Issue: Qualification/Retaliation/Grievance activity participation, Work Conditions; Management actions/misapplication of policy; Ruling Date: August 29, 2005; Ruling #2005-1065, 2005-1070; Agency: Department of Corrections; Outcome: Misapplication of policy claim is qualified; all other issues not qualified.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Numbers 2005-1065 and 2005-1070
August 29, 2005

The grievant has requested a ruling on whether his March 20, 2005[1] (Grievance #1) and March 25, 2005[2] (Grievance #2) grievances with the Department of Corrections (DOC or the agency) qualify for a hearing. In Grievance #1 the grievant claims that he was (1) deprived of his right to medical attention by being required to work a 17-hour shift while "medically incapacitated;" and (2) threatened by management. In Grievance #2, the grievant claims that (1) DOC retaliated against him when it changed his shift; and (2) he was threatened by management.[3]

FACTS

The grievant is employed as a Corrections Officer Senior with DOC. On February 20, 2005 the grievant was "drafted" to work overtime.[4] During his shift, the grievant asserts that he began to experience severe stomach pains from a medical condition for which he is under a physician's care and taking prescription medication. The grievant contacted the attending nurse at the facility, who allegedly advised the

[1] The grievant signed the grievance on March 20, 2005, however the first step-respondent claims that the grievance was received on March 24, 2005. For purposes of this ruling, we will refer to the grievance as the March 20th grievance.

[2] The grievant signed the grievance on March 25, 2005, however the first step-respondent claims that the grievance was received on March 29, 2005. For purposes of this ruling, we will refer to the grievance as the March 25th grievance.

[3] During this Department's investigation, the grievant further claimed that the agency breached his confidentiality rights; however, because this issue was not raised on Form A, it will not be addressed here. *See Grievance Procedure Manual* § 2.4 ("[o]nce the grievance is initiated, additional claims may not be added.")

[4] Security officers may be "drafted" to work mandatory overtime when there is (1) an emergency situation; (2) a staff shortage; or (3) other exceptional circumstances. *See* DOC Institutional Operating Procedure (IOP) 206.

grievant and his supervisor (Supervisor 1) that the grievant should go home to take his medicine. According to the agency, the grievant stated at this time that if he were not allowed to leave early, he would not come to work the following day. Supervisor 1 subsequently contacted another supervisor (Supervisor 2) at her home and advised her that the grievant had not completed his draft and was requesting to leave early and that if he were not allowed to leave, he would "call in" the next day. The agency alleges that Supervisor 2 then stated she "would deal with the situation the next day as it occurred." The grievant on the other hand, claims that both Supervisor 1 and Supervisor 2 threatened to "handle him" if he did not return to work the following day. More specifically, in Grievance #1, the grievant alleges that Supervisor 1 told Supervisor 2 to "handle me if I did not return to work on Monday." Similarly, in Grievance #2, the grievant claims that Supervisor 2 stated that she "was going to handle me the next day."

According to the grievant, he was subsequently ordered to either return to his post to complete his draft or seek medical attention at a private emergency medical facility off premises. The grievant allegedly advised Supervisor 1 that he could not go to the private facility because it was not open at that time of night. The agency claims, on the other hand, that the grievant refused to seek medical attention at the private facility. Accordingly, the grievant returned to his post and continued to work.

The grievant claims further that as his medical condition began to worsen, he returned to the medical department of the facility. At this time, the grievant's blood pressure was elevated and as a result, Supervisor 1 allegedly advised the grievant to contact a family member or friend to come and pick him up. The grievant claims there were no family members available to pick him up and as such, he drove himself home. On his way home, the grievant was involved in an automobile accident. As a result of the February 20, 2005 events, the grievant initiated his March 20, 2005 grievance.

Additionally, sometime around March 16, 2005, the grievant was told that he was being transferred from the day shift to the night shift. The grievant was scheduled to begin working the night shift on March 24, 2005.[5] The grievant initiated his March 25, 2005 grievance as a result of the transfer to night shift.

