Summary: Qualification-Retaliation-Grievance Activity; Ruling Date: May 14, 2002; Ruling #2002-026 and 2002-029; Agency: Department of Corrections; Outcome: not qualified. Appealed in the Circuit Court of the City of Chesapeake; File Date: 4-3-02; Case #01-328 and 01; EDR Decision Affirmed and entered on December 21, 2002.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2002-026, 2002-029
May 14, 2002

The grievant has requesting a ruling on whether his November 20, 2001 and December 5, 2001 grievances with the Department of Corrections (DOC) qualify for hearing.[1] The grievances allege that DOC (1) misapplied policy through favoritism in scheduling and assignments, by denying the grievant training, and by denying him eight hours of rest between shifts; and (2) retaliated against him for past grievance activity[2]. For the reasons discussed below, these grievances do not qualify for a hearing.

FACTS

The grievant is employed by DOC in a facility that operates a "boot camp" for probationary offenders. He has been assigned to security staff at the facility since May 18, 2001, and complains that he has not been assigned to drill staff since that date.[3] He claims that management shows favoritism to certain employees and that those employees receive better duty assignments and shifts. He specifically notes that another employee was placed in front of him for assignment of drill duties. The grievant claims that another employee is given preferential treatment in scheduling, and is rarely assigned the midnight shift. Moreover, he claims that this favoritism has affected his scheduling and caused him to have to "double-back" one day (return to work with less than eight hours of rest between shifts) when schedules were adjusted to accommodate the favored employee. Finally, he claims that management has denied him opportunities for training.

Management denies that certain employees are given preferential treatment. With respect to the grievant's concerns regarding his training opportunities, management reported that the grievant submitted requests for eleven classes between August and November 2001.[4] The Second Step respondent noted that many of the classes did not

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[1] These grievances have not been consolidated. However, for efficiency reasons, they are addressed together for the purposes of this ruling.

[2] In an attachment to his Form A, the grievant suggests that skin color is a factor in making assignments or providing training. However, during this Department's investigation, the grievant stated that he does not believe that he is the victim of racial discrimination.

[3] The grievant reported during this investigation that drill assignments are preferred over security assignments. Employees assigned to drill staff have contact with the offenders, while security staff does not.

[4] The grievant was not admitted to any of the courses, either because of the timing of his applications or because management determined that the classes did not relate to his position. The grievant was placed on

relate to the grievant's job and that the Department has the discretion to approve training and determines the agency need, suitability of the class for the position, and staffing issues.

The grievant's December 5 grievance alleges that was retaliated against for having filed his November 20 grievance. Specifically, he claims that an employee was pressured by management into filing a harassment claim against him because he had specifically named her in his November 20 grievance as a management favorite. The grievant also claims that because of his November 20 grievance, management has continued to deny him training opportunities and better shift assignments. Finally, the grievant claims that an August 2001 counseling memorandum is petty and evidence of harassment. As relief, he asks that DOC practices be investigated.

During the management resolution steps, the Second Step respondent noted that he had investigated the retaliation claims and determined that they were unfounded. After speaking to the employee who filed the harassment charge against the grievant, he concluded that an inappropriate comment made in the presence of others was the basis for her charge, not pressure by management. He also asserted that scheduling decisions were based on staff shortages, and that there was no evidence of retaliation.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[5] Thus, all claims relating to issues such as the means, methods, and personnel by which work activities and assignments are to be carried out generally do not qualify for 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 state policy may have been misapplied.[6] These grievances claim misapplication of policy and retaliation.

Misapplication of Policy

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

Favoritism

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the waiting list for one class, one class was cancelled, the Academy did not respond to two requests, and some of the requests were submitted too close to or after the start date.

[5] Va. Code § 2.2-3004(B).

[6] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(c), page 11.

The grievant's claim of favoritism can best be described as a claim that management misapplied or unfairly applied the Commonwealth's general policy that personnel actions be "based on merit principles and objective methods" of decision-making.[7] Here, the grievant asserts that management did not adequately rotate the duty roster or the shifts on an objective basis, resulting in more night patrol for his shift and more favorable duty assignments to other employees.

Management has broad authority to exercise its business judgement in establishing workplace rules and schedules, as it deems best for agency operations.[8] This includes the right to decide shift and duty assignments. While these assignments may have appeared to be more favorable to other employees, the grievant has provided no evidence that the assignments were made on anything other than his supervisor's exercise of business judgement. Nor has the grievant presented evidence of a violation of any state or agency policies. Indeed, it appears that the shift and duty assignments were applied objectively to all employees, and that adjustments were made to meet the needs of the institution.

