Issue: Qualification /Methods/Means/Transfer (not under S.O.C. or Perf. Policy); Ruling Date: March 27, 2003; Ruling #2002-160; 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. 2002-160
March 27, 2003

The grievant has requested a ruling on whether her April 3, 2002 grievance with the Department of Corrections ("DOC" or "agency") qualifies for a hearing. The grievant claims "unfair application of policy, retaliation, and change of shift as punishment." For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The Department of Corrections employs the grievant as a Correctional Officer. On March 13, 2002, the grievant and another officer were involved in an altercation in one of the housing units in front of the inmates. A sergeant and lieutenant intervened and reported the incident to management. The major informed the grievant that he was recommending to the assistant warden that the grievant receive formal discipline. Later, the grievant was told that her shift would be changed and was asked if she preferred evening or night shift. On March 23, 2002, the grievant's shift was changed from day to night, instead of the evening shift she had requested.[1]

The grievant initiated her grievance on April 3, 2002, challenging her shift change. As relief, she sought a return to day shift and an end to "all harassment and retaliatory actions and practices directed towards" her by management. Management asserted that the shift change was in the grievant's "best interest and the best interest of the institution."[2] The agency head denied qualification, and the grievant subsequently requested that the Director of this Department qualify the grievance for hearing.

DISCUSSION

[1] *See* First Resolution Step Response signed 4/12/2002.
[2] *See* Agency Head's Determination of Qualification for a Hearing dated July 31, 2002.

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 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 her shift change constituted unwarranted discipline resulting from the March 13, 2002 housing unit incident. The grievant also claims that the shift change was in retaliation for her use of the chain of command to resolve her problems, starting with seeking the assistance of the Warden with a December 2001 leave request.[5] Further, the grievant asserts that the other officer was not disciplined or subjected to a shift change even though both were equally involved.

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).[6] 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.[7]

For example, when an employee is transferred as a disciplinary measure, certain policy provisions must be followed.[8] All transfers accompanied by a Written Notice automatically qualify for a hearing if challenged through the grievance procedure.[9] 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.[10] These policy and procedural safeguards are designed to ensure that an

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[3] *See* Va. Code § 2.2-3004(B).
[4] Va. Code §2.2-3004(A) and (C); Grievance Procedure Manual § 4.1 (c), page 11.
[5] *See* Attachment to Grievance Form A written by grievant.
[6] Va. Code § 2.2-2900 *et seq.*
[7] Va. Code §§ 2.2-3004 (A) and (C); DHRM Policy No. 3.05, Compensation; DHRM Policy No. 1.60, Standards of Conduct.
[8] DHRM Policy No. 1.60, Standards of Conduct (VII).
[9] Va. Code § 2.2-3004 (A); DHRM Policy No. 1.60, Standards of Conduct (IX); *Grievance Procedure Manual* § 4.1(a), page 10.
[10] 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).

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. [11] The issues of whether the grievant's transfer constituted an adverse employment action and was disciplinary in nature are discussed below.

Adverse Employment Action: An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment.[12] 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 her employment.[13] 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.[14]

With DOC, a transfer from day shift to night or evening arguable could adversely affect an employee's opportunity for promotion. It is undisputed that most activity occurs during the day shift. Accordingly, corrections officers perform the widest variety of duties and work under the most diverse circumstances on day shift. Furthermore, diverse work experience is generally a prerequisite for advancement. Conversely, the lack of such experience could be a detriment to promotion. Therefore, transfer to a shift where there exists fewer opportunities to perform work, which could be instrumental in opening the door to promotional opportunity, could be viewed as an adverse employment action.

Disciplinary Basis: In this case, management asserts that its decision to transfer the grievant to the night shift was not disciplinary, but that the interests of the institution were best served due to the need to separate the grievant and the other employee to "avert any further hostility."[15] Management ruled out moving the grievant to another day shift, as it is highly possible that the grievant and the other officer would come into contact with each other due to the activities that occur during the day shift. Further, the agency asserts that it is common practice to change the post and/or shift assignment of Corrections Officers having conflict to maintain peace and harmony in the workplace and that this is not considered punishment. Nevertheless, management also stated that the

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[11] 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.

