

Issues: Qualification – Management Actions (assignment of duties) and Retaliation (grievance activity participation); Ruling Date: November 30, 2010; Ruling No. 2011-2810; Agency: State Board of Elections; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
QUALIFICATION RULING OF DIRECTOR

In the matter of the State Board of Elections
Ruling Numbers 2011-2810
November 30, 2010

The grievant has requested a ruling on whether her June 28, 2010 grievance with the State Board of Elections (SBE or agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as an Information Technology Specialist I with SBE. The section of the grievant's Employee Work Profile (EWP) at issue here states that the grievant is responsible for "[m]aintain[ing] documentation for system use, including step-by-steps."¹ Based on this provision of the grievant's EWP, her supervisor believes that the grievant is responsible for writing, editing and updating the step-by-step documents as necessary. As such, on June 25, 2010, the grievant's new supervisor directed the grievant to update and/or modify twenty existing VERIS step-by-steps and write or finish drafts of ten new step-by-step documents. The grievant was told that the assignment had an initial submission date of August 30, 2010 because updates to the VERIS system were scheduled to be released into production on September 3, 2010. She was also told that because the step-by-step documents are the main tool by which system users learn the system, it was important that the documents be updated according to when system changes are implemented. The grievant believes that the subject matter experts in each department of SBE are responsible for modifying and creating step-by-steps in their respective areas. The grievant alleges that she is responsible for updating only three step-by-steps, and that she only monitors the work of the subject matter experts with regard to their duty to update, modify and create step-by-steps.

On June 28, 2010, the grievant filed a grievance challenging the assignment as retaliatory. More specifically, the grievant asserts that as a result of her prior grievance activity and a complaint with the Equal Employment Opportunity Commission (EEOC), she was given an assignment "not in [her] purview" that involves an unreasonable completion date. The grievance proceeded through the management resolution steps

¹ VERIS is the computerized statewide voter registration and election management system maintained by SBE and used by state and local election officials in Virginia. The VERIS step-by-step documents are the equivalent of a user manual for VERIS.

without a resolution and the agency head denied the grievant's request for qualification for hearing. The grievant now seeks a qualification determination from 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 Therefore, a grievance challenging management's assignment of duties does not qualify for a hearing unless there is evidence raising a sufficient question as to whether discrimination, retaliation, or a misapplication of policy has occurred.³ Here, the grievant asserts that the agency arbitrarily assigned her tasks with unreasonable deadlines in retaliation for her previous grievance activity and her prior filing of an EEOC complaint.

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;⁴ (2) the employee suffered a materially adverse action;⁵ and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the materially 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.⁶ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.⁷

Here, the grievant's initiation of prior grievances and an EEOC complaint clearly constitute protected activity.⁸ Assuming without deciding that the grievant has suffered a materially adverse action,⁹ this grievance still does not qualify for a hearing as the

² Va. Code § 2.2-3004(B).

³ *Grievance Procedure Manual* § 4.1 (b) and (c).

⁴ 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 the 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).

⁵ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006). For a grievance to qualify for hearing, the action taken against the grievant must have been materially adverse such that a reasonable employee in the grievant's position might be dissuaded from participating in protected conduct. *Id.* at 68.

⁶ *E.g.*, *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005); *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000).

⁷ See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

⁸ See Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

⁹ See *Stephens v. Erickson*, 569 F.3d 779, 791 (7th Cir. 2009) ("Whether a change in job responsibilities is materially adverse 'all depends on how much of a change, and how disadvantageous a change, took place.' Our decisions involving a transfer or reassignment of job responsibilities indicate that such an action is not materially adverse unless it represents a significant alteration to the employee's duties, which is often reflected by a corresponding change in work hours, compensation, or career prospects.") (internal citations omitted). A substantial increase in workload or significant shortening of deadlines could potentially rise to

grievant's evidence fails to raise a sufficient question as to the causation element of a retaliation claim. First, the fact that the grievant has engaged in past protected activity does not mean that a management action she deems "unfair" will, standing alone, be viewed as retaliatory. Rather, she must provide some evidence to suggest that the assignment was given because of her prior protected activity. The grievant has not made such a showing here.

In particular, the grievant was assigned the task of updating and creating step-by-steps by her new supervisor based on the provision in her EWP that states that she is responsible for "[m]aintain[ing] documentation for system use, including step-by-steps." This appears to be a reasonable interpretation of the grievant's EWP and corresponding duties. Moreover, there appears to have been a legitimate business reason for the assignment (i.e., the upcoming VERIS build that was scheduled to be released into production on September 3, 2010). In addition, this assignment was given by a new supervisor that was not employed by the agency at the time the grievant engaged in prior protected activity. Although the grievant alleges the agency head has "been relentless in her efforts" to retaliate against the grievant, the grievant has presented no evidence to suggest that the assignment given to her by her new supervisor was influenced by an alleged retaliatory intent on the part of the agency head. 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 this Department's 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 notifies the agency that he wishes to conclude the grievance.

Claudia Farr
Director

the level of a materially adverse action. *Williams v. Board of Education of City of Chicago*, Case No. 05 C 4268, 2006 U.S. Dist. LEXIS 73808, at *10 (N.D. Ill, September 21, 2006)(increased workload and onerous job assignments could be considered adverse actions.) *See also* *Minor v. Centocor, Inc.* 457 F.3d 632, 634 (7th Cir. 2006)(extra work can be a material difference in the terms and conditions of employment.) *But see* *Philips-Clark v. Philadelphia Hous. Auth.*, Civil Action No. 04-2474, 2007 U.S. Dist. LEXIS 12710, at *29 (E.D. Pa. February 22, 2007)(charging an employee with being absent without leave and setting unrealistic deadlines to complete projects do not meet the standard for a materially adverse action.)