

Issue: Qualification/Retaliation/Other protected right; Ruling Date: June 17, 2003;
Ruling #2003-062; 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. 2003-062
June 17, 2003

The grievant has requested a qualification ruling on whether her grievance initiated on January 2, 2003 with the Department of Corrections (DOC or the agency), qualifies for hearing. The grievant claims she was reassigned to night shift in retaliation for reporting alleged sexual harassment and/or engaging in prior grievance activity. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Corrections Officer Senior. On November 6, 2002, the grievant initiated a grievance alleging that a male Lieutenant approached her in a threatening manner and made inappropriate sexual contact. On November 25, 2002, the grievant and her representative met with the Warden (the second-step respondent) to discuss the allegations in her grievance. The Warden issued his written response on December 2, 2002, advising the grievant that he would take appropriate action once the investigation had been completed. Because there had been no further incidents between the grievant and the Lieutenant, the Warden indicated he would not reassign the grievant to a position where she would have no contact with him. Subsequently, on December 10, 2002, the grievant's shift assignment was changed from B-Break day shift to B-Break night shift. At that time, the Lieutenant was reassigned to A-Break night shift.

DOC contends that the grievant's move to night shift was part of a rotation plan developed by management in the spring of 2002, reassigning security staff to different posts and shifts to provide job enhancement and prevent complacency.¹ Based upon the plan, management first considers the needs of the institution during a particular shift (i.e., whether an employee has a skill set or certification such as key control, tool control, etc. required by the institution). Next, they determine which Officers have never worked on

¹ The Warden decided to start shift rotations after information came to light during a training class 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.

night shift, starting with those who have been at the facility the longest and have the longest state service. Finally, management considers staff assignment requests. The first shift reassignments were effective in July of 2002, with fourteen employees transferred to different shifts or assignments.² The grievant's reassignment came in the second round of reviews, during which twenty-two employees were reassigned. During the investigation for this ruling, the agency informed the investigating consultant that the next round of shift assignment reviews will begin shortly and will be effective in July of this year.

The grievant claims, however, that a supervisor involved in the reassignment process made a derogatory comment to her about filing a complaint against the Lieutenant, and she alleges that management included her in the "reassignment plan" in retaliation for her prior grievance activity and/or reporting alleged sexual harassment.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.³ Further, complaints relating solely to the methods, means, and personnel by which work activities are to be carried on and the transfer and assignment of employees within an agency "shall not proceed to hearing"⁴ unless there is sufficient evidence of discrimination, retaliation, discipline, or a misapplication or unfair application of policy. In this case, the grievant alleges she was reassigned to the night shift in retaliation for her prior grievance activity and/or reporting alleged sexual harassment.

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's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.⁵ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.⁶

² It should be noted, however, that with the first set of shift rotations, the agency did not consider long state service without having worked night shift as one of the criteria for determining transfers.

³ Va. Code § 2.2-3004(B).

⁴ Va. Code § 2.2-3004(C).

⁵ See *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 656 (4th Cir. 1998).

⁶ See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

First, the grievant clearly engaged in a protected activity when she initiated her prior grievance. Additionally, the incident report she filed alleging sexual harassment can be categorized as "exercising any right otherwise protected by law."⁷ Title VII of the Civil Rights Act of 1964 characterizes two broad categories of activities as protected for purposes of a retaliation claim -- an employer may not retaliate against an employee for (i) participating in an ongoing investigation or proceeding under Title VII or (ii) opposing discriminatory practices in the workplace.⁸ Activities such as "complaining to the employer" and "participating in an employer's informal grievance procedures" have been held to be "opposition activities" protected under Title VII.⁹ Furthermore, as long as the employee communicates her *belief* that the practices were discriminatory, then these activities are deemed protected even if later it is determined that the practices did not constitute employment discrimination.¹⁰

The grievant also must show that she suffered an adverse employment action. An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment.¹¹ Thus, a transfer may be considered adverse if a grievant can show that the transfer had some detrimental effect on the terms, conditions or benefits of her employment.¹² 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

⁷ See *Grievance Procedure Manual* § 4.1(b)(4), page 10. Only the following activities are protected activities under the grievance procedure: participating in the grievance process; complying with any law or reporting a violation of such law to a governmental authority; seeking to change any law before Congress or the General Assembly, reporting a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law.

