Issue: Qualification/Methods/Means/Transfer; Ruling date: November 21, 2003; Ruling #2003-127; 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. 2003-127
November 21, 2003

The grievant has requested a ruling on whether his March 4, 2003 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that (1) DOC arbitrarily and capriciously transferred him, (2) his request for the lateral transfer was made under duress and out of a fear of future retaliation, (3) management retaliated against him, (4) he suffered harassment when he was continuously investigated as a result of claims against the former Warden and himself, and (5) management shared personnel information about the grievant with a former DOC employee. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant was an Internal Investigator with DOC until his lateral transfer to Training Sergeant on February 25, 2003. In November 2002, the former Warden of the grievant's facility suggested to the grievant that he should consider a lateral transfer to avoid a potential layoff in the future. On November 5, 2002, the grievant submitted a letter to the former Warden, formally requesting a transfer from Institutional Investigator to Training Sergeant. Upon further reflection, the grievant decided that he wished to remain in the Investigator position and told the former Warden that he wished to withdraw his request for a lateral transfer.[1] The grievant claims that the Warden agreed to rescind the request. On February 18, 2003, the Regional Director approved the grievant's November 5, 2002 request for a lateral transfer to Training Sergeant. The transfer took effect on February 25, 2003.

Also on February 25, the grievant received a telephone call at work from a former employee.[2] The former employee indicated that he had tape-recorded conversations in which DOC management discussed the grievant's future (or lack thereof) with the agency. The grievant declined to listen to the former employee's tapes.

---

[1] The grievant claims that his initial decision to request a lateral transfer was a "rash" one. He claims that the request was made under duress because he was concerned about the potential for layoff and because he feared retaliation by upper management. The grievant also claimed that harassment by a former co-worker played a part in his initial decision to request a transfer.

[2] This employee had been terminated from DOC as a result of an investigation by the grievant. The former employee was upset with the grievant for the role he played in his termination.

The grievant expressed concern to the agency about the stability of this former employee. In addition to the phone conversation described above, the grievant stated that the former employee has driven by his home on several occasions, stopping once.[3] The grievant further claims that the former employee has posted messages about the grievant on an Internet Website and in April 2003, sent him an email with the subject line "Don't Leave Town, [Grievant]."[4] During this Department's investigation, the grievant stated that the former employee's conduct caused him to fear for his safety. As a result, the grievant secured a "No Stalking" Order from the local Commonwealth's Attorney's office.[5]

The grievant filed a grievance on March 4, 2003 challenging his lateral transfer, claiming that it was arbitrary and capricious and that he requested the transfer under duress and out of a fear of retaliation. He also claims that he was subjected to harassment based on the conduct of the former DOC employee and because of multiple calls to the Fraud, Waste, and Abuse Hotline. Finally, the grievant asserts that DOC management shared personnel information about him with the former employee, in violation of state policy.

DISCUSSION

Transfer

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.[6] 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 lateral transfer was (1) requested under duress because of fear of future retaliation, (2) arbitrary and capricious because management ignored his request to rescind his request for a transfer, and (3) an act of retaliation for his investigations into DOC personnel.

The General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."[7] Moreover, claims of retaliation

[3] The former employee stopped at the grievant's house on December 18, 2002 around 11:00 p.m. The grievant claims that the former employee was intoxicated and threatened the grievant.
[4] The email contained the grievant's audio testimony from the former employee's grievance hearing. The grievant notified a DOC Investigator immediately after receiving the message.
[5] The grievant noted during this Department's investigation that since obtaining the "No Stalking" Order, the former employee has stopped driving by his home, but that the emails and phone calls have continued.
[6] *See* Va. Code § 2.2-3004 (B) & (C); DHRM Policy No. 1.01 (rev. 12/16/99).
[7] Va. Code § 2.2-3004(A).

require that the grievant suffer an adverse employment action.[8] The threshold question then becomes whether or not the grievant has suffered an adverse employment action. 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."[9]

