Issue: Qualification/grievant challenges transfer as disciplinary; Ruling Date: March 8, 2004; Ruling #2003-512; Agency: Department of State Police; Outcome: qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of State Police
Ruling Number 2003-512
March 8, 2004

The grievant has requested a ruling on whether his November 6, 2003 grievance with the Department of State Police (VSP) qualifies for a hearing. In his grievance, the grievant challenges his transfer as disciplinary. For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

The grievant is employed as a State Police Sergeant. On October 16, 2003, he was issued a Group I Written Notice for disruptive behavior.[1] On October 29, 2003, he was issued an order transferring him from Area 33, his post in the Tidewater area, to State Police Headquarters in Richmond, effective November 10, 2003. The transfer did not result in a loss of pay or benefits, or in a demotion. However, as a result of his transfer, the grievant was required to relocate his home from Tidewater to Richmond. Moreover, his prior work schedule (rotating between a 7:00 a.m. to 3:00 p.m. shift and a 12:00 p.m. to 8:00 p.m. shift) was changed and he now rotates between three shifts (6:00 a.m. to 2:30 p.m.; 2:30 p.m. to 10:30 p.m.; and 10:30 p.m. to 6:00 a.m.).

The grievant claims that the transfer creates an unwarranted hardship arising from his having to (1) sell his home in Tidewater and relocate to the Richmond area; (2) remove his son from a private high school where he is on full scholarship; (3) enroll his son in a different school (and because his son's school has not administered the Standards of Learning examination, he may be required to repeat the eleventh grade upon transferring to a new school); (4) work a rotating shift which makes it more difficult for him, as a single parent, to fulfill his parental responsibilities and spend time with his son.

On November 6, 2003, he initiated a grievance challenging both the Group I Written Notice and his transfer. As relief, he sought removal of the Written Notice and rescission of the transfer. The agency head qualified the Written Notice but denied qualification of the transfer issue. The grievant subsequently requested that the Director of this Department qualify the issue of his transfer for hearing.

[1] The grievant does not deny that he made a comment about killing his supervisor.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the method, means and personnel by which work activities are to be carried out (to include the best utilization of personnel) generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have influenced management's decision, or whether state policy may have been misapplied.[3] In this case, the grievant asserts that his transfer was effectuated for disciplinary reasons, and was unwarranted.

Informal Disciplinary Action

For state employees subject to the Virginia Personnel Act, a 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).[4] Applicable statutes and policies recognize management's authority to transfer an employee for disciplinary and performance purposes as well as to meet other legitimate operational needs of the agency.[5]

For example, when an employee is transferred as a disciplinary measure, certain policy provisions must be followed.[6] All transfers accompanied by a Written Notice automatically qualify for a hearing if challenged through the grievance procedure.[7] In the absence of an accompanying Written Notice, a disciplinary action qualifies for a hearing only if there is a sufficient question as to whether it was an "adverse employment action" and was taken primarily to correct or punish behavior, or to establish the professional or personal standards for conduct of an employee.[8] These policy and procedural safeguards are designed to ensure that the discipline is merited. A hearing cannot be avoided for the sole reason that a Written Notice did not accompany the involuntary transfer, 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 behavior. The issues of whether the grievant's transfer constituted an adverse employment action and was disciplinary in nature are discussed below.

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[2] *See* Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (C), page 11.
[4] Va. Code § 2.2-2900 *et seq.*
[5] Va. Code §§ 2.2-3004 (A) and (C); DHRM Policy 3.05, Compensation, DHRM Policy No. 1.60, Standards of Conduct.
[6] DHRM Policy No. 1.60, Standards of Conduct (VII).
[7] Va. Code § 2.2-3004 (A); DHRM Policy No. 1.60, Standards of Conduct (IX); Grievance Procedure Manual § 4.1 (a), page 10.
[8] Va. Code § 2.2-3004 (A) and (C); Grievance Procedure Manual § 4.1 (b) and (c), pages 10-11.

