Issues: Qualification: Discipline - Demotion, Discrimination - Harassment, Retaliation – Other Protected Right, and Compliance: 5 Day Rule & Resolution Steps; EDR Ruling #2007-1551, 2007-1552, 2007-1554, 2007-1617; Ruling Date: June 25, 2007; Agency: Department of Corrections; Outcome: All issues qualified; grievant not in compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND COMPLIANCE
RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Numbers 2007-1551, 2007-1552, 2007-1554 and 2007-1617
June 25, 2007

The grievant has requested a ruling on whether three November 19, 2006 grievances and one December 4, 2006 grievance with the Department of Corrections (DOC or the agency) qualify for hearing. In addition, the grievant claims that (1) the second step respondent failed to address the issues presented in the grievance; and (2) the agency head failed to comply with the time limits set forth in the grievance process. For the reasons discussed below, these grievances qualify for a hearing.

FACTS

Prior to her demotion, the grievant was employed as an Institution Superintendent with DOC. On November 13, 2006, the grievant was informed that as a result of an internal affairs investigation concerning sexual misconduct cases at her facility, she was being removed from her position as Institution Superintendent. To effectuate the removal, the agency gave the grievant the option of either using the "voluntary demotion" pay practice to a different position in a lower pay band with the same salary or receiving a Group III Written Notice with demotion.[1] Regardless of the option she chose, it appears the agency had previously decided that she would no longer remain in her position as Institution Superintendent. The grievant ultimately chose a "voluntary demotion" without the Written Notice. Although she retained her current salary, the grievant claims that her new position is in a lower pay band, she no longer has state housing benefits, she lost supervisory responsibilities, and she suffered a change in duties and a loss of "job stature."

[1] According to the agency, if the grievant had not chosen voluntary demotion, "she would have been charged with one or more Group III charges and other possible charges involving her failure to properly manage the correctional facility in a manner that provided for the safety and security of offenders and staff."

On November 19, 2006, the grievant initiated three grievances challenging her demotion. In these three grievances, the grievant alleges that her demotion was "coerced," the agency misapplied Department of Human Resource (DHRM) Policy 1.60, *Standards of Conduct*, by failing to provide the grievant with oral or written notification of the charge(s) and a reasonable opportunity to respond, and the agency unfairly applied Policy 1.60 as her demotion is inconsistent with how prison management has been treated in other facilities under similar circumstances. Likewise, in her December 4, 2006 grievance, the grievant alleges that her demotion was "coerced," the agency has misapplied and/or unfairly applied DHRM Policy 1.60, the investigative report(s) are erroneous, the primary investigator of her alleged mismanagement (Agent M) was biased and acted out of retaliation and the agency has misapplied DHRM Policy 2.30, *Workplace Harassment*.

DISCUSSION

Qualification

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the agency's actions result in an adverse employment action[3] and the grievant presents evidence raising a sufficient question as to whether the actions were taken for disciplinary reasons, were influenced by discrimination or retaliation, or were the result of a misapplication or unfair application of policy.[4] Here, the grievant asserts that the agency's actions were disciplinary.

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.[5] For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.[6] These safeguards are in place to ensure that disciplinary action is appropriate and warranted.

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[2] Va. Code § 2.2-3004(B).
[3] An "adverse employment action" is defined as a "tangible employment action constitut[ing] 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." Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[4] Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (C).
[5] Va. Code § 2.2-2900 *et seq.*
[6] DHRM Policy No. 1.60, "Standards of Conduct" (effective 9/16/93).

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).[7]

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment.[8] Here, it appears undisputed that the agency determined the grievant could no longer remain in her position as Institution Superintendent. The grievant was reassigned from her position as Institution Superintendent and placed in a new position within a lower pay band, and while her salary has not been reduced, she no longer has state housing benefits. In addition, the grievant asserts that she has lost supervisory responsibilities and suffered a loss of "job stature" through the change in her duties. In light of the foregoing, we conclude that the grievant has raised a sufficient question as to whether she suffered an adverse employment action. We also find that this grievance raises a sufficient question as to whether the agency's primary intent in determining she would not remain in her position as Institution Superintendent, and by giving the grievant a choice as to how that decision would be effectuated, was to correct or punish perceived poor performance or conduct. In particular, we note that the agency has stated that as a result of various lapses, such as the impregnation of an offender by a staff member and other acts of fraternization, plus additional issues that are inconsistent with the orderly operation of a secure prison, the grievant's effectiveness had been called into question and the public's confidence in the agency's ability to perform its mission had been compromised.

