

Issue: Qualification/grievant claims agency retaliated against him and misapplied state policy when it significantly reduced responsibilities; compliance/consolidation of grievances for purposes of hearing; Ruling Date: February 3, 2004; Ruling #2003-474, 2004-569; Agency: Department of Alcoholic Beverage Control; Outcome: qualified and consolidated for purposes of hearing



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Alcoholic Beverage Control/ No. 2003-474, 2004-569  
February 3, 2004

The grievant has requested a ruling on whether his September 22, 2003 grievance (Grievance 1) with the Department of Alcoholic Beverage Control (ABC) qualifies for a hearing. The grievant claims that the agency retaliated against him and misapplied state policy when it significantly reduced his responsibilities. For the following reasons, this grievance qualifies for a hearing. Moreover, this grievance is consolidated with the grievant's November 18, 2003 grievance (Grievance 2).

FACTS

The grievant is the Deputy Director of ABC's Bureau of Law Enforcement.<sup>1</sup> Prior to September 9, 2003, the grievant's responsibilities included command of ABC's eight regional offices.<sup>2</sup>

Beginning in July 2003, the grievant participated on a committee established to evaluate the possibility of a merger of the Bureau of Law Enforcement with the Virginia Department of State Police (VSP). On August 12, 2003, the committee majority recommended that all ABC special agents merge with VSP. ABC management claims that this recommendation contradicted the task assigned to the committee, which was "to divide administrative tasks from criminal law enforcement and determine the resources necessary for ABC to perform the administrative tasks and VSP to perform the law enforcement tasks."<sup>3</sup>

The agency determined that the grievant's role on the committee and its recommendation report warranted informal supervisory counseling and issued a

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<sup>1</sup> The Bureau of Law Enforcement "is charged with enforcing the alcoholic beverage control laws and regulations in the Commonwealth of Virginia." The Bureau employs over 100 special agents statewide. See <http://www.abc.state.va.us/enforce/enforce.htm> <last visited January 23, 2004>.

<sup>2</sup> The Bureau's law enforcement operations are divided into eight geographical territories. See <http://www.abc.state.va.us/enforce/offices.htm> <last visited January 22, 2003>.

<sup>3</sup> See email from Chief Operating Officer to Special Agency in Charge, dated August 13, 2003.

counseling memorandum on September 9, 2003.<sup>4</sup> In addition to the counseling memorandum, the Director of the Bureau of Law Enforcement removed the grievant's responsibility for field operations, citing the grievant's alleged failure to follow supervisor's instructions.<sup>5</sup> The grievant claims that prior to the counseling and removal of responsibilities, he "was in command of over 100 sworn special agents and supervisors statewide . . . [but is] now managing two support sections with 16 civilians."<sup>6</sup> The grievant filed Grievance 1, claiming that the agency's action (1) was disciplinary in nature but unaccompanied by a Written Notice, as required by policy, (2) was in retaliation for his exercise of his right to freedom of speech, and (3) improperly documented in his personnel file.

On November 18, 2003, the grievant filed Grievance 2, challenging comments included in his 2002-2003 annual performance evaluation. Specifically, the grievant claims that references to his committee participation and alleged failure to follow supervisor's instructions (the subject of Grievance 1) were arbitrary and capricious. The agency qualified Grievance 2 for hearing and ABC requested the appointment of a hearing officer on January 8, 2004. The grievant has requested that Grievances 1 and 2 be consolidated for hearing.

### DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.<sup>7</sup> Therefore, claims relating to issues such as informal counseling generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied. In addition, a grievance challenging management's assignment of duties does not qualify for a hearing unless there is evidence raising a sufficient question as to whether discrimination, retaliation, or a misapplication of policy has occurred.<sup>8</sup> Here, the grievant claims that the counseling memorandum with removal of responsibility for the regional offices was a misapplication of policy and an act of retaliation.

#### *Misapplication of Policy/Disciplinary Removal of Duties*

When an employee's duties are significantly altered as a disciplinary measure, certain policy provisions must be followed.<sup>9</sup> All formal disciplinary actions (Written

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<sup>4</sup> See Counseling Memorandum to the Grievant from the Director, "Reorganization," dated September 9, 2003. The agency stated that, because of the grievant's role of authority on the committee, he was responsible for the alleged insubordination.

<sup>5</sup> *Id.*

<sup>6</sup> Grievance Form A "Issues" Attachment, dated September 22, 2003.

<sup>7</sup> Va. Code § 2.2-3004(B).

<sup>8</sup> *Grievance Procedure Manual* § 4.1 (b) and (c), pages 10-11.

<sup>9</sup> DHRM Policy 1.60 (VII).

