

Issue: Qualification – Retaliation (Grievance Activity); Ruling Date: May 9, 2012;
Ruling No. 2012-3329; Agency: Department of Correctional Education; Outcome:
Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Minority Business Enterprise
Ruling Number 2012-3329
May 9, 2012

The grievant has requested a ruling on whether her grievance, dated April 29, 2011,¹ with the Department of Minority Business Enterprise (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In this grievance, the grievant describes various incidents with her former supervisor, which the grievant believes are retaliatory, bullying, and have created a hostile work environment. The precipitating event of the grievance appears to be a meeting with her former supervisor on March 29, 2011. The grievance proceeded through the management steps without final resolution. The agency has denied qualification of the grievance for a hearing and the grievant now appeals that determination. It is notable, however, that, although the agency did not substantiate the grievant's claims of retaliation, in an effort to create a more harmonious working environment, the agency head granted the grievant's request to no longer be supervised by the allegedly retaliating former supervisor.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² Thus, claims relating to issues such as the methods, 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 improperly influenced management's decision, or whether policy may have been misapplied or unfairly applied.³ In this case, the grievant has primarily alleged retaliation.

¹ While it is unclear whether this grievance was initiated on April 29, 2011, there is no indication that the grievance was initiated any time earlier. Consequently, for purposes of this ruling, we will assume the grievance was initiated on April 29, 2011. A later initiation date has no material consequence for the outcome of this ruling.

² See Va. Code § 2.2-3004(B).

³ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

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 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.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

Although the grievant's prior grievance was a past protected activity, this retaliation claim nevertheless fails to qualify for hearing. None of the actions by the grievant's former supervisor alleged to be retaliatory occurred within the 30 days preceding the initiation of this grievance. The only event within that time period was a meeting between the grievant, her former supervisor, and upper management. However, nothing in the grievant's allegations indicates that the former supervisor engaged in any improper behavior during this meeting. Further, there has not been a sufficient question raised as to whether a causal link exists between any of the former supervisor's conduct in that meeting and the grievant's prior grievance.

Based on the foregoing, the grievance does not raise a sufficient question of retaliation for this grievance to qualify for a hearing. Because there is insufficient evidence of retaliation within the 30 calendar days preceding the initiation of this grievance, the grievant's claim of an ongoing course of retaliatory actions, i.e., retaliatory hostile work environment, occurring *prior to* those 30 days cannot qualify for a hearing due to untimeliness.⁸

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 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); see, e.g., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

⁶ See, e.g., *EEOC v. Navy Fed Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005).

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 § 2.2-3003(C); *Grievance Procedure Manual* § 2.4. We note that if there had been sufficient evidence that an action by the former supervisor occurring within the 30 days preceding the initiation of the grievance was retaliatory, and thus could have been part of an ongoing course of retaliatory conduct, the grievance would have been timely to challenge the alleged ongoing conduct, even that which occurred prior to the 30 calendar days preceding the initiation of the grievance. See, e.g., *Nat'l R.R. Pass. Corp. v. Morgan*, 536 U.S. 101, 115-18 (2002) (ruling similarly in a Title VII hostile work environment harassment case); see also *Graham v. Gonzales*, No. 03-1951, 2005 U.S. Dist. LEXIS 36014, at *23-25 (D.D.C. Sept. 30, 2005) (applying *Morgan* to claim of retaliatory hostile work environment/harassment). Further, this same mode of analysis would preclude a hearing as to the grievant's other theories, intimidation and bullying, to the extent those existed, as well. Such claims would also be untimely.

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 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