Whether the agency's actions were 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 agency's actions with respect to her reassignment (demotion) were adverse and disciplinary. If the hearing officer finds that they were, the agency will have the burden of proving that its actions were nevertheless warranted and appropriate. Should the hearing officer find that the agency action was adverse, disciplinary and unwarranted and/or inappropriate, he or she may rescind the demotion, just as he or she may rescind any formal disciplinary action.[9]

The agency did not qualify the grievance on the basis that the grievant's demotion and transfer were not disciplinary because the grievant had voluntarily requested the demotion and transfer. We note that while the choice to accept the demotion without an accompanying Written Notice may have been voluntary, the agency's decision that the grievant could no longer remain in her position appears to have already been made, and

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[7] *See* EDR Ruling Nos. 2002-227 & 230.
[8] 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)).
[9] *See* EDR Ruling No. 2002-127.

the grievant has presented evidence calling into question whether the demotion and loss of housing were adverse and disciplinary. Accordingly, it is appropriate to send this grievance to hearing. The fact that the grievant chose a "voluntary demotion" without a Written Notice, instead of a demotion with Written Notice, does not bar her from a hearing on the agency's apparent decision that for performance reasons, she could not remain in her position as Institution Superintendent.[10]

Alternative Theories

The grievant also asserts that her demotion was retaliatory and that the agency has misapplied DHRM Policy 2.30, *Workplace Harassment*. Because the issue of informal discipline qualifies for hearing, this Department deems it appropriate to qualify the grievant's retaliation and harassment claims 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 demotion constituted unwarranted informal discipline or harassment, was a misapplication or unfair application of policy, or was otherwise retaliatory or improper, but only that further exploration of the facts by a hearing officer is warranted.

Compliance

Management Step Compliance

The grievant alleges the following procedural violations: (1) the second step respondent failed to address the issues presented in the grievances; and (2) the agency head failed to comply with the time limits set forth in the grievance process.

The grievance procedure requires both parties to address procedural noncompliance through a specific process.[11] That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's (EDR's) involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.[12] If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from the EDR Director, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance,

[10] We note that this is not a case where the agency reduced the discipline as an express condition of the grievant dropping her grievance. Where an agency and grievant enter into an express agreement in which the grievant voluntarily agrees to conclude his or her grievance based on the agency's agreement to reduce the discipline, this agency will honor such an agreement and would not qualify the reduced discipline for hearing.
[11] *Grievance Procedure Manual*, § 6.3.
[12] *Id.*

render a decision against the noncomplying party on any qualifiable issue.[13] Importantly, all claims of party noncompliance must be raised immediately. For example, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance.[14]

With regard to the grievant's assertion that the second step-respondent failed to address the issues presented, this Department concludes that the grievant advanced her grievances to the agency head for qualification without first formally contesting the second step response through the noncompliance process set forth above (notifying the agency head of the non-compliance and allowing 5-workdays to correct it). By proceeding to the next step, the grievant effectively waived her right to contest the agency's alleged second step noncompliance.

Additionally, a ruling on the issue of whether the agency head responded within the mandated 5 workdays is premature because the grievant has not notified the agency in writing of the alleged procedural violation, as required by the grievance procedure. Moreover, the agency has corrected any noncompliance by providing the grievant with a qualification decision for all four grievances on February 13, 2007, thus rendering the issue of any purported noncompliance moot.

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.[15]

This Department finds that consolidation of the three November 19, 2006 grievances and one December 4, 2006 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 matters of compliance are final and nonappealable.[16]

APPEAL RIGHTS AND OTHER INFORMATION

[13] While in cases of substantial noncompliance with procedural rules the grievance statutes grant the EDR Director the authority to render a decision on a qualifiable issue against a noncompliant party, this Department favors having grievances decided on the merits rather than procedural violations. Thus, the EDR Director will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, this Department will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.
[14] *Grievance Procedure Manual,* § 6.3.
[15] *Grievance Procedure Manual,* § 8.5.
[16] *See* Va. Code § 2.2-1001(5).

For the reasons discussed above, this Department concludes that the grievant's three November 19, 2006 grievances and one December 4, 2006 grievance 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.

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Claudia T. Farr
Director