Issue: Qualification/Hours of work, shift; Ruling Date: 2002-205; Ruling #2002-205; 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. 2002-205
October 6, 2003

The grievant has requested a ruling on whether her July 3, 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 due to an "unfair and inconsistent selection process" and "unfair bias on the part of the Assistant Warden of Operations (AWO) in the selection of officers, based on allegations made by his form [sic] secretary about [the grievant] and two other officers."[1] For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The Department of Corrections employs the grievant as a Corrections Officer Senior. On June 28, 2002, the Captain told the grievant that the AWO decided to change her shift from day to night. That same day, the AWO sent an email indicating that the grievant was being transferred from B Day to A Night, effective July 16, 2002.[2] Two weeks prior to this June 28, 2002 notice, the grievant found out that she and two other officers were implicated as having information pertaining to a complaint investigation regarding an employee supervised by the AWO. She initiated her grievance on July 3, 2002, challenging her shift change. Although the grievant was never directly questioned regarding the complaint investigation, she contends that normal agency policy was not followed by the AWO when he ordered that her shift be changed from day to night. The grievant contends that shift changes usually follow a request or are done by seniority. She states that she did not make a request to move to the night shift and she has more seniority than other officers that remained on the day shift. The grievant claims that she and one of the two other officers implicated in the investigation were the only senior officers whose shifts were changed, without request, from day to night. The grievant sought as relief, to be "made whole and maintain current duties."

Management responded that the Warden had a "policy to reassign staff periodically to enhance the operations of the facility and allow staff the opportunity to gain additional experience."[3] Moreover, management notes the grievant had "signed a 'Conditions of Employment' on January 2, 1996, which states on page 3, item number 2

[1] *See* Grievance Form A dated 7/3/02.
[2] *See* email sent from Assistant Warden on Friday, June 28, 2002 regarding C/O Shift Changes.
[3] *See* Second Resolution Step dated 7/22/02.

that: 'Correction Officers must be willing to work any shift and any post; and must be willing to work overtime, holidays, and weekends.'"[4] The agency head denied qualification and the grievant subsequently requested that the Director of this Department qualify the grievance for hearing.

DISCUSSION

State law[5] and applicable policies[6] reserve to management the right to assign employees as it sees fit. The wide discretion afforded management in making assignment determinations, while grievable, is not an issue that can be qualified for hearing unless the grievant produces evidence that the assignment (1) is based on an impermissible factor such as discrimination or retaliation, (2) was undertaken for disciplinary reasons, (3) resulted from a misapplication or unfair application of policy, or (4) stemmed from an arbitrary performance evaluation.[7]

In this case, the grievant essentially claims that her shift change constituted an unfair application of policy motivated by improper bias on the part of the AWO. Specifically, she asserts that the agency violated the normal practice of using the request log and seniority considerations when it changed her shift before others with less seniority.

Misapplication or Unfair Application of Policy/Procedures

For a claim of policy misapplication or unfair application of policy to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy provision, or evidence that management's actions, in their totality, are so unfair as to amount to a disregard of the intent of the applicable policy. Furthermore, the General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."[8] Thus, the threshold question then becomes whether or not the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment act constituting a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[9]

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[4] *Id.*
[5] Va. Code §2.2-3004(B) states that "Management reserves that exclusive right to manage the affairs of operations of state government."
[6] The Department of Human Resource Management (DHRM) Policy 1.25 states that "[a]gency heads, or their designees, shall set and adjust the work schedules for employees in the agency, being mindful of the hours of public need."
[7] *Grievance Procedure Manual*, § 4.1(C), page 11.
[8] Va. Code § 2.2-3004(A).
[9] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

A misapplication of policy may constitute an adverse employment action if, but only if, the misapplication results in an adverse effect *on the terms, conditions, or benefits* of one's employment.[10] In this case, 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 of an unfair application or misapplication of policy.

In this case, the grievant has not provided evidence that the agency unfairly applied or misapplied policy. While the grievant claims that she was implicated in an agency investigation, she admits that agency management never questioned her. Moreover, while management departed from the manner in which it had traditionally determined who would serve on night shift (by seniority and the request log), the agency 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.[11]

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 a misapplication or unfair application of policy.[12] 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

[10] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).
[11] It should be noted that the grievant was recently rotated back to day shift.
[12] To the extent that the grievant's claim may be viewed as stating a claim of informal discipline, the grievant has provided no evidence to support such a claim. The grievant has not identified any behavior in which she engaged that could have been conceived by management as warranting discipline.

determination to the circuit court, she 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 notifies the agency that she does not wish to proceed.

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Claudia T. Farr
Director

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Deborah M. Amatulli
EDR Consultant, Sr.