[12] 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)).

[13] Boone v. Golden, 178 F.3d 253 (4th Cir. 1999).

[14] *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* Garrison v. R.H. Barringer Distributing Co., 152 F. Supp. 2d 856 (M.D. N.C. 2001).

[15] *See* First Step Response signed 4/12/2002.

grievant's shift was changed because, unlike the other employee involved, the grievant had not shown any remorse for her behavior during the incident and had engaged in unacceptable conduct previously, thus raising a question of whether discipline was the primary motivating factor.[16]

Management contends that if it was primarily interested in punishing or correcting the grievant's behavior, it would not have offered the grievant the opportunity to return to day shift upon the exit of the other employee.[17] Significantly, the grievant confirms that indeed she had the opportunity to return to day shift but had decided not to pursue it at that time. If the agency had wanted to *primarily discipline* the grievant by changing her shift, it is reasonable to assume that such a move would not be related in any way to the departure of the other employee. However, in this case, once the other employee left the agency, management immediately offered to return the grievant to the day shift. In light of the above, this grievance presents insufficient evidence that the grievant's shift was changed *primarily* to discipline her, rather than to promote the workplace safety needs of the institution.

In sum, although, the grievant may have suffered an adverse employment action by her shift change from day to night, she has failed to substantiate her claim that her shift change was primarily disciplinary.

Retaliation

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;[18] (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's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.[19] Evidence establishing a causal connection and inferences drawn

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[16] Management is free to transfer employees as its sees fit. This is true in cases such as this where management must separate quarreling employees in order to improve workplace harmony. Certainly where the decision as to which employee will be transferred is based solely on a non-disciplinary factor (or factors) such as seniority, the transfer would less likely be viewed as potentially disciplinary.

[17] *See* Agency Head's Determination of Qualification for a Hearing, dated July 31, 2002.

[18] *See* Va. Code § 2.2-3004(A)(v). 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 Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[19] *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).

therefrom may be considered on the issue of whether the agency's explanation was pretextual.[20]

As discussed above, having her DOC shift changed from day to night could be considered an adverse employment action. However, even if the grievant had engaged in a protected activity by using the chain of command to resolve problems, she has failed to establish sufficient evidence of a causal relationship between her use of the chain of command and her shift change. The grievant originally sought the Warden's intervention at the end of 2001 and her shift was not changed until March 2002. Moreover, the agency has presented a business reason that the interests of the institution were best served by separating the grievant and the other employee after their altercation on March 13, 2002 and the grievant has failed to proffer any evidence that the reason given was pretextual.

Misapplication and/or Unfair Application 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.

In this case, although the grievant asserts that that the agency failed to give her proper notice when she was called to an "inquisition" regarding the altercation, she has not identified any policy provision that was misapplied. The mere allegation that a policy has been misapplied is insufficient to substantiate her claim. Moreover it appears to be standard agency practice for the Chief of Security to meet with Correctional Officers immediately following an altercation, with no policy requirement for notice. This meeting is referred to as an "inquisition" and its purpose is to allow communication about the incident before any recommendation for further action is taken. Following this meeting, the Chief of Security may prepare a written report for the Assistant Warden recommending formal discipline under the Standards of Conduct.[21] In this instance, such a report was made but no formal disciplinary action was taken. In sum, the "inquisition" was simply a meeting held prior to a recommendation for disciplinary action, and as such, there were no "due process" notice requirements.

APPEAL RIGHTS AND OTHER INFORMATION

[20] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

[21] DOC has promulgated Procedure Number 5-10 Standards of Conduct based on DHRM Policy No. 1.60, effective date 9/16/93. According to the DOC policy: "Disciplinary action refers to a formal corrective measure based on a violation of established Standards of Conduct that includes discussion of the offense, an explanation of the evidence, and issuance of a Written Notice." (5-10.11(C)). During this investigation, the agency stated that, once a decision is made to accept the recommendation for formal discipline, the employee is given notice prior to the issuance of any Written Notice.

For information regarding the actions that 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, she should notify her Human Resources Office, in writing, within five workdays of receipt of this ruling. If the court should qualify her grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless she notifies them that she does not want to proceed.

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Claudia T. Farr
Director

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