Issue: Qualification-Methods/Means-Transfer(not under S.O.C. or Perf. Policy), Retaliation-Whistleblowing; Ruling Date January 28, 2002; Ruling #2001-225; Agency: Department of Juvenile Justice; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Juvenile Justice/ No. 2001-225
January 28, 2001

The grievant has requested a ruling on whether his June 14, 2001 grievance with the Department of Juvenile Justice (DJJ) qualifies for a hearing. The grievant claims that his transfer from one court unit to another was for disciplinary reasons and was not accompanied by a written notice, and that the transfer was initiated in retaliation for reporting a violation to the State Employee Fraud, Waste, and Abuse Hotline.[1] For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant was an Intake Officer Senior at a county district court. On April 25, 2001, a co-worker filed an incident report against the grievant, arising from an altercation in the court parking lot.[2] As a result of this incident, DJJ placed the grievant on suspension while an investigation was conducted. At the conclusion of the investigation, management concluded that the dynamic between the grievant and at least two of his co-workers (one male, one female) was creating an unstable working environment, and that other employees expressed fear of a violent outburst by the grievant. The agency then made the decision to transfer the grievant. On May 21, 2001, he was transferred against his will to another courthouse in another county. During this Department's investigation, the agency stated that the grievant is an excellent worker, and management did not want to penalize him. They were merely concerned with the liability issues surrounding this volatile situation. The agency claims that the transfer was not for disciplinary reasons and maintains its authority to transfer employees to improve operations and maintain an orderly workplace.

---

[1] The grievant also claims on his Form A that management violated policy by suspending him for more than 10 days during its internal investigation, in violation of the Standards of Conduct. However, the grievant reported that leave no time was taken for him during the sixteen workdays during which the investigation was being conducted. The Standards of Conduct limitation only applies to suspensions that result in a loss of pay or one that requires an employee to use his leave time. Therefore, this issue will not be addressed in this ruling.

[2] The grievant alleges that his co-worker began calling him names and attempted to escalate the situation. He acknowledges that he replied to the comments, but claims that he did not make any threatening statements or gestures. A witness to the incident reported to management that the grievant and the co-worker exchanged words and that the grievant shouted at the co-worker, six to twelve inches from his face, saying "are you afraid of me?"

The grievant first claims that the incident report filed by his male co-worker and the resulting transfer were acts of retaliation for reporting a violation to the State Employee Fraud, Waste, and Abuse Hotline. In January 2000, he reported that this co-worker had been abusing state time to the Hotline and to DJJ's Inspector General. Upon the advice of those resources, he reported his allegations to his immediate supervisor. Later, the co-worker's supervisor confronted him about the matter. After learning that the co-worker and his supervisor were aware of the complaints and that he was the individual who made them, the grievant reported that he feared retaliation from them. Although almost two years has passed since this incident, the grievant contends that they were waiting for "just the right moment" to retaliate against him.

With respect to his female co-worker, the grievant has known her for about twenty years, and claims to get along with her. However, he alleges that she has been the cause of several office disputes and has difficulty getting along with many of her co-workers. In September 2000, he filed an incident report against her after she went into his office while he was out of town. They have since reconciled.

In April 2001, the issue of employees' time reporting came up again. Because the grievant spent most of his day "up front," he was given the task of monitoring the comings and goings of his co-workers. He claims that on April 25, the day in question, his male co-worker was leaving, and the grievant asked, "Should I sign you out?" This question started a dialogue that included some raised voices and name-calling, as described above.

The grievant did not desire a transfer to the new courthouse and maintains that the move was made for disciplinary reasons. Although DJJ states that move was made to prevent a volatile situation from escalating, the grievant writes in his appeal that a disciplinary action should not be taken "in the guise of 'an effort to improve operations and in the best interest of the agency.'"[3]

Management denied the grievant a hearing, claiming that he has not suffered an adverse employment action. The grievant, on the other hand, emphasizes the personal, emotional, and economic effects the transfer has had on him and his family. Moreover, the grievant raises concerns that the investigation in April 2001 yielded no written report and was based solely on verbal testimony of witnesses. He claims that if the agency is going to say he has a "history" of not getting along with co-workers, they should be able to document it.

DISCUSSION

[3] *See* Grievance Form A and attachments.

The employment dispute resolution statutes reserve to management the exclusive right to manage the affairs and operations of state government.[4] Thus, management has the statutory right to transfer and assign employees to provide for the most efficient and effective operation of the facility.[5] The transfer or reassignment of an employee generally does not qualify for a hearing unless there is evidence raising a sufficient question as to whether it resulted from a misapplication of policy, discrimination, retaliation, or discipline. In this case, the grievant asserts that management's decision to transfer him to another court unit was disciplinary without a Written Notice, and thus a misapplication of policy, since it was triggered by an incident report. He also claims that it was in retaliation for reporting a co-worker to the Fraud, Waste, and Abuse Hotline. These issues are discussed in turn below.

