

Issue: Qualification-Methods/Means-Hours of Work-Shifts; Ruling Date: September 19, 2002; Ruling #2002-127; Agency: Department of Corrections; Outcome: qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2002-127
September 19, 2002

The grievant has requested a ruling on whether his March 21, 2002 grievance with the Department of Corrections (“agency”) qualifies for a hearing. The grievant claims that his transfer from day to evening shift resulted from false accusations, a lack of due process, and was therefore an unwarranted disciplinary action. For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

The Department of Corrections employs the grievant as a Correctional Officer. On March 14, 2002, the grievant and another officer were involved in an incident in the employee parking lot. A sergeant intervened and reported the incident to management. On March 19, 2002, the grievant was informed of complaints regarding his behavior and he responded to what he considered false accusations relating to the March 14, 2002 incident.¹ On March 20, 2002, the grievant’s shift was changed from day to evening (4 p.m. to midnight).

The grievant initiated his grievance on March 21, 2002, challenging his shift change. He sought as relief a return to day shift and removal of the accusations from his files. Management asserted that the shift change was “in the best interest of the institution and ...is intended to avert any further hostility amongst employees and to see if [grievant] could do better working with other officers.”² The agency head denied qualification, and the grievant subsequently requested that the Director of this Department qualify the grievance for hearing.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.³ Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out and the reassignment or transfer of employees within the agency generally do not qualify for a hearing, unless the grievant presents evidence raising a

¹ See First Step Resolution Step Response, dated March 21, 2002.

² *Id.*

³ See Va. Code § 2.2-3004(B).

sufficient question as to whether discrimination, retaliation, or discipline may have influenced management's decision, or whether state policy may have been misapplied.⁴

In this case, the grievant essentially claims that his shift change constituted unwarranted discipline based upon false accusations.

Unwarranted Disciplinary Transfer

For state employees subject to the Virginia Personnel Act, a transfer 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).⁵ Applicable statutes and policies recognize management's authority to transfer an employee for disciplinary and performance purposes as well as to meet other legitimate operational needs of the agency.⁶

For example, when an employee is transferred as a disciplinary measure, certain policy provisions must be followed.⁷ All transfers accompanied by a Written Notice automatically qualify for a hearing if challenged through the grievance procedure.⁸ 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 that management's primary motivating factor was to correct or punish behavior, or to establish the professional or personal standards for the conduct of an employee.⁹ These policy and procedural safeguards are designed to ensure that an involuntary disciplinary transfer is merited. A hearing cannot be avoided for the sole reason that a Written Notice did not accompany the involuntary transfer, where there is a sufficient question as to whether the transfer was an "adverse employment action" and was in effect disciplinary in nature, i.e., taken primarily to correct or punish perceived poor performance.¹⁰ The issues of whether the grievant's transfer constituted an adverse employment action and was disciplinary in nature are discussed below.

⁴ Va. Code §2.2-3004(A) and (C); Grievance Procedure Manual § 4.1 (c), page 11.

⁵ Va. Code § 2.2-2900, *et seq.*

⁶ Va. Code §§ 2.2-3004 (A) and (C); DHRM Policy No. 3.05, DHRM Policy No. 1.60, Standards of Conduct (VII)(E).

⁷ DHRM Policy No. 1.60, Standards of Conduct (VII).

⁸ Va. Code § 2.2-3004 (A); DHRM Policy No. 1.60, Standards of Conduct (IX); *Grievance Procedure Manual* § 4.1(a), page 10.

⁹ Va. Code §§ 2.2-3004 (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).

¹⁰ Likewise, the policy and procedural safeguards in DHRM's Policy No. 1.40, Performance Planning and Evaluation, are designed to ensure that an involuntary performance-based transfer, demotion or termination are rationally based, and are not discriminatory, retaliatory, arbitrary or capricious. See DHRM Policy No. 1.40.

Adverse Employment Action: An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment.¹¹ Thus, a transfer may constitute an adverse employment action if a grievant can show that the transfer had some significant detrimental effect on the terms, conditions or benefits of his employment.¹² Significantly, a transfer with a dramatic shift in working hours, appreciably different responsibilities, or one providing reduced opportunities for promotion can constitute an adverse employment action, depending on all the facts and circumstances.¹³

In this case, the agency asserts that all officers understand that possible shift change is a condition of employment.¹⁴ The grievant, however, contends that the evening shift is less desirable than the day shift, and that because of the transfer, he no longer has the opportunity to act as a training officer on transportation assignments. Management confirms that the evening shift has “far less activities, the work pace is slower and supervisors have more time to closely monitor employee behavior and handle disputes,” and that along with the shift change, grievant’s transportation assignments were removed.¹⁵ In light of the above, this grievance raises a sufficient question as to whether grievant’s transfer was an adverse employment action. But that does not end the inquiry. To qualify for a hearing, there must also be a sufficient question as to whether the transfer was meant as a disciplinary measure.

Disciplinary Basis: If the transfer adversely affected the terms, conditions or benefits of the grievant’s employment, the next issue to determine is whether the primary basis for the transfer was disciplinary. Management asserts that it is common “to change the post and/or shift assignment of corrections officers having conflict in order to maintain peace and harmony in the workplace and such [h]as never been considered punishment.”¹⁶ Further, management states that the interests of the institution would best be served by changing the grievant’s shift due to the need to separate the grievant and the other employee to prevent potential workplace violence,¹⁷ and “to see if [grievant] could do better working with other officers.” The grievant, however, believes that his transfer to the evening shift was meant to serve as a reprimand, in other words, to punish for him for alleged conduct based on false allegations.

