

Issue: Qualification/Retaliation/Other protected right; Ruling Date: October 6, 2003;  
Ruling #2002-173; 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. 2002-173  
October 6, 2003

The grievant has requested a ruling on whether her July 1, 2002 grievance with the Department of Corrections (“agency”) qualifies for a hearing. The grievant claims that her change of shift from day to night was unwarranted discipline for her inability to provide information that management believed she possessed concerning an agency investigation. 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 June 1, 2002 the grievant was relieved from her post for a meeting with a Captain and Sergeant. The meeting was part of an internal investigation into a complaint filed against the grievant and two other employees by another employee. The grievant was questioned regarding an alleged conversation between herself and the other employees. The grievant contends that during the meeting the Captain told the officers that the Assistant Warden of Operations (AWO) “would get to the bottom of this, no matter what.” The grievant felt threatened by this statement and expressed her concern. The Captain assured them that they would not be mistreated and that management was “just trying to find out the truth.”<sup>1</sup>

On June 28, 2002, grievant was informed that the AWO decided that she and several other officers were being moved to night shift.<sup>2</sup> The grievant initiated a grievance on July 1, 2002, challenging her shift change. As relief, she sought to return to day shift. 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.<sup>3</sup> Thus, claims

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<sup>1</sup> See June 29, 2002 letter addressed “To Whom It Concerns” and signed by grievant.

<sup>2</sup> On July 16, 2002, the grievant’s shift was changed from B Day to B Night. See AWO email sent Friday, June 28, 2002 regarding C/O Shift Changes.

<sup>3</sup> See Va. Code § 2.2-3004(B).

relating to issues such as the methods, means and personnel by which work activities are to be carried out such as 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.<sup>4</sup>

In this case, the grievant essentially claims that her shift change constituted unwarranted informal discipline. Specifically, she contends that her shift was changed because, the AWO "didn't get what he wanted from us" regarding the investigation.<sup>5</sup> She asserts that shift changes usually follow an employee transfer request or are based on seniority with the least senior officers moving first to nights. The grievant notes that she did not make a request to move to the night shift and she has more seniority than officers that remained on day shift.

### 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).<sup>6</sup> 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.<sup>7</sup>

For example, when an employee is transferred as a disciplinary measure, certain policy provisions must be followed.<sup>8</sup> All transfers accompanied by a Written Notice automatically qualify for a hearing if challenged through the grievance procedure.<sup>9</sup> 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.<sup>10</sup> 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

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

<sup>5</sup> See June 29, 2002 letter addressed "To Whom It Concerns" and signed by grievant.

<sup>6</sup> Va. Code § 2.2-2900, *et seq.*

<sup>7</sup> Va. Code §§ 2.2-3004 (A) and (C); DHRM Policy No. 3.05, DHRM Policy No. 1.60, Standards of Conduct.

<sup>8</sup> DHRM Policy No. 1.60, Standards of Conduct (VII).

<sup>9</sup> Va. Code § 2.2-3004 (A); DHRM Policy No. 1.60, Standards of Conduct (IX); *Grievance Procedure Manual* § 4.1(a), page 10.

<sup>10</sup> 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).

was in effect disciplinary in nature, i.e., taken primarily to correct or punish perceived poor performance.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

The grievant asserts that the change in shift constitutes an adverse employment action because she has more difficulties arranging for child care and does not see her husband when she is on the evening shift because he works quite a distance from their home. Furthermore, a transfer from day shift to night or evening can adversely affect an employee's opportunity for promotion. It is undisputed that most activity occurs during the day shift. Accordingly, correction 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 fewer opportunities exist to perform work (which can be instrumental in opening the door to promotional opportunities) could be viewed as an adverse employment action. Assuming without deciding that the grievant suffered an adverse employment action, that does not end this discussion. The grievant must provide evidence that the action was taken for disciplinary reasons.

Disciplinary Basis: The grievant alleges that her shift was changed to discipline her. She contends that shift changes were always accomplished in the past by the use of the transfer request log or were based on seniority, with the least senior officers being given night shift duty. The grievant asserts that the agency deviated from this practice when it changed her shift before others with less seniority.

While management admits that it departed from the manner in which it had traditionally determined who would serve on night shift (by seniority and the request

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<sup>11</sup> 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.

<sup>12</sup> Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4<sup>th</sup> Cir. 2001)(citing Munday v. Waste Mgmt. Of North America, Inc., 126 F.3d 239, 243 (4<sup>th</sup> Cir. 1997)).

<sup>13</sup> Boone v. Goldin, 178 F.3d 253 (4<sup>th</sup> Cir. 1999).

<sup>14</sup> See Boone v. Goldin, 178 F.3d 253 (4<sup>th</sup> 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).

log), management has proffered a business reason for the deviation from past practice. The Warden decided to start shift rotations after information came to light in the spring of 2002 that there was a potential issue of facility staff becoming too familiar with inmates. He also was concerned about other recent incidents within DOC, which he attributed to staff members becoming complacent and too familiar with their routines. Accordingly, he began rotating officers, a practice that continues today and has included numerous officers who have served on six-month to one-year rotations.<sup>15</sup>

In sum, although the shift change of a senior officer without her requesting that change was a change in the long standing practice of the agency, it appears to have been merely one of the first such changes under the current Warden's plan. In light of the above, although a shift change may constitute an adverse employment action, the grievant has failed to raise a sufficient question as to whether her shift change was disciplinary in nature. Accordingly, this issue does not qualify 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 determination to the circuit court, please 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 she does not wish to proceed.

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Claudia T. Farr  
Director

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<sup>15</sup> It should be noted that the grievant was recently rotated back to day shift.