Issue: Qualification/grievant claims shift reassignment was disciplinary, sexual harassment, counseling letter unwarranted; Ruling Date: September 29, 2004; Ruling #2004-768; 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 2004-768
September 29, 2004

The grievant has requested a ruling on whether her April 1, 2004, grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that (1) her shift reassignment was disciplinary, (2) the manner in which her supervisors questioned her about her relationship with a male corrections officer constituted sexual harassment, and (3) the counseling letter (reprimand) she received was unwarranted. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Corrections Officer. On February 28, 2004, she was involved in a discussion with two male officers, which became confrontational in view of other staff and inmates.[1] The incident was reported to the watch commander who met with the participants on March 4 to discuss the matter. During his discussion with the grievant, the watch commander asked her several times if she was having an affair with one of the male officers, which she ultimately denied.

On March 8, the grievant was notified of a change in shift assignment from A-Break to B-Break, effective on March 29, 2004.[2] The change in shift assignment did not result in a loss of pay or benefits, demotion, or hours of work. The grievant claims, however, that the change in shift assignment created an unwarranted hardship by (1) causing the lost of her child care provider and (2) precluding her temporarily from accompanying a daughter to required counseling sessions.

On March 12, the grievant was notified that she must attend a disciplinary hearing scheduled for March 18, 2004. The grievant claims that during the disciplinary hearing, management officials repeatedly questioned her about her relationship with one of the male officers. She asserts that the relentless manner in which management officials questioned her on March 4 and March 18, 2004 about her relationship with a male officer constituted sexual harassment.

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[1] One of the two male officers made a comment romantically linking grievant to the other male Corrections Officer. The wife of the Corrections Officer romantically linked to the grievant also works at the facility as a Corrections Officer.

[2] The two work shifts differ only in the designated non-workdays.

Finally on March 22, 2004, the grievant was issued a counseling memorandum citing her for unprofessional conduct as a result of the February 28 incident.

DISCUSSION

Shift Reassignment

The employment dispute resolution statutes reserve to management the exclusive right to manage the affairs and operations of state government.[3] Thus, management has the statutory right to transfer and assign employees to provide for the most efficient and effective operation of the facility. 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.[4] In this case, the grievant asserts that management's decision to transfer her to another shift was disciplinary.

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).[5] 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.[6]

For example, when an employee is transferred as a disciplinary measure, certain policy provisions must be followed.[7] All transfers accomplished by a Written Notice automatically qualify for a hearing if challenged through the grievance procedure.[8] 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 (1) an "adverse employment action" and (2) was taken primarily to correct or punish behavior, or to establish the professional or personal standards for conduct of an employee.[9] 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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[3] Va. Code § 2.2-3004 (B).
[4] *See* Grievance Procedure Manual, §4.1(c).
[5] Va. Code § 2.2-2900 *et seq.*
[6] Va. Code §§ 2.2-3004 (A) and (C); DHRM Policy 3.05, Compensation, DHRM Policy No. 1.60, Standards of Conduct.
[7] DHRM Policy No. 1.60, Standards of Conduct (VII).
[8] Va. Code § 2.2-3004 (A); DHRM Policy No. 1.60, Standards of Conduct (IX); Grievance Procedure Manual § 4.1 (a).
[9] Va. Code § 2.2-3004 (A) and (C); Grievance Procedure Manual § 4.1 (B) and (C).

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.[10] 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 her employment.[11] 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.[12]

Importantly, however, "not everything that makes an employee unhappy is an actionable adverse employment action."[13] 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."[14] Accordingly, a desire to work on a shift other than the one currently assigned is not "job-related."[15]

In this case, there is no evidence that the reassignment resulted in a demotion, loss of promotional opportunities, or a cut in pay or benefits. And while the grievant's unhappiness with having to make new child care arrangements and reschedule her daughter's counseling sessions is understandable, her desire to remain on the A-Break work shift cannot be viewed as "job-related," and thus, her reassignment to the B-Break work shift cannot be viewed as an "adverse employment action." Because the grievant has not suffered an adverse employment action, the informal disciplinary action issue does not qualify for hearing.

