Issue: Qualification/Suspension/Demotion/Transfer; Management Actions/ assignment of duties; Ruling Date: February 15, 2006; Ruling #2006-1224; 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 2006-1224
February 15, 2006

The grievant has requested a ruling on whether his July 8, 2005 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that his suspension from canine duties was a misapplication and/or unfair application of policy and created a hostile work environment. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

Prior to his reassignment, the grievant was employed as a corrections officer with canine handler responsibilities. On June 16, 2005, the grievant, along with his canine, was assisting with a shakedown in one of the facility housing units. During the shakedown, the agency claims that the grievant was ordered by his supervisor to take his canine and move to an area where he was more visible to an inmate that was being disruptive. The grievant refused to do so because he believed that placing the canine next to a fully restrained inmate would violate policy. The Warden subsequently suspended the grievant from his canine duties for disobeying the supervisor's order. On July 8, 2005 the grievant initiated a grievance challenging the suspension of his canine duties.

On July 25, 2005, the grievant was granted a voluntary transfer from his current facility (Facility A) to another DOC facility (Facility B). The grievant claims that he sought the transfer to escape the hostile work environment created at Facility A by the June 16, 2005 incident. The grievant is currently employed as a corrections officer at Facility B without canine handler responsibilities. As relief, his grievance seeks the return of his canine duty in a nonhostile environment.

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 whether state policy may have been misapplied.[2] In this case, the grievant asserts that his disciplinary reassignment from a corrections officer with canine handler responsibilities to a corrections officer without such responsibilities for refusing to follow an order that violated policy was a misapplication and/or unfair application of state and agency policies governing reassignment and created a hostile work environment.

Misapplication of Policy

For state employees subject to the Virginia Personnel Act, a reassignment 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 or reassign 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 reassigned as a disciplinary measure, certain policy provisions must be followed.[5] All 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 reassignment, where there is a sufficient question as to whether the reassignment was an "adverse employment action" and was in effect disciplinary in

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[1] Va. Code § 2.2-3004 (B).
[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).

nature, i.e., taken primarily to correct or punish perceived behavior. The issues of whether the grievant's reassignment was disciplinary in nature and constituted an adverse employment action are discussed below.

Disciplinary Basis

In this case, both the first and the second step-respondent state in their management resolution step responses that the grievant's refusal to follow a supervisor's orders precipitated the grievant's reassignment from a corrections officer with canine handler responsibilities to a corrections officer without such canine duties. These statements are enough to raise a sufficient question of disciplinary intent. 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 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."[8] As a matter of law, adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9] Thus, a reassignment may constitute an adverse employment action if a grievant can show that the reassignment had some significant detrimental effect on the terms, conditions, or benefits of his employment.[10] Significantly, a reassignment 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 grievant's reassignment was an adverse employment action. In particular, the grievant admits that he did not suffer a cut in pay as a result of the reassignment.[12] Moreover, although the grievant voluntarily sought and was granted a transfer to Facility B following the June 16, 2005 incident at Facility A, the grievant's initial reassignment from a corrections officer with canine handler responsibilities to a corrections officer without such duties did not result in a change of work location and there is no evidence

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[8] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[9] 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)).
[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).
[12] It should be noted that the grievant's subsequent voluntary transfer from Facility A to Facility B did allegedly result in a pay loss for the grievant. However, the grievant's voluntary transfer to another facility and the effects of such transfer are not at issue in this grievance.

that his promotional opportunities decreased as a result of the reassignment. In fact, during this Department's investigation, the grievant stated that his opportunities for promotion have not changed as a result of the reassignment.

However, the grievant alleges that his reassignment resulted in a change in his work schedule. In particular, prior to his reassignment, the grievant worked Monday through Friday from 8:00 a.m. to 4:30 p.m. After his reassignment, the grievant still worked the day shift but his scheduled work days changed from week to week and he worked the hours of 6:00 a.m. to 6:00 p.m. with every other weekend off. The grievant also asserts that his duties and responsibilities have changed. More specifically, the grievant claims that corrections officers with canine responsibilities, unlike corrections officers without such duties, do not often work inside an institution, are provided a state vehicle, and respond to incidents at various institutions. Additionally, the grievant asserts that being able to work with a canine is advantageous because a canine handler is not tied down to one location.

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 reassignment, even if disciplinary, does not qualify for a hearing.

Hostile Work Environment

For a claim of hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on his protected status or prior protected activity; (3) sufficiently severe or pervasive so as to alter his conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[13] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[14]

Here, the grievant claims that his refusal to follow an order that he believed violated policy resulted in suspension of his canine responsibilities and that it is from this suspension of duties that a hostile work environment was created. Apart from the events surrounding his reassignment, the grievant offers no other "hostile or abusive" actions by management upon which his hostile work environment claim is based. Rather, the

[13] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).
[14] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S. Ct. 367 (1993).

grievant asserts that it was his belief that if he stayed at Facility A he would suffer future retaliatory actions by management.[15]

Even if this Department were to assume that the reassignment was unwelcome, was based on a potentially protected activity (refusing to obey a purportedly improper order)[16] and imputable on some factual basis to the agency, the grievant has failed to demonstrate that his reassignment was "sufficiently severe or pervasive to alter his conditions of employment."[17] Namely, the grievant's hostile work environment claim is based only upon his reassignment. Moreover, the grievant has failed to present any evidence that his supervisor's actions unreasonably interfered with his work performance. Accordingly, the grievant's claim of a hostile work environment 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 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.

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Claudia T. Farr
Director

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Jennifer S.C. Alger
EDR Consultant

[15] In support of his belief that Facility A management intended to retaliate against him, the grievant stated during this Department's investigation that management was in the process of deleting his computer account and he was advised that management wanted to terminate him for his alleged flagrant disobedience. As a result, the grievant claims that he sought a transfer to Facility B before any further adverse action was taken against him at Facility A.

[16] *See generally* Chaloupka v. M. Financial Holdings, Inc., 2001 U.S. Dist. LEXIS 8287 (D. Ore. June 5, 2001); Stevens v. Henderson, 2000 U.S. Dist. LEXIS 22498 (S.D. Ohio Sept. 19, 2000).

[17] *See* Von Gunten v. State of Maryland, 243 F.3d 858 (4th Cir. 2001) citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S.Ct. 367 (1993) ("[f]or a hostile work environment claim to lie there must be evidence of conduct 'severe or pervasive enough' to create 'an environment that a reasonable person would find hostile or abusive'.")