

Issue: Qualification/grievant claims that support person was transferred in retaliation for grievant's reports of patient abuse; Ruling Date: March 25, 2004; Ruling #2003-176;
Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
And Substance Abuse Services
Ruling Number 2003-176
March 25, 2004

The grievant has requested a qualification ruling on whether his May 7, 2003 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Service (DMHMRSAS or the agency), qualifies for hearing. The grievant claims that the staffing support person in his unit (Unit A) was transferred to another unit (Unit B) in retaliation for the grievant's reports of potential patient abuse. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

Prior to his resignation, the grievant was employed as an RN Coordinator for a Forensic Nursing Program within DMHMRSAS. In April of 2003, the grievant contacted the Patient Advocate Office and reported a possible patient abuse situation in Unit A. By memoranda dated April 11th and 25th, the grievant was notified by management that his method of identifying and solving problematic patient care issues was inappropriate. Subsequently, in a meeting with his supervisor on April 30, 2003, the grievant was informed that the staffing support person in the grievant's unit (Unit A) was being transferred to Unit B.

The grievant's May 7, 2003 grievance alleges retaliation. As relief, the grievant seeks: 1) rescission of the transfer of the staffing support person; 2) separation of the forensic nursing program from the traditional nursing hierarchy; and 3) that the RN Coordinator for forensic nursing report directly to the Unit Medical Director. During the management resolution steps, the grievant resigned from his position with DMHMRSAS. The staffing support person has resigned from her position with DMHMRSAS as well.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.¹ Further,

¹ Va. Code § 2.2-3004(B).

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”² unless there is sufficient evidence of discrimination, retaliation, discipline, or a misapplication or unfair application of policy. In this case, the grievant alleges that the primary support person in his unit (Unit A) was reassigned to another unit (Unit B) in retaliation for the grievant’s reports of potential patient abuse.

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.³ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency’s explanation was pretextual.⁴

In this case, assuming for purposes of this ruling only that the grievant had engaged in a protected activity by notifying the Patient Advocate Office of the potential for patient abuse, the grievant has not yet suffered an adverse employment action.⁵ The grievant asserts that the transfer of the staffing support person will damage the forensic nursing program’s progress and adversely affect him by requiring him to take on excessive additional duties. However, an adverse employment action must effect one’s employment⁶ and cannot be prospective in nature. In other words, a grievance cannot be qualified on the basis that the grievant *will* suffer a future adverse employment action as a result of the agency’s actions (as the grievant has alleged here); rather, the grievance must show that the grievant *has* suffered an adverse employment action. Accordingly, this grievance does not qualify for hearing.

Moreover, there are some instances where qualification may be inappropriate based upon the circumstances of the case. For example, during the resolution steps, an

² Va. Code § 2.2-3004(C).

³ 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).

⁴ See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

⁵ 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.” *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

⁶ See *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) (As a matter of law, adverse employment actions include any agency action that results in an adverse effect on the terms, conditions, or benefits of one’s employment)).

issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate where the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available. In this case, it appears that there is no effectual relief that a hearing officer could order in this grievance. The *Grievance Procedure Manual* expressly states that “hiring, promotion, transfer, assignment or retention of any employee” and “directing the methods, means or personnel by which work activities are to be carried out” cannot be granted as relief.⁷ Accordingly, a hearing officer would not be able to order the agency to transfer the staff support person back to Unit A or to hire the grievant back and have him report directly to the Unit Medical Director. Finally, the grievance record reflects that both the grievant and the staffing support person have resigned, so any further relief or recommendations are moot.

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

⁷ *Grievance Procedure Manual* §5.9(b), pages 15-16.