DISCUSSION

Grievance #1

Deprived of His Right to Medical Attention/Required to Work While Ill

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[6] Thus, claims relating to issues such as the method, means and personnel by which work activities are

[5] On the day the grievant was to begin work on the night shift, he was out on sick leave. The grievant reported to the night shift when he returned to work on May 9, 2005.
[6] *See* Va. Code § 2.2-3004(B).

to be carried out 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 or unfairly applied.[7] Although not specifically designated as such, the grievant's claim that he was deprived of his right to medical attention and required to work while ill can be fairly read as a misapplication of policy claim.

The applicable policies in this case are DOC Institutional Operating Procedure (IOP) Numbers 202 and 206 and Department of Human Resource (DHRM) Policy 4.55.[8] Under IOP 206, when there is (1) an emergency situation; (2) a staff shortage; or (3) other exceptional circumstances, security officers may be "drafted" to work mandatory overtime.[9] Employees may be exempt from mandatory overtime if, among other things, the employee has a temporary medical exemption approved by the Warden.[10] Any employee who refuses to work mandatory overtime without sufficient justification or documentation on file from a doctor and approved by the Warden is subject to discipline.[11]

Under DHRM Policy 4.55, "[e]mployees shall be allowed to use their accrued sick leave to take paid time off from work for the following reasons: medical necessity during the employee's temporary incapacity due to illness or injury."[12] Likewise, under IOP Number 202, employees covered by the traditional state sick leave program "may use sick leave for absences related to conditions that prevent them from performing their duties. These conditions include illness, injury or health problems related to pregnancy or childbirth."[13]

In this case, the grievant was "drafted" to work mandatory overtime on February 20, 2005 due to a staff shortage. The grievant did not meet any of the outlined exemptions in IOP Number 206 that would have prevented him from being drafted to work mandatory overtime that day. However, during his shift, the grievant asserts that he began to experience severe stomach pains and was advised by the nurse on duty to go home. The grievant requested to go home due to his illness, but was allegedly told to return to his post and finish his draft. As stated above, DHRM Policy 4.55 states that an employee shall be allowed to use his sick leave for temporary incapacity due to illness.[14] In this case, the evidence raises a sufficient question as to whether DHRM Policy 4.55 was misapplied through an improper denial of sick leave, which would also constitute an

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[7] Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (c).
[8] DHRM Policy 4.55 applies to employees that chose to continue in the state's traditional sick leave program upon implementation of the Virginia Sickness and Disability Program (VSDP). The grievant chose to continue participation in the traditional sick leave program and thus, DHRM Policy 4.55 applies in this case to the grievant's sick leave issues.
[9] *See* DOC IOP 206.
[10] *Id.*
[11] *Id.*
[12] DHRM Policy 4.55.
[13] DOC IOP 202.
[14] *See* DHRM Policy 4.55 (emphasis added).

"adverse employment action."[15] As such, the grievant's misapplication of policy claim qualifies for hearing.

Threatening Behavior by Management

In an attachment to Grievance #1, the grievant claims that he was threatened by management when Supervisor 1 told Supervisor 2 to "handle me if I did not return to work on Monday." The grievant took this statement to be a threat of disciplinary action if he did not come to work the following day.

As stated above, for a grievance to qualify for hearing, the grievant must show that the conduct grieved involves an "adverse employment action."[16] 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."[17]

In this case, the grievant has not shown that the purported threat of "handling him" if he did not return to work resulted in a significant change in his employment status or benefits. On the contrary, a threat of disciplinary action alone is essentially equivalent to receiving a Counseling Memorandum or Notice of Improvement Needed/Substandard Performance Form, actions that this Department has long held do not rise to the level of adverse employment actions.[18] Accordingly, this issue cannot be qualified for a hearing.

