Issue: Qualification/discrimination, retaliation and misapplication of policy; suspension and lateral transfer; Ruling Date: February 2, 2004; Ruling #2003-108; Agency: Virginia Community College System; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of J. Sargeant Reynolds Community College
Ruling Number 2003-108
February 2, 2004

The grievant has requested a ruling on whether her March 31, 2003 grievance with the J. Sargeant Reynolds Community College (JSRCC) qualifies for a hearing. The grievant claims that beginning in May 2001 with the issuance of a Group III Written Notice, including suspension and lateral transfer to a different job position, management took actions against her (culminating with a March 4, 2003 reorganization of her position and transfer), which established a pattern of discrimination, retaliation, and misapplication of policy. For the reasons set forth below, this grievance is not qualified for hearing.[1]

FACTS

On May 17, 2001, the grievant was issued a Group III Written Notice with five days suspension and transfer for allegedly consuming alcohol during a work activity and for abusing state time in her position as College Safety and Security Manager. On May 31, 2001, she initiated a grievance to challenge the disciplinary action.[2] The grievance was unresolved during the respondent steps and advanced to hearing.[3] In June 2001, the grievant made a call to the State Fraud, Waste, and Abuse Hotline to report violations of state policy involving construction of a work center.

In a decision rendered on August 7, 2001, the hearing officer removed the grievant's disciplinary action and restored her to her former position. The hearing officer, however, did not find evidence to support the grievant's claim of retaliation by the agency and her co-workers. Nor were there any findings of fact in the hearing officer's decision to support the grievant's claim of discrimination, sexual/racial hostile work environment, or misapplication of policies and procedures.

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[1] While this ruling does not expressly address every point raised by the grievant, all have been carefully considered by this Department.

[2] Specifically, the grievant challenged: (1) retaliation by the agency and her co-workers, (2) racial discrimination, (3) misapplication of policies and procedures, (4) agency failure to respond to reports of inappropriate workplace behavior, negative/hostile work environment, and racial and sexual overtones from co-workers, and (5) agency failure to investigate lack of confidentiality issues.

[3] During the second resolution step, the agency reduced the discipline to a Group II Written Notice and rescinded the five-workday suspension. During the third resolution step, the agency upheld the Group II Written Notice but removed the alcohol consumption allegation from the offences.

During the Fall of 2002, the grievant recommended disciplinary action against several of her employees, which was disallowed by school officials. Several months later, in January 2003, the grievant notified school officials that her office had been searched and the mail of an assistant had been opened. Finally, on March 3, 2003, the grievant was informed that her job as the College Safety and Security Manager (Band 4) would be reorganized into two separate operational areas. Effective on March 4, she was reassigned as the College Safety Manager (Band 4).[4]

DISCUSSION

Discrimination Based on Race and Sex

The grievant asserts that starting in January 2002, management's refusal to discipline other employees for inappropriate conduct was discriminatory. Essentially, she claims that she was disciplined more harshly than were other employees who engaged in misconduct.

State policy and federal law prohibit discrimination based on race, color, religion, sex and national origin.[5] To qualify her grievance for a hearing, there must be more than a mere allegation of discrimination—there must be facts that raise a sufficient question as to whether the grievant suffered an adverse employment action as a result of discrimination based on her race and sex. In other words, that because of her race and sex, the she was treated differently than other "similarly-situated" employees. If however, the agency provides a nondiscriminatory business reason for the alleged disparity in treatment, the grievance should not be qualified for hearing, unless there is sufficient evidence that the agency's stated reason is merely a pretext or excuse for improper discrimination.[6]

The grievant is a female Caucasian. As evidence of discrimination, she cites several alleged instances in which she was not allowed to discipline an African-American female, a Hispanic male, and several Caucasian male subordinates for inappropriate conduct. During the cited period, the grievant was employed as the College Safety and Security Manager.

The grievant has presented no evidence that management's actions were based on her gender or race. To the contrary, it appears that management simply wanted to be reasonably certain that any discipline issued by the grievant was appropriate and likely to be upheld if challenged through the grievance process. For example, in July of 2002 the grievant issued an African-American female subordinate a counseling memorandum that was later rescinded by the President of the College after he concluded that there was

[4] The grievant experienced no change in salary as a result of the organizational change.
[5] See DHRM Policy 2.05 and title VII of the Civil Rights Act (29 U.S.C. Section 2003-2003-17).
[6] Hutchinson v. INOVA Health System, Inc., 1998 U. S. Dist. LEXIS 7723 (E.D. Va. 1998)(citing McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973)).

