Issue: Qualification/Methods/Means/ Transfer (not under S.O.C. or Perf. Policy); Ruling Date: March 31, 2003; Ruling #2002-227, 2002-230; Agency: Department of Corrections; Outcome: qualified and consolidated for purposes of hearing.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Nos. 2002-227 & 230
March 31, 2003

The grievant has requested rulings on whether his August 5, 2002 and September 5, 2002[1] grievances with the Department of Corrections ("agency") qualify for a hearing. Both requests will be addressed together in this ruling as both grievances arise from the same facts and circumstances relating to conflict between the grievant and his former supervisor, a Lieutenant. The grievant claims in his August 5, 2002 grievance that he works in a hostile and retaliatory work environment. In his September 5, 2002 grievance, the grievant claims that his shift was changed as a result of favoritism by the Warden towards his supervisor and that the agency misapplied DHRM's Workplace Violence policy.[2] For the reasons set forth below, both of these grievances are qualified for a hearing. Furthermore, the grievances are consolidated and will be heard at a single grievance hearing.

FACTS

The Department of Corrections employs the grievant as a Corrections Sergeant. On the morning of June 27, 2002, the grievant asserts that his supervisor, a Lieutenant, came to the grievant's home following an alleged argument between the Lieutenant and the Lieutenant's girlfriend. The grievant asserts that the Lieutenant threatened the grievant with potential harm.[3]

When the grievant reported to work later that day, the Assistant Warden of Operations (AWO) took the grievant aside and questioned him about the incident involving the Lieutenant. The grievant explained what happened and assured the AWO that as far as he was concerned everything was "all right" between the Lieutenant and

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[1] Although the second grievance is also dated August 5, 2002, the grievant has clarified that this was a mistake and confirmed the date as September 5, 2002.
[2] DHRM Workplace Violence Policy No. 1.80 effective date 5/01/02.
[3] *See* Attachment to Form A, August 5, 2002, signed by grievant.

himself. [4] The agency claims that at the end of this discussion, the AWO advised the grievant to "keep him abreast of any new information."[5]

A month later, on July 28th, the grievant and Lieutenant had another off-duty confrontation at the grievant's home, during which both drew firearms. The incident ended without either being physically harmed and was witnessed by a female Corrections Officer. The following day, the grievant and Lieutenant had a discussion at the institution during which the grievant agreed not to say anything about the previous night's incident. The grievant asserts that he agreed to keep quiet about this incident for fear of retaliation and potential harm to his career.[6] The next day, on July 30th, the grievant was sent notice that his shift was being changed from day to night, effective August 11, 2002, "due to institutional needs."[7]

On August 4, 2002 the grievant filed criminal charges against the Lieutenant for his actions on July 28, 2002,[8] and on August 5, 2002, the grievant initiated a grievance challenging what he claims was a hostile and retaliatory work environment. He sought as relief to be "guaranteed employees will not suffer adverse employment actions as a result of engaging in protected activities" and that the Lieutenant be disciplined.[9]

The grievant initiated a second grievance approximately one month later on September 5, 2002 in which he claimed that his shift was changed due to the Warden's favoritism towards the Lieutenant and that management failed to apply the DHRM Workplace Violence Policy. The grievant requested as relief: (i) the agency's condemnation of retaliatory acts; (ii) a written apology from the Warden; and (iii) a transfer back to day shift. [10]

The agency head denied qualification of both grievances, and the grievant subsequently requested that the Director of this Department qualify the grievances for hearing.

DISCUSSION

Qualification

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[11] 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

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[4] *Id.*
[5] *See* First Step Response dated August 5, 2002.
[6] *See* Attachment to Form A, August 5, 2002, signed by grievant.
[7] *See* Memorandum to grievant from Major dated July 30, 2002.
[8] *See* Attachment to Form A, August 5, 2002, signed by grievant.
[9] *See* Grievance Form A dated 8/5/02.
[10] *See* Grievance Form A: Date Grievance Occurred 8/14/02 & 8/07/02.
[11] *See* Va. Code § 2.2-3004(B).