Grievance #2

Retaliation/Change in Shift

The grievance statutes and state personnel policy reserve to management the right to establish workplace policy governing the assignment and transfer of employees, and to provide for the most efficient and effective operation of the facility.[19] Accordingly, the

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[15] The General Assembly has limited issues that may be qualified for hearing to those that involve "adverse employment actions." *See* Va. Code § 2.2.3004(A). As such, as a threshold question in qualification determinations, this Department must ascertain whether the grievant has suffered an adverse employment action. The Fourth Circuit has held that "[a]dverse employment actions include decisions such as hiring, firing, *granting leave*, promoting and compensating." Johnson v. Danzig, 2000 U.S. App. LEXIS 7517 (4th Cir. 2000).

[16] Va. Code § 2.2-3004(A).

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

[18] *See* EDR Ruling Nos. 2005-953; 2004-876; and 2004-768. Cf. Mark v. The Brookdale University Hospital and Medical Center, et al, 2005 U.S. Dist. LEXIS 12584 (E.D. N.Y. 2005) ("[s]cheduling inconveniences, disciplinary notices, threats of disciplinary action and excessive scrutiny generally do not constitute adverse employment actions as a matter of law") and Boyer et al. v. Johnson Mathey, Inc. and United Steelworkers of America, Local 1165-02, 2005 U.S. Dist. LEXIS 171 (E.D. Pa. 2005) ("the threat of discipline does not constitute an adverse employment action because it does not constitute a real change in the employee's terms and conditions of employment.")

[19] *See* Va. Code § 2.2-3004 (B) & (C); DHRM Policy No. 1.01 (rev. 12/16/99).

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. The grievant asserts that his shift change was an act of retaliation for initiating his March 20th grievance.

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;[20] (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' stated reason was a mere pretext or excuse for retaliation.[21] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[22]

By participating in the grievance process, the grievant engaged in a protected activity. However, assuming without deciding that the transfer constitutes an adverse employment action, the issue of retaliation does not qualify for hearing because the grievant has failed to demonstrate a causal link between the change in shift and his March 20th grievance. Specifically, sometime around March 16, 2005 the grievant claims that he was told by management that he was being transferred to the night shift because "he could not get along with anybody." At the time of this meeting, the grievant had not yet initiated his March 20th grievance. As such, the agency had no knowledge of the protected activity (i.e., the March 20th grievance) when it made its decision to transfer the grievant to the night shift and thus, there can be no causal link between the two events.[23] Accordingly, the issue of retaliation does not qualify for hearing.

Threatening Behavior

Like Grievance #1, in Grievance #2 the grievant alleges that he was threatened by management. Specifically, the grievant states that Supervisor 2 threatened him when she told Supervisor 1 that she would "handle [the grievant] the next day" (i.e., the day after the grievant requested to leave early due to illness). During this Department's

[20] *See* Va. Code § 2.2-3004(A). 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.

[21] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe v. Total Action Against Poverty, 145 F.3d 653, 656 (4th Cir. 1998).

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

[23] *See* Dowe at 657 (the employer's knowledge that the plaintiff engaged in a protected activity is absolutely necessary to establish a causal link between the protected activity and the adverse employment action). Dowe v. Total Action Against Poverty, 145 F.3d 653, 656 (4th Cir. 1998).

investigation, the grievant stated that he interpreted Supervisor 2's comments to be a threat of potential disciplinary action. As explained above, a mere threat of disciplinary action does not constitute an adverse employment action. Therefore, this issue does not qualify for hearing.

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's claim that he was deprived of his right to medical attention by being required to work a 17-hour shift while "medically incapacitated" in Grievance #1 qualifies and shall advance to hearing. This ruling in no way determines that the agency's actions were improper, only that further exploration of the facts by a hearing officer is appropriate. By copy of this ruling, the grievant and the agency are advised that the agency has five workdays from receipt of this ruling to request the appointment of a hearing officer.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take in Grievance #2 and with regard to the issue of threatening behavior in Grievance #1, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification determination on Grievance #2 and/or the issue of threatening behavior in Grievance #1 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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