

Issues: Qualification/Discipline/Suspension-Transfer-Demotion, Retaliation/Other Protected Right, Work Conditions/Supervisor-Employee Conflict, Consolidation for purpose of hearing; Ruling Date: March 21, 2007; Ruling No. 2007-1516, 2007-1517; Agency: Department of Corrections; Outcome: All issues qualified. Consolidation granted.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND CONSOLIDATION
RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2007-1516, 2007-1517
March 21, 2007

The grievant has requested a ruling on whether his September 19, 2006 and September 28, 2006 grievances with the Department of Corrections (DOC or the agency) qualify for a hearing. For the reasons set forth below, these grievances are qualified and consolidated for hearing.

FACTS

The agency employs the grievant as a Senior Correctional Officer. The grievant asserts that on August 23, 2006, he was removed from the Transportation and Clothing Officer position, for which he had been selected five years previously, as the result of an internal investigation into allegations that he had advised an inmate in advance of a medical appointment. The grievant further alleges that the report from this internal investigation contains a number of inaccurate and false statements. On September 19, 2006, the grievant initiated a grievance challenging his reassignment from the Transportation and Clothing officer position as a misapplication of policy, harassment, and informal discipline. Subsequently, on September 28, 2006, the grievant initiated a second grievance challenging the “[u]nfair application” and falsification of the internal investigation report.

After the parties failed to resolve the grievances during the management resolution steps, the grievant asked the agency head to qualify both grievances for hearing. The agency head denied the grievant’s requests, and he appealed to this Department.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.¹ Thus, claims relating to issues

¹ See Va. Code § 2.2-3004(B).

such as the methods, means and personnel by which work activities are to be carried out and the reassignment or transfer of employees within the agency 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 improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.²

Reassignment

Informal Discipline

For state employees subject to the Virginia Personnel Act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the policies and procedures promulgated by DHRM.³ For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.⁴ These safeguards are in place to ensure that disciplinary action is appropriate and warranted.

Where an agency has taken informal disciplinary action against an employee, a hearing cannot be avoided for the sole reason that a Written Notice did not accompany the disciplinary action. Rather, even in the absence of a Written Notice, a hearing is required where the grieved management action resulted in an adverse employment action against the grievant and the primary intent of the management action was disciplinary (*i.e.*, taken primarily to correct or punish perceived poor performance).⁵

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment.⁶ Here, the grievant asserts that he was selected for the Transportation and Clothing Officer position after an application and interview process; that this position did not generally rotate; that as a result of his reassignment, he now is required to work 12-hour days (as opposed to 8½ or 9-hour days) and weekends; and that the Transportation and Clothing Officer position is viewed as being desirable not only because of the schedule, but also because it allows an employee to travel out of the prison facilities, rather than being in "smoke-filled" buildings all day. In light of these assertions, we conclude that the grievant has raised a sufficient question as to whether his reassignment from the Transportation and Clothing Officer position was an adverse employment action.

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

³ Va. Code § 2.2-2900 *et seq.*

⁴ DHRM Policy No. 1.60, "Standards of Conduct" (effective 9/16/93).

⁵ See EDR Ruling Nos. 2002-227 & 230.

⁶ *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)).

We also find that this grievance raises a sufficient question as to whether the agency's primary intent was to correct or punish perceived poor performance or conduct. In particular, we note that in denying relief on the September 28th grievance, the second-step respondent advised the grievant that he was removed from the position because of "the preponderance of the investigator's report." Similarly, in denying relief on the September 19th grievance, the second-step respondent stated, in part, "The information provided in the Internal Affairs Report is such that I would be remiss to assign you to either the clothing room post or a post involving inmate transportation."

Whether the grievant's reassignment was primarily to punish or correct the grievant's behavior is a factual determination that a hearing officer, not this Department, should make. At the hearing, the grievant will have the burden of proving that the reassignment was adverse and disciplinary. If the hearing officer finds that it was, the agency will have the burden of proving that the action was nevertheless warranted and appropriate. Should the hearing officer find that the reassignment was adverse, disciplinary and unwarranted and/or inappropriate, he or she may rescind the denial, just as he or she may rescind any formal disciplinary action.⁷

Alternative Theories

The grievant also asserts that his reassignment constituted harassment and was an unfair application or misapplication of state and agency personnel policies, procedures, rules, and regulations. Because the issue of informal discipline qualifies for hearing, this Department deems it appropriate to qualify the grievant's claims of harassment and misapplication and/or unfair application of policy for hearing as well, to help assure a full exploration of what could be related facts and circumstances.

We note, however, that this qualification ruling in no way determines that the grievant's reassignment constituted unwarranted informal discipline or harassment, was a misapplication or unfair application of policy, or was otherwise improper, but only that further exploration of the facts by a hearing officer is warranted.

Investigation Report

The grievant further argues that the investigation report was "falsif[ied]" and constituted an unfair application of policy. In a case like this, where the grievant will be afforded a hearing to challenge the action allegedly taken by the agency on the basis of the investigation report, it simply makes sense to qualify his grievance challenging the report itself for hearing as well.⁸ Sending these related claims to a single hearing (see consolidation discussion below) will provide an opportunity for the fullest development of what may be interrelated facts and issues. We note, however, that this qualification ruling in no way determines the merit of the grievant's allegations regarding the

⁷ See EDR Ruling No. 2002-127.

⁸ See EDR Ruling No. 2006-1291 and 2006-1353.

investigation report, but rather only that further exploration of the facts by a hearing officer is appropriate under the particular circumstances present.

Consolidation

EDR strongly favors consolidation of grievances for hearing and will grant consolidation when grievances involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.⁹

This Department finds that consolidation of the September 19th grievance with the September 28th grievance is appropriate. The grievances involve the same parties and likely many of the same witnesses. In addition, they share a related factual background. Finally, consolidation is not impracticable in this instance.

This Department's rulings on compliance are final and nonappealable.¹⁰

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's September 19th and September 28th grievances are qualified and consolidated for hearing. 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 for these grievances.

Claudia T. Farr
Director

⁹ *Grievance Procedure Manual*, § 8.5.

¹⁰ Va. Code § 2.2-1001 (5).