

Issue: Qualification – Retaliation (Other Protected Right); Ruling Date: August 1, 2011; Ruling No. 2011-2968; Agency: Department of Juvenile Justice; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling No. 2011-2968
August 1, 2011

The grievant has requested qualification of her February 8, 2011 grievance with the Department of Juvenile Justice (the agency). For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

On the morning of January 7, 2011, at 8:18 a.m., the grievant left a message for her supervisor indicating that she would be unable to report to work that morning because she had a personal matter she needed to address.¹ According to the grievant, she attempted to contact her supervisor again, but was unable to reach her and instead spoke to a co-worker at around 10:45 a.m. and asked him to tell her supervisor that she had 6 hours of annual leave available and as such, she would report to work by 3:00 p.m.

After receiving the grievant's messages, the grievant's supervisor contacted several people within the agency, including members of management and human resources, to seek guidance on how she should respond to the grievant's absence on that day in light of the fact that the grievant had a history of late arrivals and failure to contact her supervisor prior to her scheduled start time and had been previously counseled on these issues. As a result of these discussions, it was decided that the supervisor would meet with two members of upper management the following Monday to decide whether the grievant's leave would be approved. When the grievant finally spoke to her supervisor later that day, her supervisor informed her that her annual leave may not be approved and that she intended to discuss the issue with upper management.

The grievant reported to work on January 7, 2011 at 3:30 p.m. Because she only had 6 hours of annual leave available, she asked if she could work until 5:30 that day rather than her normal 5:00 so as to avoid any leave without pay (LWOP) should the leave be approved. The grievant also asked if she could make up the hours missed on the following day, which was a Saturday. The grievant's supervisor allowed her to stay until 5:30 but denied the grievant's request to work on Saturday.

¹ The grievant's normal work hours were from 8:00 a.m. to 5:00 p.m.

The grievant's supervisor discussed the grievant's absence on January 7, 2011 with upper management that following Monday, January 10, 2011. During that meeting, it was determined that in light of the grievant's history of late arrivals, failure to notify her supervisor of her late arrival prior to her start time and prior instructions and memoranda to the grievant on these issues,² the grievant's request for leave for January 7, 2011 should not be approved and would be LWOP. A Notice of Needs Improvement/Substandard Performance was also issued to the grievant on January 20, 2011 as a result.

The grievant initiated this grievance on or about February 8, 2011 to challenge the events of January 7, 2011 and the resulting actions taken against her. The grievant claims that her supervisor denied her request for leave on January 7th in retaliation for the grievant's reports to management in November 2010 that her supervisor had failed to timely process the grievant's leave slips and time sheets. The parties failed to resolve the grievance during the management resolution steps of the grievance process and the grievant now seeks qualification of the grievance for a hearing.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.³ Further, complaints relating solely to the establishment or revision of wages, salaries, position classifications, or general benefits "shall not proceed to a hearing"⁴ unless there is sufficient evidence of discrimination, retaliation, discipline, or a misapplication or unfair application of policy.⁵ As noted above, the grievant asserts that the denial of leave was the result of 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;⁶ (2) the employee suffered a materially adverse action;⁷ 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

² The grievant was given an Interim Evaluation on May 5, 2010 that indicated that although not substandard as of yet, "use of leave time is of some concern." In addition, in an e-mail dated May 13, 2010, the grievant was notified of the proper procedures for requesting leave and advised that prior approval by her supervisor was required. On January 5, 2011, the grievant was given a written counseling regarding the proper procedures for her submission of timesheets and leave slips. Finally, according to the Notice of Improvement Needed/Substandard Performance issued to the grievant on January 20, 2011, there were twelve instances of the grievant arriving late to work for reasons other than illness since May of 2010.

³ See Va. Code § 2.2-3004(B).

⁴ Va. Code § 2.2-3004(C).

⁵ *Grievance Procedure Manual* § 4.1(c).

⁶ 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).

⁷ *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15 (2006); see, e.g., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

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.⁸ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.⁹

The grievant engaged in a protected activity when she expressed her concerns to management regarding the way her leave slips and time sheets were processed by her supervisor.¹⁰ In addition, because the six hours she was absent on January 7th were deemed LWOP, the grievant has suffered a materially adverse action. However, beyond the relatively close proximity in time between the grievant's complaint about her supervisor in November 2010 and the denial of leave on January 7, 2011, the grievant has presented no evidence of, nor has this Department found, a causal link between the grievant's prior protected acts and the materially adverse action at issue in this case. There is no indication that the agency's decision not to approve her use of annual leave was motivated by improper factors. Rather, as noted above, it appears that the agency's decision was motivated by the grievant's documented history of late arrivals to work, failure to notify her supervisor of her absence prior to her start time and because the grievant had been told, on at least two prior occasions, of the proper procedures for notifying her supervisor of unexpected absences and the use of leave. In addition, it is noteworthy that the decision to deny the grievant's request for leave was not made by the supervisor alone, the one she alleges harbors retaliatory animus, but was agreed upon by the supervisor and other members of management and in accordance with the recommendation of the human resource office. Because the grievant has not raised a sufficient question as to the elements of a claim of retaliation, the grievant's claim does not qualify for 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 wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

⁸ See, e.g., EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

⁹ See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

¹⁰ See Va. Code 2.2-3000(A) ("employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management").