⁸ 42 U.S.C.A. § 2000e-3(a); *Bradley v. CMI Industries, Inc.*, 17 F. Supp.2d 491, 496 (W.D. N.C. 1998).

⁹ See *Bradley v. CMI Industries, Inc.*, 17 F. Supp.2d 491, 496 (W.D. N.C. 1998) (quoting *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996) and *Armstrong v. Index Journal Company*, 647 F.2d 441, 448 (4th Cir. 1981)). See also EEOC Compliance Manual, EEOC Directives Transmittal, Number 915.003, 8-II (B), dated 5/20/98 available at <http://www.eeoc.gov/docs/retal.html> (protection under the anti-retaliation provisions "applies if an individual explicitly or implicitly communicates to his or her employer ... a belief that its activity constitutes a form of employment discrimination that is covered by any of the statutes enforced by the EEOC...2. [e]xamples of opposition...[a] complaint or protest about alleged employment discrimination to a manager... [where] the individual explicitly or implicitly communicates a belief that the practice constitutes unlawful employment discrimination... [and] the complaint would reasonably have been interpreted as opposition to employment discrimination").

¹⁰ EEOC Compliance Manual, EEOC Directives Transmittal, Number 915.003, 8-II (B), dated 5/20/98 available at <http://www.eeoc.gov/docs/retal.html>, *supra* text accompanying note 7. In this case, after investigation, management determined the grievant's allegations to be unfounded and failed to grant her requested relief. This Department later denied qualification of her grievance, finding that with regard to the Lieutenant's alleged actions, even if her allegations were true, such actions did not constitute sexual harassment. See EDR Ruling Number 2003-032.

¹¹ *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)).

¹² *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999).

all the facts and circumstances.¹³ Assuming, without deciding, for purposes of this ruling only that the grievant suffered an adverse employment action,¹⁴ as discussed below, the grievant has not presented evidence raising a sufficient question as to whether her transfer to night shift resulted from management's intent to retaliate against her for prior grievance activity and/or filing an incident report alleging sexual harassment.

As evidence of a causal link, the grievant asserts that prior to her transfer to night shift the Chief of Security accused her of damaging the Lieutenant's reputation when she filed her complaint.¹⁵ Furthermore, the grievant's reassignment was in fairly close proximity to the filing of the grievance and incident report.¹⁶ The agency, however, has provided a nonretaliatory business reason for the decision to reassign the grievant -- the need to rotate staff to different posts and shifts to provide job enhancement and prevent complacency. While acknowledging reassignment to a different shift is a condition of employment for all Corrections Officers the grievant contends the agency's justifiable business reason for her reassignment to night shift was pretextual and an excuse for retaliation.

As evidence of pretext, the grievant alleges management included her in the reassignment plan in retaliation for having engaged in protected activities. In support of this allegation, the grievant states she and two other female Officers began working at the facility on August 9, 1993, but neither of these employees were reassigned with her although they too have never worked night shift. Additionally, the grievant notes that a male Officer hired by the facility several months after the beginning of her employment

¹³ 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 *Garrison v. R.H. Barringer Distributing Co.*, 152 F. Supp.2d 856 (M.D. N.C. 2001).

¹⁴ In this case, the agency contends that a shift change cannot be "adverse" because the ability to work any assigned shift is an essential function of the position, and all officers understand that possible shift change is a condition of employment. See Agency's Orientation Manual, Essential Functions of a Corrections Officer Position, page 8 and Conditions of Employment for All Employees, page 27, number 2 (stating that Corrections Officers must be willing to work any shift). Furthermore, management contends the grievant's reassignment is not adverse because the shift change actually will increase the grievant's opportunities for promotion at the facility. The Warden states in his second-step management resolution response that a shift rotation provides the employee with work experience covering the entire operation of a correctional facility, which "makes the employee a better candidate for promotion and gives them exposure to other supervisors and staff." On the other hand, the grievant notes that there are limitations to the skills a Corrections Officer is exposed to or is able to acquire on night shift because it is much slower than day shift. Interestingly, during the investigation for this ruling, the grievant advised the investigating consultant that she no longer wished to return to day shift as she had originally requested in her grievance. She indicated that she never had a problem with the reassignment itself because she knew it was a condition of employment, but her concern is that the reassignment was effectuated to retaliate against her for engaging in protected activities.

¹⁵ The Chief of Security was involved in the reassignment process.