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.[12]

In this case, the grievant essentially claims that his shift change from day to night constituted unwarranted discipline based on favoritism toward the Lieutenant.

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).[13] 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.[14]

For example, when an employee is transferred as a disciplinary measure, certain policy provisions must be followed.[15] All transfers accompanied by a Written Notice automatically qualify for a hearing if challenged through the grievance procedure.[16] 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.[17] 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.[18] The issues of whether the grievant's transfer constituted an adverse employment action and was disciplinary in nature are discussed below.

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[12] Va. Code §2.2-3004(A) and (C); Grievance Procedure Manual § 4.1 (c), page 11.
[13] Va. Code § 2.2-2900, *et seq.*
[14] Va. Code §§ 2.2-3004 (A) and (C); DHRM Policy No. 3.05, DHRM Policy No. 1.60, Standards of Conduct (VII)(E).
[15] DHRM Policy No. 1.60, Standards of Conduct (VII) effective date 9/16/93, amended 9/25/200.
[16] Va. Code § 2.2-3004 (A); DHRM Policy No. 1.60, Standards of Conduct (IX); *Grievance Procedure Manual* § 4.1(a), page 10.
[17] 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).
[18] 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.[19] 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.[20] 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.[21]

In this case, the grievant asserts that his shift change was punishment for the incidents with his supervisor and asserts that being on night shift lessens his 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 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.

Disciplinary Basis: Management asserts that it moved the grievant because he has less seniority than the Lieutenant and it was less disruptive to the agency because the Lieutenant was a Unit Manager over several housing units. However, during the investigation for this ruling, the agency confirmed that the Lieutenant did not work at the grievant's facility from August 6, 2002 through January 23, 2003, at which time he left the agency's employ. Management further asserts the grievant's shift was changed so it could conduct an investigation into "some other issues."

In this case, 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 hostility, violence and/or related liability is a factual determination that a hearing officer, not this Department, should make.[22] For example, there appears to be evidence

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[19] 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)).
[20] Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).
[21] *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).
[22] 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

that contradicts the stated reason for transferring the grievant (greater efficiency), which could potentially support a claim that the transfer was disciplinary in nature. For example, if the transfer was to avoid potential violence between the grievant and Lieutenant, that possibility was essentially eliminated by the fact that the Lieutenant did not work at the institution from August 6, 2002 (five days before the transfer took place), until January 23, 2003, when the Lieutenant's employment with the Department ended. 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, the issue of unwarranted transfer is qualified for a hearing.

Additional Theories for Shift Change

The grievant has advanced several alternative theories related to the agency's decision to change his shift, including allegations of favoritism, harassing and hostile working environment, and misapplication of policy. Because the issue of unwarranted discipline qualifies for a hearing, this Department deems it appropriate to send these ancillary issues for adjudication by a hearing officer as well, to help assure a full exploration of what could be interrelated facts and claims.

Compliance: Consolidation

Written approval by the Director of this Department or her designee in the form of compliance ruling is required before two or more grievances are permitted to be consolidated in a single hearing. EDR strongly favors consolidation and will grant consolidation when grievances involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.[23] The EDR Director may consolidate rulings for hearing without a request from either party.

This Department finds that consolidation of both grievances at hearing in this case is appropriate: each grievance originates from the same basic factual background, involve the same parties, and consolidation in not impracticable in this instance. This Department's rulings on compliance are final and nonappealable.[24]

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, the August 5, 2002 and September 5, 2002 grievances are qualified for hearing. This qualification ruling in no way determines that

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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.

[23] Grievance Procedure Manual § 8.5, page 22.

[24] Va. Code § 2.2-1001 (5).

the agency's decision to change the grievant's shift was unwarranted discipline or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

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Claudia T. Farr
Director

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