Shift Change the Only Potential Adverse Employment Action

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment, such as a discharge, demotion, cut in pay or benefits, or a failure to promote.[9] Thus, a transfer may constitute an adverse employment action if a grievant can show that the transfer had some significant detrimental effect on the terms, conditions, or benefits of his employment.[10] Significantly, a transfer with dramatic shift in working hours, appreciably different responsibilities, or one providing reduced opportunities for promotion can constitute an adverse employment action, depending on all the facts and circumstances.[11]

Importantly, however, "not everything that makes an employee unhappy is an actionable adverse employment action."[12] As one court has put it, an adverse employment action "must be adverse in the right way. In particular, it must not arise from the employee's individual preferences, and must be 'job-related' in the appropriate sense."[13] Accordingly, a "desire to live and work in a city other than the one in which one currently works is not 'job-related.'"[14]

In this case, there is no evidence that the grievant's transfer resulted in a demotion, loss of promotional opportunities, or a cut in pay or benefits. And while the grievant's unhappiness with having to relocate and enroll his son in a new school is understandable, his desire to remain in Tidewater cannot be viewed as "job-related," and thus, his relocation to Richmond cannot be viewed as an "adverse employment action."[15] Accordingly, the only aspect of grievant's transfer that may be considered an "adverse employment action" is the grievant's new assignment to three rotating shifts upon his relocation. Whether the evidence raises a sufficient question as to the disciplinary basis for this shift reassignment is discussed below.

Whether the Shift Change Was Disciplinary

The grievant would allege that the shift change accompanying his transfer was disciplinary because it was ordered in conjunction with issuance of the Group I Written Notice, as a result of the same offense, his comment about his supervisor. Management,

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[9] Von Gunten v. Maryland Department of Employment, 2001 U. S. App. LEXIS 4149 (4th Cir. 2001)(citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).
[10] Boone v. Goldin, 178 F.3d 253 (4thCir, 1999).
[11] *See* Boone v. Goldin, 178 F.3d253 (4th Cir. 1999); Webster v. Henderson, 2000 U.S. Dist. LEXIS 5777 (D. Md. 2000), aff'd 2002 U.S. App. LEXIS 287 (unpublished opinion). *See also* Garrison v. R. H. Barringer Distributing Co. 152 F. Supp. 2d 856 (M.D. N.C. 2001).
[12] Smart v. Ball State University, 89 F. 3d 437, 441 (7th Cir. 1996).
[13] Fallon v. Meissner, 66 Fed. Appx. 348, 352 2003 U.S. App. LEXIS 8277 (3d Cir. 2003)(unpublished opinion).
[14] Id.
[15] It should be noted that the agency offered to pay the grievant's relocation expenses.

however, asserts that its decision to relocate the grievant was to maintain "the operational effectiveness and productivity of Area 33." Further, that upon relocation, the grievant shared three rotating shifts with his new counterparts, with whom he shared like responsibilities.

In this instance, the grievant's admitted comment about his former supervisor in Tidewater no doubt would have had an adverse impact on the working relationships of those involved, thereby impacting adversely on the overall efficiency of Area 33. Thus, it would not be unreasonable for management to exercise its authority to transfer the grievant in order to preclude the tense working situation from escalating. Indeed, the new rotating shifts are part and parcel of the responsibilities he shares equally with other employees at his new post.

However, given the proximity in time between the Group I Written Notice and the shift reassignment, and given that the issue of the Written Notice has been qualified for hearing it would appear to make sense to send the issue of the grievant's shift change to hearing as well to ensure a full exploration of what could be interelated facts and issues. Accordingly, this grievance is qualified for hearing.

ADDITIONAL INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. Qualification of this ruling in no way determines that the agency's decision to change the grievant's shift was disciplinary or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

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Claudia T. Farr
Director

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June M. Foy
EDR Consultant, Sr.