

Issue: Qualification/Retaliation for Grievance Activity; Ruling Date: April 18, 2003;
Ruling #2002-174; 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 2002-174
April 18, 2003

The grievant has requested a ruling on whether her June 4, 2002 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that management's action in transferring her from one correctional center to another constituted a misapplication of policy, retaliation, and religious discrimination. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Corrections Officer. For three and a half years, she was assigned to the midnight shift (11:45 p.m. to 8:15 a.m.). Assignment to that shift allowed her to serve as a music director for several different churches. On March 10, 2002, her spouse, a Corrections Lieutenant, was also reassigned to the midnight shift, at the same facility, in the expanded role of Watch Commander. As a result, management determined that the spouse's reassignment to the same shift as the grievant created a conflict with the DOC Standards of Ethics and Conflict of Interest policy (DOC Procedure 5-4.9), which provides that an "employee shall not be employed in a position where they would be in a direct supervisory or administrative relationship to their spouse or any other relative residing in the same household." In accordance with that policy, the grievant requested and was granted assignment to a different shift (3:45 p.m. to 12:15 a.m.).

Management states that it subsequently determined that even with the change in shift assignment, the policy could still be violated because there would be occasions when decisions made by grievant's husband as the Watch Commander would carry over to grievant's shift, as in the case of emergency transportation and overtime requirements. Management asserts for that reason the grievant was reassigned to another correctional center on May 6, 2002, where she works the midnight shift. On June 4, 2002, the grievant initiated a grievance to challenge the transfer action.

DISCUSSION

The grievance statutes and state personnel policy reserve to management the right to establish workplace policy governing the assignment and transfer of employees, and to provide for the most efficient and effective operation of the facility.¹ Accordingly, the transfer or reassignment of an employee generally does not qualify for a hearing unless there is evidence raising a sufficient question as to whether it resulted from a misapplication of policy, discrimination, retaliation, or discipline. In this case, the grievant asserts that management's decision to transfer her to another facility constituted a misapplication or unfair application of DOC policy, retaliation, and religious discrimination. These issues are discussed below.

Misapplication/Unfair Application of DOC Policy

For a claim 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 written DOC policy, an employee may not be in a direct supervisory or administrative relationship to his or her spouse or any other relative residing in the same household.² The grievant asserts that because she and her spouse were assigned to different shifts prior to her transfer, no conflict of interest existed under policy, and thus her transfer arose from the agency's misapplication of that policy. The grievant also asserts that the DOC policy was not consistently applied throughout the region. To support her assertion, she identified four married couples at another correctional center who were allegedly in conflict with the policy, yet allowed to retain their shifts at the same facility.

The agency contends, however, that the spouse's new expanded role as a Watch Commander at the same facility made it more likely for him to be put in the position of having to provide direct supervision of his wife, the grievant, or to make decisions that might affect the conditions of her employment, which would present a conflict of interest under policy. Therefore, the agency asserts, the grievant's transfer was necessary to avoid such a conflict and maintain the most efficient and effective operations of the facility. The grievant has provided insufficient evidence that management's assessment of the potential for a conflict of interest was erroneous.

Management also denies that its application of this policy has been inconsistent among married couples employed at the same facilities. In reviewing the grievant's assertions, the facts reflect that the four couples cited are assigned to a larger facility with approximately 1,200 inmates, as compared to the grievant's assigned facility with less than 500 inmates. The larger facility's organizational structure allows greater flexibility in avoiding conflicts with the policy -- flexibility that is not available at the smaller

¹ Va. Code § 2.2-3004 (B) & (C); DHRM Policy No. 1.01 (rev. 12/16/99).

² See DOC Policy 5-4.9, Standards of Ethics and Conflict of Interest.

facility where grievant and her husband worked.³ While the grievant may disagree with management's judgement that her transfer was necessary in order to avoid a conflict of interest, she has not provided facts that raise a sufficient question that the Conflict of Interest Policy was misapplied or unfairly applied.

Retaliation

The grievant asserts that her transfer was an act of retaliation against (1) her having voiced concerns about the agency's removal of a religious accommodation and (2) her spouse's grievance activities.

