Summary: Qualification/Methods/Means-Other; Ruling Date: April 19, 2002; Ruling #2002-032; Agency: Department of Corrections; Outcome: Not qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2002-032
April 19, 2002

The grievant has requested a ruling on whether his grievance with the Department of Corrections ("agency") qualifies for a hearing. The grievant complains that he has not been informed as to (1) the reason he was asked to rewrite an inmate disciplinary action, or (2) what corrective action was taken to discipline his supervisor for her actions regarding this incident. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant was a correctional officer. On August 25, 2001, the grievant prepared a charge against an inmate that was delivered to the grievant's Lieutenant, who then, under DOC policy, should have immediately forwarded it to the Watch Commander for resolution. By the end of the day, however, the grievant's charge against the inmate had not been given to the Watch Commander. The next day, the grievant inquired as to the status of the charge and the Watch Commander seemed unaware of its existence. The Lieutenant informed the Captain that she had it. Later that day, the grievant was asked by the Watch Commander to rewrite the charge, which he did. The grievant asserts that he was asked to rewrite the charge because the Lieutenant had destroyed it, and had not been truthful when she stated that she had it. The grievant filed a grievance on September 9, 2001, asking that his supervisor be counseled regarding her behavior.

Management determined from its investigation that the grievant's complaint was founded and asserts that appropriate action has been taken to address this issue. The grievant is not satisfied with this response and seeks (1) to know what corrective action has been taken against the Lieutenant, and (2) assurance that the conduct will not be repeated. The agency head denied qualification on the grounds that a hearing officer cannot grant the grievant any further relief.

DISCUSSION

Disciplinary Action Against a Supervisor

The employment dispute resolution statutes reserve to management the exclusive right to manage the affairs and operations of state government.[1] Thus, claims relating to issues such as methods, means, and personnel by which work activities are to be carried out 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 state policy may have been misapplied.[2] Inherent in management's exclusive right to manage the affairs of state government is its responsibility to administer discipline against employees as necessary. In this case, management investigated the grievant's claim, determined that it was a valid claim, and did what it felt was necessary to remedy the situation. Furthermore, the grievant was reminded that disciplinary actions are confidential and that he would not be informed of any actions taken against his supervisor.

The grievant asserts that he is not satisfied with management's reply that appropriate action has been taken. Further, he claims that he received a Written Notice following this incident, and believes this incident may have been used as a "set up" for the disciplinary action.[3] However, he does not provide any evidence of this or that management's handling of the situation was a result of discrimination, retaliation, or discipline against him or that state policy was misapplied. He merely asserts that he deserves a better answer and assurance that the conduct will not be repeated.

The Agency is correct that in this case there is no further effectual relief that a hearing officer could order. The *Grievance Procedure Manual* expressly states that "taking any adverse action against an employee" cannot be granted as relief.[4] Accordingly, a hearing officer would not be able to order the discipline of the Lieutenant. Likewise, the grievant's request that he be told what action was taken against the Lieutenant could not be granted as relief. While the grievance raises an important management/leadership issue – mutual respect between supervisors and subordinates – such an issue is not appropriate for adjudication by a hearing officer. Also, the grievance record reflects that the grievant resigned, as of October 14, 2001 so any further recommendations, such as mediation, are moot. Accordingly, this issue does not qualify for a hearing.[5]

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[1] Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(c), page 11.
[3] During this investigation it was learned that the grievant has filed a grievance on the disciplinary issue and claimed retaliation in that grievance on the Form A.
[4] *Grievance Procedure Manual* § 5.9 (b), page 16.
[5] The grievance record reflects that the grievant resigned, as of October 14, 2001 so any further recommendations, such as mediation, are moot. [Tab 5]

Retaliation

The grievant asserts that the Lieutenant retaliated against him by failing to immediately forward to the Watch Commander the charge prepared by the grievant against the inmate. The grievant claims that this purported retaliation stemmed from the grievant having initiated prior grievances. 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;[6] (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 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.[7]

The first element of a retaliation claim is readily established given that prior grievances unquestionably constitute protected activity. However, under the facts of this case, the grievant cannot establish the second element of his retaliation claim. An adverse employment action is defined as a "tangible 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."[8] The failure of the Lieutenant to immediately process the charge prepared by the grievant did not result "in an adverse effect on the 'terms, conditions, or benefits' of employment."[9] As a result of the failure to immediately process the charge, the grievant has suffered no loss of pay, position title, or shift, and there is no evidence that promotional opportunities were taken from him. In sum, because the Lieutenant has not suffered an adverse employment action, the claim of retaliation cannot be qualified for hearing.

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

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[6] 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."

[7] *See* Rowe v. Marley 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).

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

[9] 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)).

determination to the circuit court, the grievant 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 the grievant does not wish to proceed.

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Claudia Farr
Deputy Director

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Deborah M. Amatulli
Employment Relations Consultant