¹⁶ See *Tinsley v. First Union National Bank*, 155 F.3d 435 (4th Cir. 1998)(closeness in time between a protected activity and an adverse employment action can be sufficient to make a prima facie case of causality). The grievant initiated her grievance and filed the incident report on November 6, 2002, and she received notification of her reassignment to night shift a little more than a month later, on December 10, 2002.

was reassigned with her, and he allegedly also has engaged in prior grievance activity. Furthermore, she claims that her transfer was a result of management's decision to separate her and the Lieutenant. Finally, the grievant claims the "plan" was applied inconsistently because Officers on night shift are not rotated to day shift on a mandatory basis.

For the following reasons, we find no merit to the grievant's arguments. As mentioned above, agency management (the Warden) concluded that to prevent complacency among the correctional staff, they should be rotated to different posts and shifts. The Warden met with his administrative staff to "systematically develop a method to rotate staff."¹⁷ The Warden ultimately adopted a plan that considers shift assignments and critical job functions (such as Tool Control, possession of a Commercial Drivers License, or Strike Force membership) as criteria for determining staff rotation. The agency also considers accommodations due to health reasons. Then, the agency reviews the security staff to determine which staff members have worked the longest, in terms of *state* (as opposed to agency) employment, without having worked on night shift for six months or more. Those with the longest state service who have not worked more than six months then become the first to be moved to night shift, assuming that no critical job functions, employee accommodations, or other legitimate agency concerns necessitate alteration of the queue.

While the grievant is correct that she and the two cited female employees all began working at the facility on the same day, as explained above, DOC also considers the employees' *state* service seniority to determine which employees are next in line for shift reassignments. In this case, the grievant had been employed by another state agency prior to accepting a position at the facility, while the other two employees had not.¹⁸ With respect to the male Officer who started his employment after the grievant, during the investigation for this ruling, management provided documentation to establish that he had worked as a Corrections Officer with DOC at another location for several years prior to transferring to the grievant's facility. Likewise, the Lieutenant had been in state service since 1985, but had never worked the night shift.¹⁹ Thus, these employees, like the grievant, appear to have been appropriately placed in line for reassignment with the group of twenty-two transferred in December.

Furthermore, while the grievant claims that night shift employees were not made to transfer to day shift, the DOC memorandum announcing the reassignments indicates that nine of the twenty-two reassignments were from night shift to day shift and three

¹⁷ Second Step Response, dated January 21, 2003

¹⁸ The grievant's state service commenced on April 1, 1991.

¹⁹ The grievant maintains that management transferred her to separate her from the Lieutenant. If management's action was an attempt to retaliate against the grievant for filing a complaint against the Lieutenant (which management later determined was unfounded), there would have been no reason to reassign the Lieutenant to a night shift; he could have remained on day shift. Additionally, the grievant had requested as relief in her November 6, 2002 grievance that she have no further contact with the Lieutenant. Therefore, she now basically disputes an action as "retaliatory" that she had previously requested -- separation from the Lieutenant.

additional night shift employees were transferred to a different night shift, from “A” to “B” or vice-versa.²⁰ While not equal, a number of reassignments were from night shift to day shift. Significantly, based on the facility’s reassignment plan, management considers the needs of the institution for a particular shift, staff development, and staff requests before making reassignments, thus, the number of transfers from one shift to another may not be equal. However, such does not indicate that the plan has been applied inconsistently.

In sum, the grievant’s evidence has not presented a sufficient question as to whether her reassignment to night shift was motivated by retaliation or that the business reason given was pretextual. Accordingly, this grievance does not qualify for a hearing.²¹

CONCLUSION

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 notifies the agency that she wishes to conclude the grievance.

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Director

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²⁰ Memorandum from Chief of Security to Shift Commanders, dated December 12, 2002.

²¹ This grievance can be distinguished from others where shift rotation decisions were made on an individual, non-standardized basis and where the motives for the transfers were questionable. In contrast to earlier transfers where the moves were not pursuant to a predetermined process, here, the agency developed a systematic plan by which it determined staff rotations and, apparently, then applied that process. When an agency adopts a systematic plan of determining employee rotations, this Department will not qualify a grievance challenging a transfer made in accordance with such a plan unless the grievant can produce evidence that the agency deviated from its plan for an improper motive such as retaliation, discrimination, or unwarranted discipline. The grievant has provided no such evidence in this case.