Issue: Qualification - Discipline (transfer); Ruling Date: November 10, 2015; Ruling No. 2016-4244; Agency: Department of Corrections; Outcome: Qualified in Full.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2016-4244
November 10, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) on whether his grievance filed on or about July 8, 2015 with the Department of Corrections (the agency) qualifies for a hearing. For the reasons set forth below, this grievance is qualified for a hearing in full.

FACTS

The grievant is employed by the agency as a Correctional Officer. On June 16, 2015, he was issued a Group II Written Notice for alleged failure to follow instructions or policy regarding an incident that occurred on April 14, 2015. When the grievant was provided his due process notification of this proposed disciplinary action, he was also informed that he would be transferred from his post-assignment at the facility's Work Center to the facility's main compound. On or about July 8, 2015, the grievant initiated a grievance challenging both the Written Notice and the transfer to the facility's main compound. After proceeding through the management resolution steps, the agency head partially qualified the grievance for a hearing, indicating that the Written Notice may be properly challenged at a grievance hearing, but the change in post-assignment may not. The grievant now appeals that determination to EDR.

DISCUSSION

For state employees subject to the Virginia Personnel Act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the policies and procedures promulgated by DHRM.[1] For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.[2] These safeguards are in place to ensure that disciplinary actions are appropriate and warranted.

Where an agency has taken informal disciplinary action against an employee, a hearing cannot be avoided for the sole reason that a Written Notice did not accompany the disciplinary action. Rather, even in the absence of a Written Notice, a hearing is required where the grieved

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[1] Va. Code § 2.2-2900 *et seq.*
[2] *See* DHRM Policy 1.60, *Standards of Conduct*.

management action resulted in an adverse employment action[3] against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance).[4] In this instance, the grievant did receive a Written Notice based upon the events allegedly occurring on April 14, 2015. Further, the agency indicates that the grievant was transferred "because it was felt [he] needed another layer of supervision based on the poor decisions made on April 14, 2015 . . . ." Given this information, EDR finds that this grievance raises a sufficient question as to whether the agency's primary intent in reassigning the grievant to the facility's main compound was to correct or punish perceived unsatisfactory job performance or conduct.

Whether the grievant's reassignment was primarily to punish or correct the grievant's behavior or performance is a factual determination that a hearing officer, not this Office, should make. At the hearing, the grievant will have the burden of proving that the reassignment was adverse and disciplinary. If the hearing officer finds that it was, the agency will have the burden of proving that the action was nevertheless warranted and appropriate. Should the hearing officer find that the reassignment was adverse, disciplinary, and unwarranted and/or inappropriate, he or she may rescind the reassignment, just as he or she may rescind any formal disciplinary action.[5] This qualification ruling in no way determines that the grievant's reassignment constituted unwarranted informal discipline or was otherwise improper, but only that further exploration of the facts by a hearing officer is warranted. The grievance is qualified as to the grievant's challenge to his reassignment, as well as to the Written Notice of June 16, 2015.[6]

CONCLUSION

The grievant's July 8, 2015 grievance is qualified for hearing in full. 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.

EDR's qualification rulings are final and nonappealable.[7]

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Director
Office of Employment Dispute Resolution

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[3] The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions." *See Grievance Procedure Manual* § 4.1(b).

[4] *See*, *e.g.*, EDR Ruling Nos. 2007-1516, 2007-1517; EDR Ruling Nos. 2002-227, 2002-230; *see also* Va. Code § 2.2-3004(A) (stating that grievances involving "transfers and assignments . . . resulting from formal discipline or unsatisfactory job performance" qualify for a hearing).

[5] *See Rules for Conducting Grievance Hearings* § VI(B)(1); *e.g.*, EDR Ruling No. 2002-127.

[6] *See* Va. Code § 2.2-3004(A) (stating that grievances involving "transfers and assignments . . . resulting from formal discipline or unsatisfactory job performance" qualify for a hearing).

[7] *See* Va. Code § 2.2-1202.1(5).