Disciplinary Transfer

Management asserts that its decision to transfer the grievant was not disciplinary, but was "to re-establish a more stable and professional working environment for the employees" of the unit from which the grievant was transferred.[6] For state employees, 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 Department of Human Resource Management (DHRM).[7] 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.[8]

When an employee is transferred as a disciplinary measure, certain policy provisions must be followed.[9] All transfers accompanied by a written notice automatically qualify for a hearing if challenged through the grievance procedure.[10] 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 the transfer was an "adverse employment action" and is intended to correct behavior or to establish the professional or personal standards for the conduct of an employee.[11] These policy and procedural safeguards are designed to ensure that a disciplinary transfer is merited. A hearing cannot be avoided for the sole reason that a written notice did not accompany the transfer.

The threshold question then becomes whether or not the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible

---

[4] Va. Code § 2.2-3004 (B).
[5] Va. Code § 2.2-3004 (C).
[6] *See* Qualification Decision of DJJ Acting Director.
[7] Va. Code § 2.2-2900, *et seq.*
[8] Va. Code §§ 2.2-3004 (A) and (C); DHRM Policy No. 1.60, Standards of Conduct (VII)(E).
[9] DHRM Policy No. 1.60, Standards of Conduct (VII).
[10] Va. Code § 2.2-3004 (A); DHRM Policy No. 1.60, Standards of Conduct (IX); *Grievance Procedure Manual* § 4.1(a), page 10.
[11] Va. Code §§ 2.1-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (b)(5) and (c)(4), pages 10-11 (a claim of disciplinary transfer, assignment, demotion, suspension, or other action similarly affecting the employment status of an employee may qualify for a hearing if there are sufficient supporting facts).

employment act constituting a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[12]

The grievant's new position is essentially the same as the post he held at the courthouse where he formerly worked, although his assignments are somewhat different: he spends less time performing intake and more time conducting interviews in the field. Moreover, he reports that he is "on call" more frequently than he was in his former position, and that he does not have the same opportunities to perform conflict resolution and operate diversion programs.[13] These changes, he reports, have raised concerns for his professional development. However, it can be said that the change in the grievant's assignment is not significant, as it did not result "in an adverse effect on the 'terms, conditions, or benefits' of employment."[14] Specifically, he has suffered no loss of pay, position title, or shift, and there is no evidence that promotional opportunities were taken from him. With respect to his desire to pursue development in alternative dispute resolution and conflict resolution, this can be viewed as a personal goal of the grievant, and not as a requirement of his job.[15] Furthermore, the fact that the grievant is "on-call" more frequently and spends more time traveling and less time performing intake, while less appealing to the grievant, is not an adverse employment action. 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."[16]

He also reports an increased commute, which results in a loss of personal time spent with his family. However, a transfer that results in a longer commute is not sufficient to constitute an adverse employment act.[17] Therefore, although the transfer and longer commute may be disappointing to the grievant, it cannot be viewed by any reasonable fact finder as an adverse employment action, must less disciplinary, because the reassignment had no significant detrimental effect on the grievant's employment status.

---

[12] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

[13] The grievant reported during this investigation that the court to which he was transferred does not offer mediation services and that he is not involved with their diversion programs. While at his former position, he coordinated a diversion program for shoplifters.

[14] Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001) (quoting Munday v. Waste Mgmt. of North America, 126 F.3d 239, 243 (4th Cir. 1997)).

[15] *See id.* at 868.

[16] Boone v. Goldin, 118 F.3d 253, 256-7 (4th Cir. 1999).

[17] *Burlington*, 118 S. Ct. at 2268 (citing Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1999) (a transfer to a more inconvenient location is not sufficient)); *see also* Crady v. Liberty National Bank and Trust Co., 993 F.2d 132, 136 (7th Cir. 1993) (an employment action that is merely inconvenient is not an adverse employment action); Sanchez v. Denver Public Schools, 164 F.3d 527, 532 (10th Cir. 1998) (increased commute distance without more is not an adverse employment action).

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; (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity.[18] If any of these three elements is not met, the grievance may not qualify for a hearing.

In this case, it is undisputed that the grievant engaged in a protected activity by reporting suspected abuse of state time to the State Employee Fraud, Waste, and Abuse Hotline. However, as discussed above, it cannot be said that the grievant's transfer to the other court unit was an "adverse employment action," so his retaliation claim cannot stand.

Other Claims

Finally, the grievant asserts that the investigation that resulted in his transfer was never reduced to writing. Rather, management relied on statements made by witnesses to the April 25 incident and other co-workers. While management is always encouraged to document in writing any activities involving personnel, nothing in state or agency policies require that internal investigations must be documented. Furthermore, the agency reported that there is no set standard in how managers at DJJ are to conduct such investigations, and the manner in which they are conducted varies based on the styles of the managers. In support of their decision to transfer the grievant, DJJ did provide to him several memoranda from co-workers stating that they feared a violent outburst by the grievant. Moreover, management cited two examples of the grievant's "history" of not getting along with co-workers: the one in September 2000, in which the grievant and his female co-worker had an altercation, and the one in April 2001, which involved both the male and female co-workers. Therefore, even though the internal investigation produced no final written report, DJJ did provide the grievant support for its determination that he was unable to maintain working relationships with these two individuals.

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 determination to the circuit court, he should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the

[18] *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."

appointment of a hearing officer unless the grievant notifies the agency that he does not wish to proceed.

_____
Neil A.G. McPhie, Esquire
Director

_____
Leigh A. Brabrand
Employment Relations Consultant