Training

The grievant asserts that additional training opportunities would have assisted in advancing in his career. The applicable policy is DHRM Policy 5.05, Employee Training and Development. This policy states that "[a]gencies shall provide, within reasonable resources, employee training necessary to assist the agency in achieving its mission and accomplishing its goals."[9] There is no mandate in this policy, however, to provide employees with the training they request. Thus, it cannot be concluded that the agency misapplied or unfairly applied policy by not providing certain training opportunities to the grievant. DOC correctly states that the decision to send employees to training is within management's discretion. It appears that management considered the grievant's applications for training, and noted that many of the classes were not suitable to the grievant's position and did not meet any agency needs. There is no evidence that management's denial of his requests were based on discrimination or other unlawful motives; rather, the decisions appear to be based on perceived agency needs.

Eight Hours of Rest

The grievant claims that DOC violated agency policy when it required him to work two shifts on November 20-21 without eight hours of rest inbetween the shifts. DOC acknowledges that the grievant was given less than eight hours of rest, but claims that the grievant should have alerted his supervisors to the scheduling conflict. However, DOC reported during this Department's investigation that there is no policy requiring eight hours of rest. Rather, there is an "unwritten policy" that is practiced as a courtesy to DOC employees. Management will do its best to schedule at least eight hours of rest

[7] Va. Code § 2.2-2900.
[8] *See* Va. Code § 2.2-3004(B).
[9] DHRM Policy No. 5.05 III.A, effective 9/16/93, page 2 of 5.

between shifts, but in instances of emergency or staffing problems, the courtesy may not apply.[10] The grievant does not specify what relief he would like from this grievance. Where there is a misapplication of policy, a hearing officer only has the authority to "order the agency to reapply the policy from the point at which it became tainted."[11] In this case, there is no relief that a hearing officer could grant to the grievant that would remedy the situation. First, there is no written policy; there is only a practice at the facility that is meant as a courtesy to employees. Moreover, as noted above, the facility has been experiencing staff shortages, making it necessary to make scheduling adjustments. As a result, it appears that the practice of allowing eight hours between shifts is flexible, allowing management discretion in scheduling in order to meet agency needs. The agency reported that an adjustment to the grievant's schedule would have been made, had he made them aware of the overtime he worked on November 20. Therefore, it appears that there has been no misapplication of policy, and this issue does not qualify for a hearing.

Retaliation

The December 5 grievance claims that DOC retaliated against the grievant for earlier grievances.[12] Specifically, the grievant alleges that a harassment charge against him is unfounded, and that the complainant was pressured into issuing the harassment claim against him. He also cites as retaliation continued unfair scheduling and lack of training opportunities, as well as a harassing counseling memorandum for tardiness.

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;[13] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity.[14]

It is undisputed that the grievant has engaged in the protected activity of participating in the grievance procedure. Assuming that the grievant has suffered an adverse employment action, his retaliation claim fails for lack of a causal link between the protected activity and the alleged retaliatory acts. First, the grievance presents no evidence that the harassment complaint against the grievant was coerced by DOC management. The grievant's only evidence to support his assertion that she was

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[10] Furthermore, it is worth noting that employees are required to report to their shifts 15 minutes before its start and stay 15 minutes after it ends. The extra 30 minutes account for the employees' meal breaks, and do not factor in the unwritten "8-hour" policy.

[11] *Rules for Conducting Grievance Hearings*, page 14.

[12] The grievant filed three grievances in November 2001 (11/5, 11/9, and 11/20) and one on December 4, 2001.

[13] *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."

[14] *See* Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653 (4th Cir. 1998).

"coaxed" into filing a complaint is that her complaint was unfounded. Absent any further evidence, we cannot find that the complaint was coerced by management and filed in retaliation for the grievant's use of the grievance process.

Nor is there sufficient evidence to support the grievant's assertions that he was denied preferable scheduling and training in retaliation for his grievance activity. Moreover, the counseling memorandum for tardiness cannot be found to be retaliation for grievance activity. The grievant initiated grievances in November and December of 2001. However, the counseling memorandum was issued on August 4, 2001, well before his exercise of his protected grievance rights. Thus, the grievances could not have been the cause of the counseling memorandum.

In closing, the grievance record reflects a significant level of conflict between the grievant and his coworkers and supervisors. We wish to note that mediation through his agency or through EDR may be a viable option to pursue. EDR's mediation program is a voluntary and confidential process in which two mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work units involved.

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

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Claudia T. Farr
Director

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