Issue: Qualification/retaliation/other protected right/work conditions/violence in the workplace; Ruling Date May 10, 2005; Ruling #2005-998; Agency: Department of Corrections; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections/ No. 2005-998
May 10, 2005

The grievant, a Department of Corrections (DOC or agency) Captain, has requested qualification of his July 18, 2004 grievance. The grievance asserts that the agency dismisses valid disciplinary charges issued by corrections officers against inmates and retaliates against DOC employees who challenge this purported agency practice. For the reasons set forth below, the grievance is not qualified for hearing.

FACTS

In September of 2002, a corrections officer at the facility where the grievant formerly worked filed a grievance alleging that the agency had misapplied policy and retaliated against him. The employee also claimed that a significant number of valid inmate disciplinary charges issued by corrections officers had been improperly dismissed by the agency. On October 6, 2003, a hearing was held at the agency's regional office, and in an October 20, 2003 hearing decision, an EDR hearing officer ruled that the agency had misapplied policy. The corrections officer had claimed that the agency's preferential treatment of a particular inmate (Inmate E) had undermined his authority with inmates and created a hazardous work environment. The hearing officer found "that because Inmate E was given special consideration when facing disciplinary action, the agency emboldened Inmate E and made him feel protected when making direct or indirect threats against [the corrections officer]."[1] He further found that the "[corrections officer] was placed in reasonable fear of injury by Inmate E."[2] The hearing officer concluded that by "failing to apply IOP [internal operating procedure] 861 the agency failed to properly protect [the corrections officer] from workplace violence" and that the

[1] In particular, the hearing officer determined that the Inmate Hearing Officer (IHO) had violated policy because he "(1) dissuaded [the corrections officer] from filing charges against Inmate E, (2) arbitrarily dismissed charges against Inmate E while Inmate E "was working for" the IHO, and (3) shredded a stack of charges pending against Facility inmates." October 20, 2003, Hearing Decision, page 6. The hearing officer held that the "IHO's actions made Inmate E believe he could abuse his relationship with [the corrections officer] and made [the corrections officer] unnecessarily fear injury by Inmate E and by inmates within Inmate E's immediate circle of friends." October 20, 2003, Hearing Decision, Case No. 5813, pages 6-7.

[2] October 20, 2003, Hearing Decision, Case No. 5813, page 7.

"agency's actions were contrary to the DHRM Policy 1.80, *Workplace Violence*."[3] The hearing officer ordered the agency to "comply with IOP 861 and thereby protect [the corrections officer] from workplace violence."[4] The grievant provided favorable testimony for the employee at the October 2003 hearing.

Returning to this case, the grievant has alleged that despite the hearing officer's October 2003 order directing the agency to comply with IOP 861, it has failed to do so. Thus, on July 18, 2004, the grievant initiated this grievance in which he asserts that the agency continues to negate valid disciplinary charges against inmates and retaliates against those who challenge the practice.

DISCUSSION

Misapplication of Policy

The grievant claims that the agency has misapplied policy by invalidating disciplinary charges against inmates, which has resulted in an erosion of the officer's authority and a loss of inmate control. It is undisputed that in 2003 an EDR hearing officer found that the agency had indeed misapplied the IOP 861 and as a result placed the grieving corrections officer at personal risk of injury. However, evidence tends to refute the claim that dismissals of valid charges occurred after the October 20, 2003 hearing decision. For example, in December 2003, a number of charges were dismissed because the corrections officer who had written the charges had not properly served the charges.[5] More importantly, evidence tends to support the agency's contention that it disciplined the inmate hearing officer (IHO) who had earlier improperly dismissed charges. Disciplining the IHO would appear to be more in keeping with an agency intent on following rather than skirting policy. In addition, while not dispositive, the EDR hearing officer that issued the October 20, 2003 order has twice since adjudicated grievances which allege that the agency continues to negate valid disciplinary charges. The hearing officer found that the agency had "taken appropriate and commendable action to investigate the work performance of the IHO and to comply with Hearing Officer's Decision 5813,"[6] and that the agency "has not misapplied IOP 861 or state policies relating to IOP 861."[7] In sum, this Department cannot conclude that there is sufficient evidence to send the issue of misapplication of IOP 861 to hearing for further exploration of the facts.

Retaliation:

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[3] *Id.*
[4] *Id.*, page 8.
[5] The charges were not filed by the corrections officers during the "shift when the evidence supporting the charge [was] discovered." *See* IOP 861.8.
[6] Hearing Case Number 7991/7992/7993.
[7] Hearing Case Number 8018.

The grievant asserts that the agency continues to retaliate against those who object to the agency's practice of negating valid disciplinary charges. The grievant claims that he was transferred to another facility as a result of his opposition to this purported practice. 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;[8] (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.[9] 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.[10] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[11]

The grievant has presented evidence satisfying the first element of his retaliation claim. Complaining of the agency's purported action of negating valid disciplinary charges (thus creating an unsafe work place) would constitute a protected activity.[12] However, under the facts of this particular case, the grievant has not provided evidence of any *adverse employment actions*.[13] 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."[14] A reassignment may constitute an adverse employment action if, but only if, the reassignment results in an adverse effect *on the terms, conditions, or benefits* of one's employment.[15] This would encompass any tangible employment action by management that has some

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[8] *See* Va. Code § 2.2-3004 (A)(v). 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 the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[9] Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656 (4th Cir. 1998).

[10] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe, 145 F.3d at 656.

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

[12] The fact that an EDR hearing officer has found no violation of IOP 861 does not render the reporting of a *perceived* workplace safety violation unprotected. *See* 29 C.F.R. 1977.9(c) which states that "complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer." *Cf.* Peters v. Jenney, 327 F.3d 307, 320 (4th Cir. 2003)(a plaintiff need not demonstrate that the employer has actually violated Title VII; rather, the plaintiff must show that "he opposed an unlawful employment practice which he reasonably believed had occurred or was occurring")(internal quotation marks omitted).

[13] The General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions." Va. Code § 2.2-3004(A).

[14] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

[15] 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)).

significant detrimental effect on factors such as an employee's hiring, firing, compensation, job title, level of responsibility, or opportunity for promotion.[16]

In this case, the grievant has not shown that he suffered an adverse employment action as a result of the reassignment. He suffered no loss of rank with his transfer to another facility nor did he suffer any loss of pay. In addition, the grievant has provided no evidence that the facility where he was transferred was a less desirable duty station. To the contrary, the grievant claimed that his duty at the facility where he was transferred was a better assignment. In sum, the transfer under the particular facts of this case does not appear to rise to the level of an adverse employment action.[17] Accordingly, this grievance is not qualified 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.

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Claudia T. Farr
Director

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William G. Anderson, Jr.
EDR Consultant, Sr.

[16] *See* Boone v. Goldin, 178 F.3d. 253 (4th Cir. 1999).

[17] The grievant has also claimed that on two occasions he was improperly counseled regarding his performance. To the extent that this grievance can be viewed as asserting a hostile workplace claim, when viewed in the aggregate, management's actions do not appear to be sufficiently severe or pervasive as to create a hostile workplace.