Issue: Qualification/misapplication of training policy; Ruling Date: March 16, 2004; Ruling #2003-503; 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
Ruling Number 2003-503
March 16, 2004

The grievant has requested a ruling on whether his April 30, 2003 grievance with the Virginia Department of Corrections (DOC or the agency) qualifies for a hearing. The grievances allege that DOC (1) retaliated against him for prior grievance activity; (2) misapplied or unfairly applied policy; and (3) subjected him to supervisory conflict.[1] For the following reasons, this grievance does not qualify for hearing.

### FACTS

The grievant is employed by DOC as a Corrections Sergeant. On April 4, 2002, the grievant initiated a grievance challenging certain actions of his co-workers. According to the grievant, after the Superintendent assured him the issues raised in the grievance would be handled, the grievant concluded his grievance in May of 2002. Dissatisfied with what he views as a lack of action by the Superintendent concerning the incidents raised in his April 2002 grievance and numerous subsequent incidents, the grievant initiated another grievance on April 30, 2003. The grievant claims management (i) retaliated against him for prior grievance activity; (ii) misapplied and/or unfairly applied policy; and (iii) subjected him to supervisory conflict.

In support of these claims, the grievant asserts management denied his request to attend General Instructor training in April, but granted the requests of other employees. Additionally, he states an inmate was transferred from the facility because the inmate was providing him with information.[2] Furthermore, he notes the Superintendent's failure to

[1] In his grievance, the grievant states the alleged actions of the Superintendent and the grievant's co-workers create a "hostile work environment." However, during this Department's investigation for a compliance ruling concerning this same grievance, the grievant indicated the term "hostile work environment" did not refer to any form of unlawful discrimination. In this case, the grievant used the term to describe actions that are more accurately described as supervisory conflict. Therefore, the alleged acts will be addressed as such in this ruling.

[2] The grievant asserts he was falsely accused of an incident at the facility and an inmate had viewed the incident and provided a statement to management supporting the grievant's position.

arrange for the grievant to meet with the Regional Director**.** Also, the grievant disputes where and with whom the Superintendent chooses to eat lunch, asserting the Superintendent lunches on a daily basis with a group of favored employees.

As background evidence in support of his claims,[3] the grievant notes other training sessions he purportedly was not permitted to attend in 2003. Furthermore, he notes policies the Superintendent has allegedly failed to follow and instances where management has failed to discipline certain "favored" employees, while he states he has been unfairly reprimanded.

In response to the grievant's claims, the Superintendent states he denied the grievant's request to attend General Instructor's training because he had already granted the requests of two other employees.[4] Also, a Sergeant was already trained and serving in that capacity, which alleviated the need for the grievant to be trained.[5] Moreover, the Superintendent indicates that agency policy grants him the authority to identify and satisfy organizational training needs as he deems appropriate.

With respect to the transfer of the inmate, management denies a correlation between his transfer and allegations that the inmate was supplying the grievant with information, citing no knowledge of any such communications between the grievant and the inmate. The Superintendent also maintains that the inmate's return to the general population and his transfer from the facility were necessary to facilitate the inmate's medical needs.[6]

Furthermore, the Superintendent states that his luncheons with employees do not violate agency policy or demonstrate favoritism. He acknowledges that on occasion he eats lunch at the Maintenance Shop because it is located close to his office, but indicates

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[3] Upon receipt of the grievance, the first step respondent administratively closed the April 30 grievance for non-compliance with the grievance procedure, stating that none of the incidents cited by the grievant occurred within 30 calendar days of its initiation. The grievant requested a ruling from this Department. We determined certain of the grievant's claims to be timely and, thus, these claims could proceed through the grievance process as claims for which relief could be granted. However, we also held that those claims deemed untimely (events which occurred outside the 30 calendar day period) could be used as background evidence to support his timely claims. *See* National Railroad Passenger Corporation v. Morgan, 122 S.Ct. 2061, 2072 (2002)(holding that prior discrete acts can be used as background evidence in support of a timely claim).

[4] During the investigation for this ruling, the Superintendent explained that one of the employees sent to the General Instructor training course was the American Correctional Association Manager, who required the training in order to be able to train others. Also, the grievant indicates he has no evidence that would contradict the Superintendent's claim that the other employees requested this training class prior to the grievant's request.

[5] During this Department's investigation, management provided a memorandum from the Watch Commander to the Superintendent dated October 10, 2003, which advised the Superintendent that the grievant's requests to attend training sessions to become a trainer have been denied because, at this time, the grievant is more valuable to the institution as a Building Supervisor.

[6] During the investigation for this ruling, the Superintendent provided information to the investigating consultant which confirmed DOC's position that the inmate's transfer was predicated upon medical need.

that employees do not receive advance notice and are there of their own accord. Also, the Superintendent denies the grievant's claims that he has failed to discipline certain employees because of their "favored" status, but he will not discuss that issue with the grievant because to do so would violate personnel policy. Finally, the Superintendent asserts his workplace decisions have not been based upon any retaliatory intent against the grievant, but are predicated upon the needs of the institution.

## DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[7] Thus, all claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out 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 the process, or whether policy may have been misapplied or unfairly applied.[8] In this case, the grievant claims misapplication or unfair application of policy, retaliation and supervisory conflict.

### Misapplication of Policy

For an allegation of misapplication of policy 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 as to amount to a disregard of the intent of the applicable policy.

#### *Training*

The grievant asserts the Superintendent should have granted his request to attend General Instructor training because other employees were permitted to attend. The applicable policy is DHRM Policy 5.05, Employee Training and Development. This policy states that "[a]gencies shall provide, within reasonable resources, employee training necessary to assist the agency in achieving its mission and accomplishing its goals."[9] There is no mandate in this policy, however, to provide employees with the training they request. Thus, it cannot be concluded that the agency misapplied or unfairly applied policy by not providing this training opportunity to the grievant. DOC correctly states that the decision to send employees to training is within management's discretion. In this case, management considered the grievant's request, but determined that the General Instructor training was more suitable for other facility employees. Therefore, management's decision appears to be based on perceived agency needs. Thus, this issue does not qualify for hearing.

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[7] Va. Code § 2.2-3004(B).
[8] Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1, pages 10-11.
[9] DHRM Policy No. 5.05 III.A, effective 9/16/93, page 2 of 5.

*Favoritism*

The grievant's claim of favoritism can best be described as a claim that management misapplied or unfairly applied the Commonwealth's general policy that personnel actions be "based on merit principles and objective methods" of decision-making.[10] Here, the grievant asserts the Superintendent shows favoritism to certain employees by granting their training requests and joining them for lunch.

Management has broad authority to exercise its business judgment, as it deems best for agency operations.[11] This includes the right to determine which employees are best suited for specific training opportunities. While management's decision may have appeared to be more favorable to other employees, the grievant has provided no evidence that the decision was made based upon anything other than the Superintendent's exercise of business judgment. Nor has the grievant presented evidence that management's action violated any policy.

Additionally, no policy prescribes where or with whom the Superintendent may eat lunch. Although the grievant disagrees with the Superintendent's eating in the Maintenance Shop with other employees, the evidence presented by the grievant fails to show the Superintendent is engaging in improper favoritism in so doing. During this Department's investigation, the Superintendent indicated he occasionally has lunch in the Maintenance Shop because it is located close to his office and has a kitchen area. However, the Superintendent states he does not invite specific employees to lunch. Nor does he advise anyone when he will be eating in the Maintenance Shop. The grievant has not provided any evidence to the contrary. Therefore, this issue does not qualify for hearing.

Retaliation

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;[12] (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's stated reason was a mere pretext or excuse for

[10] Va. Code § 2.2-2900.
[11] *See* Va. Code § 2.2-3004(B).
[12] *See Grievance Procedure Manual* §4.1(b)(4), page 10. 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 Congress or the General Assembly, reporting a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law."

retaliation.[13] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[14]

It is undisputed that the grievant has engaged in the protected activity of participating in the grievance procedure. Assuming for purposes of this ruling only that the grievant suffered an adverse employment action when management denied his training request,[15] his retaliation claims fails for lack of a causal link between the protected activity and the alleged retaliatory act.

The record shows that the prior grievance activity concluded in May of 2002. Thus, there is no close proximity in time between the conclusion of the grievance and the Superintendent's denial of the grievant's training request, which was almost a year later in 2003.[16] Furthermore, the agency has offered a legitimate business reason for the denial of the training -- it was not necessary for the grievant to receive the training to assist the agency in achieving its mission or accomplishing its goals. In this case, two other employees were granted permission to attend the training prior to the grievant's request and a third employee, a Sergeant, is already trained. Thus, management does not need the grievant to receive this training course. Moreover, as discussed above, the Superintendent has discretion to determine the training needs of the facility and his decision did not violate a mandatory policy provision. Additionally, the grievant offers no evidence that management's stated business reason for its actions was only a pretext for retaliation for his previous use of the grievance procedure. Accordingly, this issue does not qualify for hearing.

Supervisory conflict

The facts cited in support of the grievant's claim can best be summarized as describing significant conflict between the grievant and management concerning management's decisions and actions. Such claims of supervisory conflict, while grievable through the management resolution steps, are not among the issues identified by the

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[13] *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).

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

[15] 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). 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. 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)). In this case, the only potential adverse employment action cited by the grievant in support of his retaliation claim is the denial of training. As a matter of law, the Superintendent's alleged (i) transfer of an inmate, (ii) failure to schedule a meeting with the Regional Director, and (iii) luncheons with certain employees are not adverse employment actions because they do not impact the terms or conditions of the grievant's employment.

[16] Since the initiation of his grievance on April 30, 2003, the grievant has filed additional grievances against DOC, but they are not at issue here because they are not "prior" grievance activity.

General Assembly that may qualify for a hearing. Accordingly, this issue does not qualify for a hearing.

In closing, the grievance record reflects a significant level of conflict between the grievant and management. We wish to note that mediation through his agency or through EDR may be a viable option to pursue. EDR's mediation program is a voluntary and confidential process in which two mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work units involved.

## 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, he 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 notifies the agency that he does not wish to proceed.

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Claudia T. Farr
Director

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Susan L. Curtis
EDR Consultant