A lateral transfer may constitute an adverse employment action if, but only if, the transfer results in an adverse effect *on the terms, conditions, or benefits* of one's employment.[10] During this Department's investigation, the grievant reported that both positions are considered "security" positions, but that the Investigator position is more prestigious and involves decision-making at the administrative level while the Trainer position is more physically demanding. However, there is no evidence that the grievant's transfer to another position resulted in a substantive effect on his employment. Regardless of the grievant's perception of the two positions, there was no change in the grievant's level of responsibility, compensation, benefits, or opportunity for promotion. Therefore, although the lateral transfer may be disappointing to the grievant, it cannot be viewed by any reasonable fact finder as an adverse employment action because it had no significant detrimental effect on the grievant's employment status. Thus, the issues surrounding the grievant's transfer cannot qualify for a hearing due to the absence of an adverse employment action.

Harassment

The grievant also claims that because of several claims to the Commonwealth's Fraud, Waste, and Abuse Hotline, he was continually investigated or called as a witness in investigations against other employees. The grievant claims that these nonstop investigations constitute harassment. As further evidence of harassment and intimidation, the grievant asserts that the former employee responsible for the Hotline calls also repeatedly drove past the grievant's home, made phone calls to the grievant at work and at home, sent the grievant threatening emails, and posted comments about the grievant on an Internet Web site.

Hotline Calls

A claim of workplace harassment qualifies for a grievance hearing only if an employee presents evidence raising a sufficient question as to whether the challenged

[8] Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656 (4th Cir. 1998) (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. (emphasis added)).
[9] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[10] 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)).

actions are based on race, color, religion, political affiliation, age, disability, national origin, or sex.[11] The grievant does not assert, however, that the alleged harassment was based on any of these factors. Rather, his claim essentially describes an ongoing, troubling conflict between the grievant and a former co-worker and the co-worker's allegedly frivolous calls to the Commonwealth's Fraud, Waste, and Abuse Hotline. Such claims of workplace conflict are not among the issues identified by the General Assembly that may qualify for a grievance hearing.[12]

Threatening Behavior of Former Co-Worker

Under DHRM's Workplace Violence Policy, agencies are expected to create and maintain a workplace designed to prevent or deter workplace violence.[13] DHRM Policy 1.80 expressly requires that agencies must protect victims of workplace violence and those who report acts of violence.[14] Workplace violence includes "any physical assault, *threatening behavior* or verbal abuse occurring in the workplace by employees *or third parties* . . . such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing."[15] Prohibited conduct includes "engaging in behavior that subjects another individual to extreme emotional distress."[16] Federal and state laws also require employers to provide safe workplaces.[17] Thus, an act or omission by an employer resulting in actual or threatened workplace violence against an employee, or an unreasonably unsafe work environment for that employee, can reasonably be viewed as having an adverse effect on the terms, conditions, or benefits of his employment.[18]

---

[11] Va. Code § 2.2-3004 (A)(iii). *See also* Department of Human Resource Management (DHRM) Policy 2.30, which defines workplace harassment as conduct that "denigrates or shows hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status or pregnancy."

[12] Moreover, pursuant to Executive Order 24 (02), the State Internal Auditor "shall ensure that investigation and resolution activities are undertaken in response to allegations received through the Hotline." Executive Order 24 (02) (rescinding Executive Order 13 (98)). *See also* http://www.doa.state.va.us/ procedures/DSIA/Fraud_and_Abuse_Hotline.htm <last visited 9-09-03>. Therefore, while the grievant found the continuous investigations to be burdensome, they cannot be imputed to the agency as "harassment" because the State Internal Auditor had a duty to thoroughly investigate the claims reported to the Hotline by the former co-worker.

[13] DHRM Policy 1.80, page 2 of 3.

[14] DHRM Policy 1.80, pages 2-3 of 3.

[15] DHRM Policy 1.80, page 1 of 3 (emphasis added).

[16] DHRM Policy 1.80, page 1 of 3.

[17] Under the Occupational Safety and Health Act of 1970 (OSHA), an employer must establish "place[s] of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 654(a)(1).