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. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.⁴

Assuming for purposes of this ruling only that the grievant had engaged in a protected activity, the issue of retaliation does not qualify for hearing because her transfer is not an "adverse employment action," which is required to sustain a retaliation claim. An "adverse 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.⁵ 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.⁶ Here, there is no evidence that the grievant's transfer to a position as a Corrections Officer at a different facility resulted in a substantive change in her duties or responsibilities. Her job duties were the same after the transfer as before it, and there was no change in the grievant's level of responsibility, compensation, benefits, or opportunity for promotion.

³ Specifically, (1) Couple A-one spouse works in a housing unit while the other works in the recreation yard; (2) Couple B- one spouse is assigned to the kitchen while the other works in the housing unit in another cluster; (3) Couple C- spouse supervised by another Assistant Warden; and (4) couple D- one spouse is a Watch Commander on day shift while the other is assigned to the evening shift. Management stated that a potential conflict is avoided during overtime situations by having both a Lieutenant and Sergeant in the supervisory chain between the spouses. In the grievant's case, however, there is only a Sergeant coming between the spouses in the supervisory chain.

⁴ See *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653 (4th Cir. 1998).

⁵ See *Von Gunten v. Maryland Dept. of the Environment*, 243 F.3d 858 (4th Cir. 2001).

⁶ See *Boone v. Golden*, 178 F.3d 253 (4th Cir. 1999).

Religious Discrimination

State policy and federal law prohibit discrimination in employment based on religion.⁷ Courts have recognized two types of religious discrimination claims: "disparate treatment" claims and "failure to accommodate" claims,⁸ each of which is discussed below.

Disparate Treatment: To qualify a disparate treatment religious discrimination claim for hearing, the grievant must present evidence raising a sufficient question as to whether: 1) she is a member of a protected class; 2) her job performance was satisfactory; 3) in spite of her performance she suffered an adverse employment action; and 4) she was treated differently than similarly situated employees outside the protected class.⁹ For the same reason discussed above in connection with the retaliation claim, the issue of disparate treatment religious discrimination also does not qualify for hearing. Again, even if the grievant can meet the first, second and fourth requirements for establishing a disparate treatment claim, her transfer was not an "adverse employment action" under the third requirement needed to support such a claim.

Failure to Accommodate: By law, an employer must "reasonably accommodate to an employee's . . . religious observance or practice," unless such accommodation would cause "undue hardship on the conduct of the employer's business."¹⁰ To qualify a religious accommodation claim for hearing, the grievant must come forward with evidence raising a sufficient question as to whether (1) she has a bona fide belief that conflicts with an employment requirement; (2) she has informed the agency of this conflict; and (3) the agency nevertheless maintained the conflicting employment requirement.¹¹ Once she has produced this evidence, the agency has an obligation to reasonably accommodate her beliefs or prove that it cannot reasonably accommodate her without undue hardship.¹² If an undue hardship is established, DOC does not have an obligation to provide an accommodation.

Upon her transfer, the grievant was assigned to the midnight shift, the very shift that she had previously informed the agency was essential to accommodate her religious activities.¹³ There is no evidence that working the midnight shift at the new work site conflicts with the grievant's religious beliefs.

⁷ See DHRM Policy 2.05 and Title VII of the Civil Rights Act (29 U.S.C. Section 2000e-2000e-17).

⁸ See *Chalmers v. Tulon*, 101 F.3d 1012, 1017 (4th Cir. 1996).

⁹ See *Hutchinson 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, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)).

¹⁰ 42 U.S.C. § 2000e(j). The concept of "reasonable accommodation" for religion under Title VII of the Civil Rights Act "resembles the accommodation obligation owed to persons with disabilities under the Americans with Disabilities Act." I Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 219, n. 2 (1996).

¹¹ See *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1019, and (4th Cir. 1996).

¹² *Id.*

¹³ In her grievance, the grievant also made repeated reference to a March 5, 2002 assignment off the midnight shift at her original work site as constituting religious discrimination. However, her assignment

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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off the midnight shift in that instance is not the management action challenged by this grievance: transfer to another facility.