Summary: Qualification: Methods/Means-Assignment of Duties; Ruling Date: May 17, 2002; Ruling #2001-208 and 2002-090; Agency: Department of Health; Outcome: Not qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Health/ No. 2001-208 and No. 2002-090
May 17, 2002

The grievant has requested a ruling on whether his July 17, 2001 and January 14, 2002 grievances with the Department of Health (VDH) qualify for hearing. The grievant claims that the reassignment of his duties was an unwarranted disciplinary action, a misapplication of policy, retaliatory, and constituted a failure to implement an earlier grievance hearing decision. For the reasons discussed below, these two grievances do not qualify for a hearing.

FACTS

The grievant is employed as a General Administration Practitioner I, with the working job title of Business Manager A. The grievant's primary job function is human resources management. Since October 1998, the grievant has been assigned to a management team administering two of the agency's health districts –his own health district, where he had worked since his hire in November 1993 (hereinafter, the "original district"), and an adjoining district, where the agency had experienced high turnover and difficulty in recruiting for management positions (hereinafter, the "adjoining district"). [1]

[1]The grievant was assigned to his General Administration Manager I position in October 1998, pursuant to his reinstatement by a grievance hearing decision. Originally, the grievant had been hired by the agency as a Business Manager B on November 1, 1993, with primary duties as the financial officer of a single health district. During the fiscal year 1997-98, problems arose with the district's budget and the grievant was terminated shortly thereafter on June 30, 1998 for an accumulation of two Group II Written Notices for failure to follow supervisor's instructions. The grievant challenged the Written Notices and the termination through the grievance procedure, and in two separate grievance hearings, on September 28, 1998 and November 19, 1998, the disciplinary actions were overturned and the grievant was ordered to "be fully restored to his original position" with back pay and benefits. In the interim between his termination and reinstatement, the agency had decided to jointly manage the grievant's district and an adjoining district. This resulted in the abolition of the Business Manager B position he previously occupied, because financial management of the jointly managed districts was to be performed by a Business Manager C (a higher pay grade level position than the grievant's). Upon his reinstatement, effective October 14, 1998, the agency intended to reinstate the grievant as a Business Manager A (one pay grade lower than his former Business Manager B position). The Business Manager A position had essentially the same human resources duties as the grievant's current position, with no responsibilities related to finance. The grievant, however, expressed concerns about being reinstated to a position with no finance-related duties. In response, the agency offered the grievant a Business Manager B position in another health district contiguous to his

By January 2001, the agency had noted problems in the management of the adjoining district, and the decision was made to temporarily discontinue the joint management arrangement, pending the development of other plans. Consequently, on May 24, 2001, the grievant and four other management team members were informed that they would be reassigned to duties outside the adjoining district. The grievant was notified that he was being temporarily reassigned to work as a Business Manager A exclusively in his original district, effective June 18, 2001, because of "serious problems in the management and supervision of the [adjoining] district" including the perceived failure to monitor and correct substandard employee performance, failure to develop and implement operational policies and/or to conform the district to relevant policies, poor communication among the management team, and a lack of follow up in assessing programs.[2] The grievant was instructed not to discuss the reassignment with coworkers, and not to try to influence the affairs of the adjoining district.[3]

The reassignment did not result in any change in the grievant's compensation, classification or benefits, and he was offered reimbursement for expenses incurred because of the temporary duties.[4] The grievant's primary work location was also unchanged. Finally, the grievant was notified on January 16, 2002 that the reassignment would become permanent.

DISCUSSION

Retaliation

The grievant claims that in taking away his responsibilities for the adjoining district in June 2001, the agency has retaliated against him "for having filed and won a grievance before a hearing officer." His July 27, 1998 grievance challenged his second Group II Written Notice and termination, which resulted in his reinstatement on October 14, 1998.

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;[5] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the

---

original district (not the "adjoining district" of the joint management arrangement), with duties as the financial manager of that district, which the grievant declined.

[2] See letter to grievant from Associate Commissioner dated May 24, 2001.

[3] *Id.*

[4] *Id.*

[5] *See* the *Grievance Procedure Manual* §4.1(b)(4), page 10. 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 a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law."

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]

Although the grievant has satisfied the first prong of his case by filing grievances in the past, he cannot establish the second prong of the test, because the reassignment does not constitute an "adverse employment action." An "[a]dverse employment action includes any retaliatory act or harassment if, but only if, that act or harassment results in an adverse effect on the 'terms, conditions, or benefits' of employment."[7] This would encompass any tangible employment action by management that has some significant detrimental effect on factors such as an employee's hiring, firing, compensation, job title, level of responsibility, or opportunity for promotion.[8] The grievant has not presented any evidence that covering one health district rather than two was a substantive change in his duties or responsibilities. Other than geography, the grievant's areas of responsibility and job duties were the same after the reassignment as before it, and there was no change in the grievant's level of responsibility, compensation or benefits as a result of the reassignment. Also, telling the grievant not to talk to other employees—or vice versa—does not constitute an adverse action, because there is no evidence that the terms, conditions, or benefits of his employment were thereby adversely affected.[9] In sum, "[a]bsent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position commensurate with one's salary level does not constitute an adverse employment action, even if the new job does cause some modest stress not present in the old position."[10]

Misapplication of DHRM and VDH Policy No. 3.05

The grievant claims that his June 2001 removal from duties in the adjoining district constitutes a misapplication of policy. Specifically, the grievant claims that the agency did not reevaluate his compensation or return him to his Business Manager A position responsible for both the original and adjoining districts within six months after the reassignment, which he asserts is required under VDH policy 3.05.1.