inadequate communication between the grievant and the employee. On December 13, 2002, the grievant issued the same employee a Group II Written Notice that was ultimately rescinded by an administrative hearing officer following an April 7, 2003 grievance hearing.[7] Hence, it would appear that the agency's monitoring of the grievant's intended disciplinary actions was reasonable. This issue is, accordingly, not qualified for hearing.[8]

Retaliation

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[9] Further, complaints relating solely to the methods, means, and personnel by which work activities are to be carried on and the transfer and reassignment of employees within an agency "shall not proceed to hearing"[10] unless there is sufficient evidence of discrimination, retaliation, discipline, or a misapplication or unfair application of policy. In this case, the grievant claims that her March 4, 2003 reassignment from the position of College Safety and Security Manager to College Safety Manager was retaliatory.

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;[11] and (3) a casual 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's stated reason was a mere pretext or excuse for retaliation.[12]

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[7] *See* Hearing Case No. 5672. The hearing officer held that grievant's characterizations regarding the incident in question were "almost vitriolic" and that it appears the "disciplinary action was taken, at least in part, because of a rift between the Security Manager and grievant." Hearing Case No. 5672, pages 6-7. He summarized: "At the very least, it must be concluded that her assessment of the event was not objective." Id. at 7.

[8] It should also be noted, despite the grievant's claims that she had been treated more harshly than similarly situated employees, she has provided no evidence that the employees she had recommended for disciplinary actions had purportedly engaged in the same activity for which she was disciplined: use of alcohol during work hours.

[9] Va. Code § 2.2-3004 (B).

[10] Va. Code § 2.2-3004 (C).

[11] 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 proteted by law.

[12] 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).

Evidence establishing a casual connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[13]

First, the grievant clearly engaged in a protected activity when she initiated her prior grievance. Additionally, her May 2001 reporting of a violation to the State Employee Fraud, Waste and Abuse Hotline constituted the exercise of a protected right.[14] However, it is not clear that grievant suffered an adverse employment action when her responsibilities as security manager were removed. 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.[15] As a matter of law, adverse employment actions include any agency actions that have an adverse effect on the terms, conditions or benefits of one's employment.[16]

As a general rule, reassigning a manager to a position with a more narrow scope and with lesser supervisory responsibility could be viewed, depending on the facts and circumstances, as a blemish on her work record. (In this case, the grievant remained in the same role, pay-band, and suffered no change in pay or benefits.) But even if the reassignment could be viewed as an adverse employment action, the grievant has not presented evidence linking the reassignment to any protected activity. In contrast, the College has advanced a legitimate business reason for its action: the need to place greater emphasis on college-wide security operations and workplace safety, which it believed could best be accomplished by reorganizing these functions into two operational areas.[17] In sum, the grievant has not presented evidence to raise a sufficient question as to whether the College's reorganization of the safety and security functions, resulting in the grievant's her reassignment as safety manager, was motivated by retaliation or that the business reason given was pretextual.

Misapplication of Policy

For a misapplication or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision or whether the challenged action, in its totality, was so unfair

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[13] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 10, 101 S. Ct. 1089 (Title VII discrimination case).
[14] *See* Grievance Procedure Manual, § 4.1(b)(4), page 10.
[15] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[16] 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)).
[17] *See* the President's March 4, 2003 e-mail, Subject: Greater Emphasis on Workplace Safety = Establishment of College Safety Manager Position & Internal Reorganization of College Security Operations. This e-mail outlined the College's plan to divide its safety and security functions into two separate operational areas. In addition to its own assessment of the need for the change, the College points to a 2002 safety audit conducted by the Department of Human Resource Management's Workers' Compensation Division which resulted in a recommendation for greater emphasis on the development of an aggressive workplace/safety program.

as to amount to a disregard of intent of the applicable policy. The grievant claims that the College did not consistently conduct internal investigations of complaints or comply with DHRM Standards of Conduct policy in administering disciplinary action.

Inconsistent Conduct of Internal Investigations

The grievant asserts that despite making multiple reports that her office had been searched and that the mail of her assistant had been opened, the HR Director took no action to conduct an investigation into the matter. In this case, there is no written policy mandating the circumstances under which informal investigations are to be conducted; essentially, this determination is left to the discretion and judgment of the HR Director. In the case cited, the HR Director stated that she made a preliminary inquiry and determined that no additional investigation was warranted. The grievant has provided insufficient facts to show that investigative procedures were inconsistently applied.

Inconsistent Application of Standards of Conduct policy

The grievant claims that the HR Director inconsistently applied Standards of Conduct policy by denying her permission to discipline her employees while approval was granted to other managers.

