

Issue: Qualification/Methods and Means/Assignment of Duties; Ruling Date: October 18, 2002; Ruling #2002-060; 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
Ruling Number 2002-060
October 18, 2002

The grievant has requested a ruling on whether his December 17, 2001 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that management discriminated against him based on his age¹ and religion and unfairly applied policy when it revised his duties. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Recreation Supervisor. The stated purpose of the position, as indicated on the Employee Work Profile (EWP), is to plan and organize programs and recreational activities for inmates at the prison. Until November 1, 2001, the grievant's highest priority "core responsibility" was to "maintain [a] safe and healthy work environment,"² for which 20 percent of his work time was allocated. The second highest priority "core responsibility" was "schedules recreation,"³ for which 40 percent of the grievant's work time was allocated. The grievant was also responsible for the delivery and receipt of library and law library materials; however, these duties constituted less than five percent of the grievant's core responsibilities. The remainder of the grievant's

¹ During this Department's review of this matter, the grievant stated that he wished to withdraw an earlier claim of religious discrimination from his grievance. Therefore, this issue will not be discussed in this ruling.

² Performance Measure: "Ensures a safe and healthy work environment through training and supervision of inmate workers: reports maintenance needs and follows up to assure maintenance is completed to reduce hazards with no accidents or injuries."

³ Performance measure: "Complies a schedule for recreation areas: directly supervises inmates during recreational periods; maintains control of recreation equipment to ensure no breach in security or loss of equipment."

core responsibilities included supervision of inmate programs, inmate work and equipment and supply maintenance.

Effective November 1, 2001, the grievant's core responsibilities were revised and reprioritized. Under this change, the highest priority core responsibility became the planning, development, and implementation of programs and the supervision of inmate workers, for which 50 percent of the grievant's work time was allocated.⁴ According to the EWP, this core function includes the supervision of the operation of the law library. According to management, time worked in the law library consequently increased to approximately 32 hours per week, or about 75% of the grievant's 40-hour work week. Furthermore, while scheduling recreation remains the second highest core responsibility, the percent of the grievant's work time allocated to this function was reduced from 40 percent to 25 percent. The remainder of the grievant's core responsibilities included maintenance of a safe, healthy work environment, maintenance of equipment and supplies, and support in other departments.

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 methods, means, and personnel by which work activities are to be carried out, or to the transfer, reassignment, or scheduling of employees within the agency 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 or applied unfairly.⁶ The grievant asserts that management unfairly applied policy and discriminated against him in revising his core responsibilities.

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination on the basis of age.⁷ To qualify his grievance for hearing, there must be more than a mere allegation of discrimination—there must be facts that raise a sufficient question as to whether the grievant suffered an “adverse employment action”⁸ as the

⁴ Performance Measure: “Plans, develops and directly supervises recreation programs for inmate population with no grievance originating due to lack of support from Recreation Supervisor. Hires and supervises inmate recreation workers, barbers, and library workers and ensures training for each area. Supervises the operation of the law library and with the delivery and receipt of library and law materials as needed.”

⁵ Va. Code § 2.2-3004(B).

⁶ Va. Code § 2.2-3004(A) and (C); Grievance Procedure Manual § 4.1(b) and (c), pages 10-11.

⁷ See Grievance Procedure Manual, § 4.1(b), page 10.

⁸ An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. *Von Gunten v. Maryland Department of the Environment* 243 F.3d 858, 866 (4th Cir. 2001)(citing *Munday v. Waste Mgmt. Of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997)).

result of age discrimination.⁹ If the agency provides a nondiscriminatory reason for the alleged disparity in treatment, the grievance should not be qualified for hearing, unless there is sufficient evidence that the agency's professed reason is merely a pretext or excuse for discrimination.¹⁰

In this case, it is undisputed that as a 48-year-old male, the grievant is a member of a protected class: over the age of forty. However, the grievant has presented no evidence showing that he was treated differently than other employees not in his protected class (under age 40) with respect to the assignment of his duties. Moreover, revising an employee's core responsibilities, without more, does not constitute an "adverse employment action." Here, the grievance presents no evidence that the revised duties constitute a demotion or otherwise adversely affect the terms, conditions, or benefits of the grievant's employment.

Misapplication or Unfair Application of Policy

For an allegation of misapplication 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.

Under state policy, DOC is required to develop Performance Plans for each classified position, identifying the core responsibilities, special projects, and performance measures for the incumbent during the performance cycle.¹¹ Inherent in this authority is the discretion to change the core responsibilities of a position to ensure the most effective and efficient operation of the facility.¹²

In this case, management has determined that the security level of the facility does not allow for expanded recreation programs. Therefore, a greater portion of the grievant's work time could be better utilized in operating the law library. While the grievant may believe that he has been treated unfairly as a result of the change in his core responsibilities, the grievance presents no evidence that any policy was misapplied or applied unfairly. Moreover, the fact that his law library hours actually make up about

⁹ A general framework for establishing a prima facie case of discrimination requires the employee to establish: (1) membership in a protected group (e.g. over the age of forty); (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination. Cf. McDonnell Douglas, 411 U.S. at 802; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-254, n. 6, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). See also Swierkiewicz v. Sorema, 534 U.S. 506, 509-513 (2002) for discussion on the prima facie case.

¹⁰Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

¹¹ See DHRM Policy 1.40, *Performance Plan*, page 3.

¹² See DHRM policy 1.40, *Changes to the Performance Plan During the Performance Cycle*, page 4.

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75% of his typical work week, rather than the 50% noted on his EWP, does not, in and of itself, constitute a misapplication or unfair application of policy.¹³

¹³ DHRM Policy 1.40 does not require or even recommend that the Core Responsibilities portion of the EWP list percentage allocations of an employee's work week. Thus, management's inclusion of such percentages need only serve as rough approximations, subject to change.

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, 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 wishes to conclude the grievance and notifies the agency of that desire.

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