual* § 4.1 (a) and (b).

² Va. Code § 2.2-3004(B).

Misapplication and/or Unfair Application of Policy Claim - Adverse Employment Action

The grievance procedure generally limits grievances that qualify for a hearing to those that involve an “adverse employment action.”³ Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.⁴ An adverse employment action is defined as a “tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁶

This Department has reviewed the materials submitted and finds that the grievant’s allegations in this case do not amount to an adverse employment action. Analogous case law researched by this Department indicates that the removal of an employee’s weapon alone is not an adverse employment action unless it causes an adverse impact upon the employee’s job in some other way, such as a significant alteration to duties, reassignment and/or transfer, or disqualification from overtime work.⁷ In essence, the removal of an employee’s weapon must significantly change the terms, conditions, or status of the employment to be considered an adverse employment action.

In this case, it does not appear that the grievant’s lack of a weapon has a significant detrimental effect on the terms, conditions, or benefits of his employment. Indeed, it appears that the grievant’s job has not been altered at all. Further, there are apparently other agency employees performing similar tasks as the grievant that do not carry a weapon. Consequently, there is no basis for this Department to find that the removal of the grievant’s weapon had a significant effect on his employment.

In addition, there is no evidence that the referral to EAP has had an adverse impact on the grievant’s employment. The agency has indicated that the EAP referral will not appear in the grievant’s file. As such, because there is insufficient evidence that the grievant has experienced an adverse employment action, this grievance does not qualify for a hearing.

³ See *Grievance Procedure Manual* § 4.1(b).

⁴ While evidence suggesting that the grievant suffered an “adverse employment action” is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an “adverse employment action.” For example, consistent with recent developments in Title VII law, this Department substitutes a lessened “materially adverse” standard for the “adverse employment action” standard in retaliation grievances. See EDR Ruling No. 2007-1538. The grievant’s retaliation allegations are discussed below.

⁵ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁷ See, e.g., *Caver v. City of Trenton*, 420 F.3d 243, 256 (3d Cir. 2005) (finding removal of weapon part of adverse employment action taken against employee because it prevented him from performing many of the normal duties of his job); *Terry v. Ashcroft*, 336 F.3d 128, 142-43 (2d Cir. 2003) (finding that suspension of firearm privileges could be an adverse employment action because of evidence that the weapon was an “essential tool” of the job); *Montgomery v. Chertoff*, No. 03-CV-5387, 2007 U.S. Dist. LEXIS 30519, at *52-53 (E.D.N.Y. Apr. 25, 2007) (removal of weapon was materially adverse because employee was unable to work overtime and was effectively demoted).

Retaliation Claim

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;⁸ (2) the employee suffered a materially adverse action;⁹ 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.¹⁰ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹¹

Even assuming that the EAP referral and removal of the grievant's weapon amount to a materially adverse action, this grievance still does not qualify for a hearing. Although the grievant has alleged that he engaged in protected activity (prior grievance activity), he has not presented sufficient evidence to raise a question as to the causation element of a retaliation claim. The agency states that it based the EAP referral and removal of the grievant's weapon on his conduct in the workplace. This basis for the removal of his weapon was reviewed and approved in an evaluation by the agency's Mental Health Clinical Supervisor. There is insufficient evidence to suggest that the agency's justifications were mere pretext for retaliation.

Because of the potential issues of employee safety and the opinion of the Mental Health Clinical Supervisor, the agency's actions are understandable. Indeed, with the findings of the Mental Health Clinical Supervisor, the agency may have had little choice than to take the action it did. Although the grievant's supervisor did not perceive the grievant's statement to indicate any threat, to ensure the safety of its employees the agency should take such preventative measures even out of an overabundance of caution. This Department finds no evidence of any other motivating cause for the EAP referral and removal of the grievant's weapon that could suggest retaliation. Because the grievant has not raised a sufficient question as to the elements of a claim of retaliation, this grievance does not qualify for a hearing.

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

⁸ 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).

⁹ *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.

¹⁰ See, e.g., *EEOC v. Navy Fed Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005).

¹¹ See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

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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