Issue: Qualification-Retaliation/Grievance Activity, Work Conditions/Management Practices, Records, Confidentiality, Access to Policy; Ruling Date: July 24, 2002, Ruling #2002-111; 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 2002-111
July 24, 2002

The grievant has requested a ruling on whether his January 14, 2002 grievance with the Department of Corrections qualifies for a hearing. The grievant claims that his involuntary transfer to another correctional center was in retaliation for his past grievance activity. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Corrections Officer. On August 3, 2001, he was issued two Group III Written Notices, both with termination of his employment. The grievant initiated grievances to challenge the disciplinary actions. On October 9, 2001, a hearing officer issued a decision reinstating the grievant to his former position with back pay and benefits, except for ten days suspension.[1] Subsequently on January 14, 2002, the grievant was transferred to another correctional center, which lengthened his commute by approximately twenty minutes each way.

The grievant claims that in transferring him to another correctional center, the agency has retaliated against him because he exercised a right protected by law and won his grievance against management. The agency asserts that the grievant was reassigned because, as a result of his failure to report "suspicious activity or irregularities at once to supervision," he had undermined his effectiveness at his former facility.

DISCUSSION

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; in other words, whether management took an adverse action because the employee had engaged in the protected activity.[2] If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify

[1] On September 27, 2001, the Director of the Department of Employment Dispute Resolution issued a compliance ruling granting consolidation of the two grievances for purposes of the hearing.
[2] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 863 (4th Cir. 2001).

for a hearing, unless the employee presents sufficient evidence that the agency' stated reason was a mere pretext or excuse for retaliation.[3]

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 transfer 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."[4] 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.[5] The grievant has not presented any evidence that his transfer to a position as a Corrections Officer at a different facility was a substantive change in his duties, responsibilities or opportunities for promotion. Nor were his compensation and benefits decreased. Further, the increased commute in this case does not constitute an adverse action, because there is no evidence that the terms, conditions, or benefits of his employment were thereby adversely affected.[6]

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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Claudia T. Farr
Director

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June M. Foy
Senior Employee Relations Consultant

[3] *See* Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653 (4th Cir. 1998).
[4] *See* Von Gunten v. Maryland Dept. of the Environment, 243 f. 3d 858 (4th Cir. 2001).
[5] *See* Boone v. Golden, 178 F. 3d.253 (4th Cir. 1999).
[6] *See* Grande v. State Farm Mutual, 83 F. Supp. 2d 559, 563-564 (E.D. Pa. 2000) ("while the court does not minimize the effect of a lengthened commute or feelings of ill treatment, without some evidence of actual harm to plaintiff's career or some indication that he could not perform the job," these factors do not create prima facie case of retaliation). *See also* Rosales v. City of San Antonio, 2001 U.S. Dist. Lexis 10282 (W.D. Tex. 2001)(longer commute, without more, generally does not constitute an adverse employment action).