[18] *See* Patrolman's Benevolent Association of the City of New York, Inc. v. the City of New York, 310 F.3d 43 (2nd Cir. 2002). A police officer's transfer to a position where the officer no longer worked in his area of expertise (domestic violence) coupled with his fear for personal safety because the level of mistrust among the other officers in the precinct entitled jury to conclude, "if it so chose, that the transfer had a sufficiently material negative impact on the terms and conditions of [the officer's] employment with the NYPD to constitute an adverse employment action." 310 F.3d. at 51-52. *See also* Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742 (7th Cir. 2002), describing a "materially adverse employment action" or

In this case, the grievant claims that his safety has been compromised by a former DOC employee. DOC claims that the alleged stalking and threatening behavior described by the grievant occurred outside of the workplace and that it can only prevent violence in the workplace. Moreover, DOC reported that the former employee is prohibited from entering the institution.[19] During this Department's investigation, DHRM, the agency charged with implementation and interpretation of the Commonwealth's personnel policies, stated that the Commonwealth's Workplace Violence Policy only extends to threatening behavior *in the workplace*. Therefore, DOC's duty under state policy to protect the grievant from the former employee is limited to protecting the grievant in his place of employment only. It appears that the agency has fulfilled its responsibility under policy in refusing to allow the former employee on DOC premises. DHRM further noted that if the grievant is being stalked or harassed by a former employee, he should seek a restraining order from the local sheriff's office. The grievant reported during this Department's investigation that he has already taken these steps. However, the grievant has failed to provide sufficient evidence that DOC has contravened the state's workplace violence policy by failing to protect his safety in the workplace. Accordingly, this issue does not qualify for a hearing.

Personnel Information

The grievant further claims that DOC management discussed information about him to a former employee. The former employee claims to have tape-recorded the conversations, although the grievant has not heard the tapes. Based on information given to the grievant by the former employee, the grievant alleges that those conversations concerned the grievant's future employment with DOC.

The applicable policy is Department of Human Resources Management (DHRM) Policy 6.05, "Personnel Records Disclosure,"[20] which provides that "personal information may not be disclosed to third parties without the written consent of the subject employee."[21] "Personal information" expressly includes employment records, such as an employee's performance evaluations, job applications, or grievance

---

"tangible employment action" as including the circumstance where "the employee is not moved to a different job or the skill requirements of his present job altered, but the conditions in which he works are changed in a way that subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment . . . ." 315 F.3d at 744.

[19] *See* Memorandum from Warden, dated June 14, 2003.

[20] *See* DHRM Policy 6.05, "Personnel Records Disclosure."

[21] DHRM Policy No. 6.05, page 2 of 9. However, some individuals/agencies may have access to employee records without the consent of the subject employee. These individuals/agencies include: (1) "[t]he employee's supervisor and, with justification, higher level managers in the employee's supervisory chain."; (2) "[t]he employee's agency head or designee and agency human resource employees, as necessary."; and (3) "[s]pecific private entities which provide services to state agencies through contractual agreements (such as health benefits, life insurance, Workers' Compensation, etc.) in order to provide such services." DHRM Policy 6.05, page 3 of 9.

records.[22] Here, however, the grievant has not presented any evidence that DOC revealed any personal information about the grievant, as defined by state policy, to a third party. Rather, during this Department's investigation, he acknowledged that he is not aware of any specific information given to the former employee, since he did hear the former employees' tape recordings; he claims only that his employment was discussed generally. DHRM Policy 6.05 prohibits agencies from disclosing *specific* information about an individual's employment, but does expressly prohibit an agency from discussing *general* information about an employee. Moreover, a mere allegation of misapplication of policy, without more, is not appropriate for adjudication by a hearing officer. Without specific examples, there is insufficient evidence that management improperly revealed personal information about the grievant to a third party.[23] As such, this issue 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 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.

_____
Claudia T. Farr
Director

_____
Leigh A. Brabrand
EDR Consultant

[22] *See* DHRM Policy No. 6.05, page 2 of 9. Other personal information may include medical records, payroll deduction information, criminal records, Workers' Compensation or Unemployment Compensation records, letters of recommendation, or information relating to an employee's race, sex, age, address, telephone number, marital status, dependents, insurance, or social security number. *Id*. at pages 2 and 3.

[23] It should be noted that during the course of this Department's investigation, the individual in possession of the tape recordings stated that the Agency did not discuss or otherwise disclose any personal information regarding the grievant.