Sexual Harassment

State policy prohibits sexual harassment, which includes both quid pro quo harassment and hostile environment harassment.[16] In this case, the grievant maintains that her supervisors' actions created a sexually hostile work environment. To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination—the grievant must present evidence raising a sufficient question as to whether the conduct in question was (1) unwelcome; (2) based

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[10] Boone v. Goldin, 178 F.3d 253 (4th Cir, 1999). 239, 243.
[11] Von Gunten v. Maryland Department of Employment , 243 F.3d 858, 866 (4th Cir. 2001)(citing Munday v. Waste Mgmt. of North America, Inc., 126 F. 3d, 239,243 (4th Cir. 1997).
[12] *See* Boone v. Goldin, 178 F.3d 253 (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).
[13] Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir. 1996).
[14] Fallon v. Meissner, 66 Fed. Appx. 348, 352 2003 U.S. App. LEXIS 8277 (3d Cir. 2003)(unpublished opinion)(citing DiIenno v. Goodwill Indus., 162 F.3d 235, 236 (3d Cir. 1998)).
[15] Id.
[16] *See* Department of Human Resource Management (DHRM) Policy No. 2.30, *Workplace Harassment*, page 1 of 4 (effective May 1, 2002). Under state policy, *quid pro quo* sexual harassment occurs "when a manager/supervisory or a person of authority gives or withholds a work-related benefit in exchange for sexual favors," while *hostile environment* sexual harassment occurs "when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work."

on her sex; (3) sufficiently severe or pervasive so as to alter her conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[17] If any of these four elements are not met, the grievance may not qualify for hearing.

In this case, the exchange between the grievant and her supervisors on March 4 and March 18, 2004 can best be described as an investigation of the facts surrounding the February 28 confrontation between the grievant and two male corrections officers. Because the grievant was present during an altercation (which occurred in the presence of inmates), management had the right, if not the duty, to investigate the altercation and its cause. The agency does not appear to have an *applicable* bar against Corrections Officers having relationships with one another.[18] However, given that the altercation appears to have been sparked by a Corrections Officer's comment romantically linking the grievant to a third married Corrections Officer (whose wife also works at the same facility), management had the right to ask the grievant about the nature of her relationship with the married Corrections Officer, and to determine the role any relationship may have played in the altercation, as well as the likelihood that it might cause future workplace disruption. In sum, assuming without deciding that the grievant was questioned as to the nature of her relationship with the married Corrections Officer, under the particular facts of this case, such questioning does not appear to be sufficiently severe or persuasive so as to alter the terms and conditions of her employment (element 3) or have otherwise been improper. Thus, this issue is not qualified. [19]

Counseling Memorandum

Under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[20] Inherent in this authority is the responsibility and discretion to communicate to employees perceived behavior problems. The Department of Human Resource Management (DHRM) has sanctioned the issuance of counseling memorandum as an informal means of communicating what management notes as problems with behavior, conduct, or performance. However, DHRM does not recognize such counseling as formal disciplinary action under the *Standards of Conduct.*[21]

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[17] Spicer v.Virginia Department of Corrections, 66 F.3d 705,710 (4th Cir. 1995).

[18] The agency has a policy that prevents an employee from supervising a spouse or relative who resides in the same residence. DOC Procedure 5-9. This policy does not apply here because none of the employees reside in the same residence or supervise one another.

[19] This ruling should not be read as a blanket endorsement of management's unconditional right to inquire into the private relationships of Commonwealth employees. The particular circumstances of this case: (1) the paramilitary nature of the work performed by those involved, (2) the fact that the officer linked to the grievant is married to another Corrections Officer who works at the same facility, and (3) the potential explosive *workplace* consequences of such a purported relationship, warrant an inquiry into the nature of the grievant's alleged relationship with the married Corrections Officer. The key in this case is the existence of a nexus (or link) between the purported relationship and the impact of that relationship on the workplace. Without such a link, an inquiry into the nature of a relationship would likely be inappropriate.

[20] Va. Code § 2.2-3004(B). *See also Grievance Procedure Manual,* § 4.1 (c).

[21] *See* DHRM Policy Number 1.60(VI)(C).

Under the grievance procedure, counseling memorandum do not qualify for hearing unless there is evidence raising a sufficient question as to whether, through the issuance of the memorandum, management took an "adverse employment action" against the grievant affecting the term, conditions, or benefits of his employment.[22] A counseling memorandum, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[23] Moreover, the General Assembly has limited issues that may be qualified for a hearing to those that involve adverse employment actions.[24]

In this case, the counseling letter did not, by itself, constitute an adverse employment action. Therefore, the issue of the counseling letter cannot qualify for a hearing as a separate claim for which relief can be granted. However, should the counseling memorandum later serve to support an adverse employment action against the grievant (e.g. a "Below Contributor" performance rating), the grievant may address the underlying merits of the counseling memorandum through a subsequent grievance challenging the performance evaluation.[25] Accordingly, this issue does not qualify for 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 this 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

June M. Foy
EDR Consultant, Sr.

[22] *Grievance Procedure Manual* § 4.1. 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). An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001)(citing Munday v. Waste Mgmt. of North America, Inc. 126 F.3d 239, 243 (4th Cir. 1997)).
[23] *See* Boone v. Golden, 178 F. 3d 253 (4th Cir. 1999).
[24] Va. Code § 2.2-3004(A).
[25] *See* EDR Rulings # 2004-596, 2004-597.