Notices) automatically qualify for a hearing if challenged through the grievance procedure.<sup>10</sup> In the absence of an accompanying Written Notice, a challenged reassignment of duties 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.<sup>11</sup> A hearing cannot be avoided for the sole reason that a Written Notice did not accompany the removal of responsibilities, where there is a sufficient question as to whether the transfer was an “adverse employment action” and was in effect disciplinary in nature, i.e., taken primarily to correct or punish perceived poor performance.<sup>12</sup> The issues of whether the removal of the grievant’s duties constituted an adverse employment action and was disciplinary in nature are discussed below.

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.”<sup>13</sup> 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.<sup>14</sup> Thus, a reassignment of duties may constitute an adverse employment action if a grievant can show that it had some significant detrimental effect on the terms, conditions, or benefits of his employment.<sup>15</sup>

Prior to his September 9 counseling memorandum, the grievant was responsible for the eight field regions. The grievant claims that removal from command of the field operations could ultimately result in demotion and/or reduction in salary. While the grievant has suffered no loss of pay or position title, it appears that he has experienced a significant decrease in his level of responsibility, which could have an affect on his promotional opportunities. Therefore, because ABC’s action (taking away command functions that the grievant had been performing) could be found to have some significant detrimental effect on the grievant’s level of responsibility or opportunity for promotion, this grievance raises a sufficient question as to whether the grievant has suffered an adverse employment action.

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<sup>10</sup> Va. Code § 2.2-3004(A) and (C); DHRM Policy 1.60 (IX); *Grievance Procedure Manual* § 4.1(a), page 10.

<sup>11</sup> 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).

<sup>12</sup> Likewise, the policy and procedural safeguards in DHRM’s Policy 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 1.40.

<sup>13</sup> *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

<sup>14</sup> *Von Gunten v. Maryland Department of the Environment*, 243 F.3d 858, 866 (4<sup>th</sup> Cir 2001)(citing *Munday v. Waste Management of North America, Inc.*, 126 F.3d 239, 243 (4<sup>th</sup> Cir. 1997)).

<sup>15</sup> *Boone v. Goldin*, 178 F.3d 253 (4<sup>th</sup> Cir. 1999).

Disciplinary Basis: In this case, it is undisputed that the reassignment of the grievant's duties was to address perceived performance problems, and thus, could be viewed as disciplinary. The counseling memorandum states that the decision to reorganize the grievant's responsibilities was "made necessary by [grievant's] recent refusal to follow supervisors' instructions."<sup>16</sup> Moreover, the grievant's second-step respondent stated that the removal of responsibility for field operations was the result of the grievant's "defiance of authority and refusal to perform the work assigned."<sup>17</sup> The second-step respondent further noted that the grievant's actions could have resulted in the issuance of a Group III Written Notice with termination.<sup>18</sup> However, the removal of responsibilities was not accompanied by a Written Notice.

It must be noted that a grievance that relates solely to informal supervisory actions, such as counseling memoranda, does not qualify for a hearing. While counseling memoranda generally do not qualify for hearing because they do not, by themselves, constitute "adverse employment actions," here the memorandum was accompanied by an adverse employment action – the reassignment of several of the grievant's responsibilities. Moreover, there is evidence that the Standards of Conduct may have been misapplied: the counseling memorandum and accompanying reassignment may have been disciplinary in nature.

Further, in this case, where a grievance challenging the 2002-2003 annual performance evaluation (Grievance 2) has already been qualified for hearing, it makes sense to consolidate it with this grievance (Grievance 1), which is challenging the events giving rise to comments in the performance evaluation to ensure a full exploration of what could be interrelated facts and issues. Therefore, these two grievances are consolidated for hearing purposes and will be heard before a single hearing officer at a single hearing.<sup>19</sup>

#### *Additional Theories for Removal of Grievant's Duties*

The grievant has advanced an alternative theory related to the agency's decision to remove his responsibility for field operations – retaliation for exercising his right to freedom of speech under the First Amendment to the U.S. Constitution. The grievant further claims that the agency improperly included the informal written counseling memorandum in his personnel file. Because the issue of misapplication of policy qualifies for a hearing, this Department deems it appropriate to send these ancillary issues

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<sup>16</sup> Counseling Memorandum to Grievant from Director, "Reorganization," dated September 9, 2003.

<sup>17</sup> Second Step Response, dated October 20, 2003.

<sup>18</sup> *Id.*

<sup>19</sup> EDR strongly favors consolidation and will grant consolidation for hearing when two or more grievances are each at the hearing stage, and involve the same parties, legal issues, policies, and/or factual background, unless consolidation would be impracticable. Grievance Procedure Manual 8.5, page 22. *Cf.* EDR Rulings Nos. 2003-494, 2003-050.

for adjudication by a hearing officer as well, to help assure a full exploration of what could be interrelated facts and claims.

### CONCLUSION

For the reasons discussed above, this Department qualifies Grievance 1 for a hearing and consolidates this grievance with Grievance 2. This qualification ruling in no way determines that the agency's decision to restructure the grievant's responsibilities was disciplinary or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

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