Under DHRM Standards of Conduct policy, supervisor and/or manager should take corrective action as soon as they become aware of an employee's unsatisfactory behavior or performance, or commission of an offense.[18] The policy further assigns to agency HR Directors the responsibility for viewing all disciplinary actions involving demotion or transfer and disciplinary salary reduction.[19]

Under College Human Resources Procedures Procedure Number HRD-1, the HR Director is required to research supervisor reports of improper conduct and provide a written summary of her findings, with a recommended course of action, to the appropriate Dean for final determination.[20]

In this case, the HR Director states that Procedure HRD-1 is consistently applied to all reports of improper conduct. In the instances cited by the grievant, the HR Director believed that the grievant initially did not provide sufficient information to support her proposed disciplinary actions. However, the HR Director was eventually convinced that disciplinary action was appropriate in at least two of the cited cases and the grievant was permitted to take action under the Standards of Conduct. In sum, the grievant has not

[18] *See* DHRM Policy Number 1.60.(VI)(A), page 8 of 20.
[19] *See* DHRM Policy Number 1.60.VII (E)(1)(a), page 14 of 20.
[20] *See* JSRCC Human Resource Procedure Number: HRD-1, Reports of Improper Conduct, effective 7/10/02.

provided sufficient facts to show that the agency has misapplied or unfairly applied policy.[21] Accordingly, this issue does not qualify for a hearing.

Unwarranted Disciplinary Reassignment

The grievant appears to imply that her reassignment may have been disciplinary in nature.[22] For state employees subject to the Virginia Personnel Act, a reassignment or 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).[23] Applicable statutes and policies recognize management's authority to transfer or reassign an employee for disciplinary and performance purposes as well as to meet other legitimate operational needs of the agency.[24]

For example, when an employee is reassigned as a disciplinary measure, certain policy provisions must be followed.[25] All reassignments and transfers accompanied by a Written Notice automatically qualify for a hearing if challenged through the grievance procedure.[26] In the absence of an accompanying Written Notice, a challenged reassignment qualifies for a hearing only if there is a sufficient question as to whether the reassignment 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.[27] These policy and procedural safeguards are designed to ensure that an involuntary disciplinary reassignment is merited. A hearing cannot be avoided for the sole reason that a Written Notice did not accompany the involuntary reassignment, where there is a sufficient question as to whether the reassignment was an "adverse employment action" and was in effect disciplinary in nature, i.e., taken primarily to correct or punish perceived poor

[21] It is important to note, there is nothing unusual about a HR Director being thoroughly involved with the issuance of disciplinary actions. By reviewing all disciplinary actions issued agency-wide, the HR Department has an extremely broad breadth of experience to draw from when deciding what particular action, if any, should be meted out in a given situation. Moreover, one of the fundament tenants of sound human resource management is that similarly situated employees should be treated in a similar manner. Because the HR Department reviews *all* actions taken under the Standards of Conduct, it is uniquely positioned to ensure that any given infraction is treated in the same manner that the agency has dealt with similar infractions in the past.

[22] As relief the grievant requested that reprimands be issued as applicable, presumably so that she will have an opportunity to challenge the veracity of such reprimands.

[23] Va. Code § 2.2-2900 *et seq.*

[24] Va. Code §§ 2.2-3004 (A) and (C); DHRM Policy No. 3.05, Compensation; DHRM Policy No. 1.60, Standards of Conduct.

[25] DHRM Policy No. 1.60, Standards of Conduct (VII).

[26] Va. Code § 2.2-3004 (A); DHRM Policy No. 1.60, Standards of Conduct (IX); *Grievance Procedure Manual* § 4.1(a), page 10.

[27] 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).

performance.[28] As previously discussed, it is questionable whether the grievant suffered an adverse employment action in this case. However, assuming that she did, the grievant has not provided evidence that the reassignment into her restructured position was disciplinary in nature.

In this case, management asserts that its decision to restructure the grievant's position was based on a non-disciplinary reason: the need to institute an aggressive workplace/safety program. Management simply divided the duties of the division among two individuals and, despite the grievant's presumably decreased scope of responsibility, did not decrease the grievant's pay, lower her pay band, or change her role title. Thus, the agency's actions appear to be more concerned with the former safety and security division as whole, than with the grievant as an individual. Furthermore, the grievant has not produced any evidence that the job structuring was primarily disciplinary in nature.

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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Claudia T. Farr
Director

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June M. Foy
EDR Consultant, Sr.

[28] 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.