Whether the transfer was effected primarily to punish or correct the grievant’s behavior or primarily for organizational reasons such as to avoid the potential for

¹¹ Von Gunten v. Maryland Department of the Environment, 2001 U.S. App. LEXIS 4149 (4th Cir. 2001)(citing Munday v. Waste Mgmt. Of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

¹² Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).

¹³ See Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999); Webster v. Henderson, 2000 U.S. Dist. LEXIS 5777 (D. Md. 2000), aff’d 2002 U.S. App. LEXIS 287 (unpublished opinion). See also RGC Mineral Sands, Inc. v. NLRB, 281 F.3d442 (2002); Garrison v. R.H. Barringer Distributing Co., 152 F. Supp. 2d 856 (M.D. N.C. 2001).

¹⁴ See agreement to above listed conditions of employment signed and dated by grievant 3/25/91.

¹⁵ See Memorandum to this Department from Chief of Security to this Department dated August 8, 2002.

¹⁶ See Memorandum to this Department from Chief of Security to this Department dated August 8, 2002.

¹⁷ *Id.*

hostility, violence and/or related liability is a factual determination that a hearing officer, not this Department, should make.¹⁸ For example, there is some evidence (e.g., recently being removed from hospital duty because of his alleged difficulty in getting along with another officer) to suggest that management transferred the grievant due to the business reason of maintaining workplace harmony. Other evidence, however, (e.g., referral of the matter to the Assistant Warden for disciplinary consideration followed by a disciplinary hearing)¹⁹ depending on all the facts and circumstances, could point to an underlying intent to punish or correct the grievant's behavior, even though a formal disciplinary group notice was ultimately not issued. But these are not factual conclusions that this Department should make. All in all, the issue of whether the grievant's transfer was primarily disciplinary or primarily based on the organizational needs of the institution involves interrelated factual determinations best left to a hearing officer. Thus, this grievance is qualified for a hearing.²⁰

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. Please note that in qualifying this issue, this Department has in no way determined that the grievant's transfer was adverse, disciplinary or unwarranted. Rather, this ruling simply reflects that there is a sufficient question as to these issues, and that further review by a hearing officer is justified.

At the hearing, the grievant will have the burden of proving that the transfer was adverse and disciplinary. If the hearing officer finds that it was, the agency will have the burden of proving that the transfer was warranted.

Should a hearing officer find that the transfer was disciplinary and unwarranted, he or she may rescind that transfer, thus effecting reinstatement to the day shift, just as he or she may rescind any formal disciplinary action, such as termination, by ordering

¹⁸ A major concern prompting the recent reform of the Commonwealth's employee compensation plan was that agencies had limited ability to efficiently transfer personnel, reassign duties, and adjust to changing demands. See generally, *Final Report: Reform of the Classified Compensation Plan, January 14, 2000*. To remedy this situation, the policies relating to compensation and hiring have been significantly altered to allow management to make personnel changes without having to engage in overly burdensome procedures. Under the Commonwealth's new compensation plan, an agency may freely consider the strengths and weaknesses of particular employees as it assigns duties and structures its workforce. See DHRM Policy 3.05. Accordingly, only in cases like this one where the evidence raises a sufficient question as to whether an employee has suffered an adverse action which was *primarily* intended to discipline (that is, to correct or punish,) will this Department qualify a grievance alleging that a transfer or reassignment was unwarranted, informal discipline. Here, there is a sufficient question as to whether the reassignment was made *primarily* to correct or punish conduct rather than for organizational purposes such as to prevent workplace violence.

¹⁹ See Memorandum from Chief of Security to Assistant Warden; subject Disciplinary Referral (grievant), dated March 19, 2002.

²⁰ It should be noted that under DHRM Policy 1.40, an employee also might be transferred for performance reasons. However, management initiates such transfers after the employee is presented with an unfavorable performance evaluation (currently non-contributor rating) and subsequently receives an unfavorable follow-up evaluation.

reinstatement to a previously held position.²¹ On the other hand, it is important for the grievant to note that if a hearing officer finds that his transfer (i) was not an adverse employment action, (ii) was not disciplinary in nature, or, (iii) if adverse and disciplinary, was warranted, the agency may need to determine whether it would be obligated to treat the transfer consistently with those findings and applicable DHRM policy. For instance, if the hearing officer finds that the transfer was warranted because it resulted from the grievant's poor conduct or performance, it may be possible that applicable policy would allow or even require the agency to issue formal disciplinary action and/or an unfavorable performance evaluation.

Finally, we wish to reiterate that the agency had and continues to have the authority to transfer any employee if, in management's judgment, that would further the agency's legitimate operational needs and the transfer is not retaliatory, discriminatory, unwarranted discipline, or a misapplication of policy.

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²¹ *Grievance Procedure Manual* § 5.9(a) and (b), pages 15-16. We wish to clarify that under the grievance procedure, a hearing officer typically may not order a transfer. However, the grievance procedure has long empowered a hearing officer to rescind an unwarranted disciplinary action. In cases where the unwarranted disciplinary action itself is a transfer, that action, like all other unwarranted disciplinary actions, may be rescinded by the hearing officer, with the result that grievant is returned to the status quo prior to the disciplinary transfer. *See Rules for Conducting Grievance Hearings*, § VI (A), page 10.