

Issue: Qualification/Discipline/suspension/demotion/transfer; Ruling Date: October 7, 2005; Ruling #2006-1133; 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 2006-1133
October 7, 2005

The grievant has requested a ruling on whether his July 13, 2005 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that his transfer/reassignment was disciplinary and improper under the Standards of Conduct policy. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Correctional Officer with DOC. On June 23, 2005 the grievant was counseled for allegedly engaging in disruptive conversations with staff members about his personal relationship with a co-worker. On July 8, 2005, the grievant allegedly discussed his personal relationship again with a co-worker and made derogatory comments about the co-worker to inmates. Shortly thereafter, the grievant was transferred to another building within the correctional institution in which he worked.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.¹ Thus, claims relating to issues such as the methods, 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

¹ Va. Code § 2.2-3004(B).

whether state policy may have been misapplied.² In this case, the grievant asserts that his transfer/reassignment to another building was effectuated for disciplinary reasons and in violation of the Standards of Conduct policy because it is improper to discipline him for an issue not related to work.

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).³ 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.⁴

For example, when an employee is transferred/reassigned as a disciplinary measure, certain policy provisions must be followed.⁵ All transfers/reassignments accomplished by a Written Notice automatically qualify for a hearing if challenged through the grievance procedure.⁶ 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.⁷ 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/reassignment, where there is a sufficient question as to whether the transfer/reassignment 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/reassignment was disciplinary in nature and constituted an adverse employment action are discussed below.

Disciplinary Basis

In this case, both the second step-respondent and the agency head state in their management resolution step responses that the grievant continued to engage in behavior for which he had been previously counseled as well as make derogatory comments about a co-worker to an inmate and as a result, management decided to transfer/reassign the grievant. These statements are enough to raise a sufficient question of disciplinary

² Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (C).

³ Va. Code § 2.2-2900 *et seq.*

⁴ Va. Code § 2.2-3004 (A) and (C); DHRM Policy 3.05, Compensation, DHRM Policy No. 1.60, Standards of Conduct.

⁵ DHRM Policy No. 1.60, Standards of Conduct (VII).

⁶ Va. Code § 2.2-3004 (A); DHRM Policy No. 1.60, Standards of Conduct (IX); *Grievance Procedure Manual* § 4.1 (a).

⁷ Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (b) and (c).

intent.⁸ However, as stated above, to qualify for hearing, it must also be shown that the grievant suffered an adverse employment action.

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 or reassignment may constitute an adverse employment action if a grievant can show that the transfer/reassignment had some significant detrimental effect on the terms, conditions, or benefits of his employment.¹⁰ Significantly, a reassignment or transfer with significantly different responsibilities, or one providing reduced opportunities for promotion can constitute an adverse employment action, depending on all the facts and circumstances.¹¹

In this case, the grievance fails to raise a sufficient question as to whether the transfer was an adverse employment action. The grievant admits that he has not suffered a cut in pay or benefits as a result of the transfer/reassignment. Moreover, there is no evidence that his promotional opportunities have decreased as a result of the transfer. The grievant claims that when he was transferred, he was told by management that if his name came up on anything else, he would be moved to the night shift. The grievant interprets the alleged statement by management as prohibiting him from applying for future promotions within the agency. However, the grievant has provided no evidence to support such an interpretation. Instead, the alleged statement appears to have been intended to deter the grievant from further misconduct, not prevent him from applying for a promotion.

Additionally, the grievant alleges that his transfer/reassignment resulted in a change in his work hours and schedule as well as his duties and responsibilities. Specifically, prior to his transfer, the grievant worked an 8-hour day shift with a Monday through Friday schedule. In his new position, the grievant works a 12-hour day shift and his schedule is to work five days and then have five days off or work four days and then have four days off. Under this new schedule, the grievant allegedly has every other Saturday, Sunday and Monday off. Additionally, prior to his transfer/reassignment to the main facility, the grievant allegedly spent his day supervising inmate labor crews on location. Since the transfer/reassignment, the grievant works many different posts (e.g.,

⁸ The grievant claims that the Standards of Conduct policy does not allow an agency to discipline an employee to correct a non-work related issue. However, it appears that the grievant was transferred for a work-related issue, not a personal issue as alleged. Specifically, while the content of the grievant's conversations with co-workers were related to personal matters; it appears that the agency acted in response to how these conversations impacted the workplace. Discipline for inappropriate behavior while at work is certainly contemplated by the Standards of Conduct policy. *See generally* DHRM Policy 1.60.

⁹ *Burlington Industries, Inc., v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

¹⁰ *Von Gunten v. Maryland Department of the Environment*, 243 F.3rd 858, 866 (4th Cir. 2001)(citing *Munday v. Waste Mgmt. of North America, Inc.*, 126 F.3d, 239, 243 (4th Cir. 1997)).

¹¹ *See Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999) and *James v. Booz-Allen, Hamilton, Inc.*, 368 F.3d 371 (4th Cir. 2004). *See also Edmonson v. Potter*, 118 Fed. Appx. 726 (4th Cir. 2004) (unpublished opinion).

roving patrol, floor officer, control room officer) and does whatever is needed and asked of corrections officers that work inside a correctional facility.

Although the grievant's work hours, schedule and duties may have changed somewhat, the evidence fails to raise a sufficient question as to whether there was any detrimental affect on the terms, conditions or benefits of his employment. Namely, there appears to have been no change in his level of responsibility, compensation, benefits, or opportunity for promotion. Further, it does not appear that the grievant's duties changed so significantly as to constitute an adverse employment action. Based upon the foregoing, the transfer, even if disciplinary, does not qualify for a 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 the qualification 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

Jennifer S.C. Alger
EDR Consultant