Issue: Qualification/Methods/Hours of Work Shifts; Ruling date: July 17, 2003; Ruling #2003-102; 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. 2003-102
July 17, 2003

The grievant has requested a ruling on whether his March 17, 2003 ruling with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that DOC retaliated against him when it changed his shift. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is a Correctional Officer with DOC and has worked at his present facility for four and a half years. In February 2003, a Sergeant on the grievant's shift initiated a lawsuit against nine coworkers, including the grievant.[1] On February 15, 2003, DOC management instructed the grievant, who was on "B-Break" shift, to report to "A-Break" shift. The grievant began his new shift on February 17. Both shifts are daytime shifts, but are under different chains of command and have different break days. The grievant did not experience a loss of responsibility or pay with his shift transfer.

DOC claims it transferred the grievant to avoid any potential tension between the grievant and the Sergeant who initiated the lawsuit against him. The agency further argues that management has the right to make shift changes "to ensure the orderly operation of the institution."[2] The grievant claims that the lawsuit was not the true reason for his transfer, but that the agency is using the lawsuit as an excuse to retaliate against him for allegedly sending an anonymous letter to the Warden involving a "paint-ball incident," which caused damage to state property.[3] He asserts that he also has been told that he is a threat to the Major, and he claims that he has been accused of phoning in a complaint to the Fraud, Waste, and Abuse Hotline. The grievant also points out that two of the defendants in the lawsuit, himself and a Captain, were on the Sergeant's shift, but the grievant was the only employee transferred to another shift. He questions why the

[1] During this Department's investigation, the grievant reported that the lawsuit involved the Sergeant's shift changes. According to the grievant, the court dismissed the suit. The grievant further reported that the Sergeant was in the grievant's chain of command and has since been reassigned to the night shift.
[2] Third Step Response to Grievant from DOC Regional Director, dated April 16, 2003.
[3] During the course of this investigation, the grievant related that the Major and other DOC employees were involved in horseplay with paint-ball guns that damaged state property. The grievant and five other employees witnessed the incident and the grievant denies sending an anonymous letter to the Warden about it.

Sergeant and the Captain were not transferred if the agency was trying to avoid tension among employees involved in the lawsuit.

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.[4] 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. The grievant asserts that his shift change was an act of retaliation for (1) his allegedly having voiced concerns about vandalism to state property and (2) his allegedly placing a call to the state's Fraud, Waste, and Abuse Hotline.

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;[5] (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' stated reason was a mere pretext or excuse for retaliation.[6] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[7]

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 his shift change is not an "adverse employment action," which is required to sustain a retaliation claim. An "adverse employment action" includes any retaliatory act *only if* that act results in an adverse effect on the "terms, conditions, or benefits" of employment.[8] 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.[9]

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[4] *See* Va. Code § 2.2-3004 (B) & (C); DHRM Policy No. 1.01 (rev. 12/16/99).

[5] *See* Va. Code § 2.2-3004(A). 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 the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[6] *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).

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

[8] *See* Von Gunten v. Maryland Dept. of the Environment, 243 F.3d 858, 866 (4th Cir. 2001).

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

Here, there is no evidence that the grievant's transfer to another shift resulted in a substantive change in his duties or responsibilities. His 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. The grievant reported only a difference in break days, which affected his approved days off for vacation, and a change in his commute/carpool.[10] However, a transfer that results in such temporary inconveniences is not sufficient to constitute an adverse employment act.[11] Therefore, although the shift change and its effect on the grievant's vacation and carpool may be disappointing to the grievant, it cannot be viewed by any reasonable fact finder as an adverse employment action because the reassignment had no permanent detrimental effect on the grievant's employment status. Thus, even if the grievant could demonstrate a nexus between a protected activity and his transfer, this grievance could not qualify for a hearing due to the absence of an adverse employment action.

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 the qualification 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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Claudia T. Farr
Director

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Leigh A. Brabrand
EDR Consultant

[10] During this Department's investigation, the grievant claimed that his vacation days have been affected by his shift change because he is now scheduled to work on days he had off while on the B-Break shift. Moreover, the grievant stated that, because he lives far from his place of employment, it is more convenient to carpool with other employees. He argues that his shift change affected his carpool, and it took him some time to find coworkers on his new shift who live near him. The grievant is now part of a carpool.

[11] *Burlington*, 118 S. Ct. at 2268-69 (citing Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1999) (a transfer to a more inconvenient location is not sufficient)); *see also* Crady v. Liberty National Bank and Trust Co., 993 F.2d 132, 136 (7th Cir. 1993) (an employment action that is merely inconvenient is not an adverse employment action); Sanchez v. Denver Public Schools, 164 F.3d 527, 532 (10th Cir. 1998) (increased commute distance without more is not an adverse employment action).