

Issue: Qualification/Discrimination/Race; Ruling date: July 17, 2003; Ruling #2003-001; 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 2003-001
July 17, 2003

The grievant has requested a ruling on whether her August 29, 2002 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that her shift reassignment was discriminatory and retaliatory.

FACTS

Until her termination on December 12, 2002, the grievant was employed as a Corrections Officer.¹ For approximately 14 months, she was assigned to the day shift (6 a.m. to 6 p.m.). Effective on August 12, 2002, the grievant was reassigned to the night shift (6 p.m. to 6 a.m.).

DISCUSSION

The employment dispute resolution statutes reserve to management the exclusive right to manage the affairs and operations of state government.² Thus, management has the statutory right to transfer and assign employees to provide for the most efficient and effective operation of the facility. 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 shift was discriminatory based on her race and retaliatory for having expressed her concerns to the facility superintendent about the Chief of Security's intent to issue her a counseling memorandum.

Discrimination

For a claim of race discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. The grievant must present facts that raise a sufficient question as to whether she was transferred because of her race. The

¹ On December 11, 2002, the grievance was issued a Group III Written Notice with termination for falsifying official state records. The disciplinary action and termination were upheld by a hearing officer's decision on March 20, 2003.

² Va. Code § 2.2-3004 (B).

grievant may accomplish this by coming forward with evidence that: (1) she is a member of a protected class; (2) she is qualified for the pre-transfer position; (3) in spite of her qualifications she suffered an adverse employment action through her reassignment, and (4) that she was treated differently than similarly situated employees outside of the protected class.³ If, however, the agency comes forward with a nondiscriminatory reason for its action, the grievance should not qualify for hearing, unless there is sufficient evidence that the agency's stated reason is merely a pretext or excuse for improper discrimination.

In this case, the grievant has not met all of the four elements of a discrimination claim. As an African American, the grievant is a member of a protected class. The grievant is presumably qualified for her position as evidenced by receiving a "Contributor" rating on her most recent performance evaluations. However, even if the shift reassignment constituted an adverse action,⁴ the grievant has presented no evidence that other similarly situated employees outside of the protected class have been treated differently under circumstances similar to hers.

Moreover, the agency has explained that the grievant's transfer was based on a legitimate business need to replace another officer who had been reassigned from the night shift to the day shift for medical reasons. According to the agency, the grievant was chosen to replace her because of her demonstrated leadership, maturity, and good judgement.⁵ Further, the agency asserts that all officers understand that a possible shift change is a condition of employment.⁶ The grievant has offered no evidence to show that the agency's stated reason is merely a pretext or excuse for discrimination on the basis of her race. Indeed, the officer who was transferred to day shift for medical reasons is also an African American female, as is the facility Superintendent who had reviewed and approved both assignments.

Retaliation

The grievant claims that she was retaliated against for expressing her concerns to the facility Superintendent about the Chief of Security's stated intent to issue her a counseling memorandum.

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

³ See *Hutchinson v. INVOVA health System, Inc.*, 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

⁴ See *Boone v. Golden*, 178 F.3d 253, 255 (4th Cir. 1999) typical requirements for an "adverse employment action" include, but are not limited to, a decrease in pay and benefits.

⁵ These traits were desirable in officers assigned to the night shift because there was no assigned Lieutenant. Supervision was provided by one of the assigned officers.

⁶ Management states that the facility has no written policy governing transfers and shift assignment. Decisions are made based upon management's determination of what is in the best interest of the facility.

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.⁷

Only the following activities are protected activities under the grievance procedure: (1) participating in the grievance process, (2) complying with any law or reporting a violation of such law to a governmental authority, (3) seeking to change any law before the Congress or the General Assembly, (4) reporting a violation to the State Employee Fraud, Waste and Abuse Hotline, or (5) exercising any right otherwise protected by law.⁸ Here the grievant has presented no evidence that prior to her reassignment, she had engaged in any of the protected activities above, including her constitutionally protected right to free speech.⁹ Accordingly, the issue of retaliation does not qualify for a 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, 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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Director

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⁷ See *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653 (4th Cir. 1998).

⁸ Grievance Procedure Manual § 4.1(b), page 10.

⁹ In expressing her concerns to the Superintendent about an impending counseling memorandum, the grievant spoke primarily in her role as an employee embroiled in a workplace dispute rather than as a citizen discussing a matter of public concern. Thus, her speech about the Chief of Security's stated intent to issue her a counseling memorandum was not "protected speech" for First Amendment purposes. See *Harris v. City of Virginia Beach*, 1995 U.S. App. LEXIS 30912 (4th Cir. 1995).