For a claim of policy misapplication or unfair application of policy to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy provision, or evidence that management's actions, in their totality, are so unfair as to amount to a disregard of the intent of the applicable policy.

---

[6] *See* Rowe v. Marely Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656 (4th Cir. 1998).
[7] *See* Von Gunten v. Maryland Dept. of the Environment, 243 F.3d 858 (4th Cir. 2001).
[8] *See* Boone v. Goldin, 178 F.3d. 253 (4th Cir. 1999).
[9] *See* Von Gunten v. Maryland Department of the Environment, 2001 U.S. App. LEXIS 4149 (4th Cir. 2001)(citing Munday v. Waste Mgmt. Of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).
[10] Boone v. Goldin, 118 F.3d 253, 256-7 (4th Cir. 1999).

Under the Department of Human Resources Management (DHRM) Policy 3.05, management may reassign an employee from one position to another position of the same or different Role, within the same Pay Band, without a change in base salary.[11] This policy states that such reassignments are available to management when "agency business (staffing or operational) needs . . . require the movement of staff." Such an action is known as a reassignment within the pay band, and there is no time limitation placed on an agency limiting the duration of such a change.[12]

VDH Policy 3.05.1 tracks the DHRM Policy, but also contains a provision stating that: "[s]upervisors may assign new duties to a position for up to a period of six months without taking formal action. At the expiration of six months, the duties must be withdrawn or the position reevaluated."[13] According to the VDH Commissioner, the purpose of this policy is to ensure that employees who take on new responsibilities are properly compensated, since such transfers might result in employees working outside their assigned Role. In this case, the grievant has not presented any evidence that he was assigned new duties; rather, as stated, the grievant performed the same or comparable duties after his June 2001 reassignment. Accordingly, the decision to transfer the grievant permanently with no change in salary was consistent with DHRM Policy 3.05, and VDH Policy 3.05.1.

Disciplinary Transfer[14]

For state employees subject to the Virginia Personnel Act, a reassignment must be either voluntary, or, if involuntary, must be based on objective methods and must adhere to all applicable statutes and to the policies and procedures promulgated by the DHRM.[15] Applicable statutes and policies recognize management's authority to transfer an employee for disciplinary purposes as well as to meet the agency's legitimate operational needs.[16]

When an employee is transferred as a disciplinary measure, certain policy provisions must be followed.[17] All transfers accompanied by a Written Notice automatically qualify for a hearing if challenged through the grievance procedure.[18] In the absence of an accompanying Written Notice, a challenged transfer qualifies for a hearing only if there is a sufficient question as to whether: (1) the transfer was an

---

[11] DHRM Policy 3.05, *Reassignment Within the Pay Band*, pages 4, 17-18.
[12] The term for such an action prior to the September 25, 2000 reform of the Commonwealth's Compensation System was "lateral transfer."
[13] *See* VDH, Human Resource Policy 3.05.1(12).
[14] The grievant does not expressly state on his Form A that the reassignment was disciplinary; however, the facts presented and the responses of management in the resolution steps justify this characterization of the grievant's claim.
[15] Va. Code § 2.2-2900, *et seq.*
[16] Va. Code §§ 2.2-3004 (A) and (C); DHRM Policy No. 1.60, Standards of Conduct (VII)(E).
[17] DHRM Policy No. 1.60, Standards of Conduct (VII).
[18] Va. Code § 2.2-3004 (A); DHRM Policy No. 1.60, Standards of Conduct (IX); *Grievance Procedure Manual* § 4.1(a), page 10.

"adverse employment action;" and (2) the primary motivating factor was to correct or punish behavior, or to establish the professional or personal standards for the conduct of an employee.[19] These policy and procedural safeguards are designed to ensure that an involuntary disciplinary transfer is merited. A hearing cannot be avoided for the sole reason that a Written Notice did not accompany the involuntary transfer, where there is a sufficient question as to whether the transfer was an adverse employment action that was in effect disciplinary in nature, i.e., taken primarily to correct or punish perceived poor performance.[20]

Here, the grievant cannot establish that his transfer was disciplinary because, as discussed in the *Retaliation* section above, the reassignment does not constitute an "adverse employment action."

Implementation of Hearing Decision

The grievant also states on his Form A that "I feel that I have been stripped of my professional integrity and duties. I was not restored to my prior job functions, after winning the 1998 grievance." The grievant complains that, following the hearing officer's 1998 reinstatement order, he was not returned to his former Business Manager B position, as the financial officer of the original health district. This in turn, he asserts, caused him to lose skills in the finance area, thus negatively impacting his career growth. This claim is an express challenge to the agency's implementation of the hearing decision in the grievant's July 27, 1998 grievance. Therefore, the proper avenue for the grievant would be to petition the circuit court for an order that the agency fully implement the December 28, 1998 hearing decision in that earlier grievance. It would appear, however, that the agency did implement the decision properly by reinstating the grievant with full back pay and benefits, effective October 14, 1998, and offering him the option of a Business Manager B position within reasonable proximity to his prior workplace. The

0)9.36 d procedueea9c40guyista3 0yDlacR'syP lsta3 ista3 1cdaTyJc40y-deiN1 5(y2c4-5(Pe) f180s)Pysta3 1l0'ysc180mpe'5f.1e.6('5.1-)

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 does not wish to proceed.

_____
Claudia T. Farr
Director

_____
Jeffrey L. Payne
EDR Consultant