Issue: Qualification/notice of improvement needed, discipline/transfer; Ruling Date: September 11, 2006; Ruling #2007-1424; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: not qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Mental Health,
Mental Retardation, and Substance Abuse Services
Ruling Number 2007-1424
September 11, 2006

The grievant has requested a ruling on whether her challenge to a May 19, 2006 Notice of Improvement Needed/Substandard Performance, as raised in her June 19, 2006 grievance with the Department of Mental Health, Mental Retardation, and Substance Abuse Services (the agency), qualifies for a hearing. For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Direct Service Associate II with the agency. On May 19, 2006, the grievant was issued a Notice of Improvement Needed/Substandard Performance. The agency transferred the grievant to another area as part of the improvement plan contained in the Notice of Improvement. In her new position, the grievant provides care for a group of clients with different functional capacities than the group she cared for prior to the transfer. Those clients she now oversees are mostly non-verbal, confined to wheelchairs, and unable to perform many life functions. Before the grievant was transferred, she cared for clients who were ambulatory, verbal, and generally able to engage in more activities and life functions with less assistance. The grievant challenged the basis for the Notice of Improvement Needed and associated transfer by initiating her June 19, 2005 grievance.

DISCUSSION

By statute and under the grievance procedure, management reserves 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 her transfer/reassignment to another area was effectuated for disciplinary reasons.

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.

<u>Disciplinary Basis</u>

---

[2] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(C). In addition, claims relating solely to a Notice of Improvement Needed/Substandard Performance generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination or retaliation may have improperly influenced management's decision, or whether agency policy may have been misapplied or unfairly applied, resulting in an "adverse employment action." Va. Code § 2.2-3004(A). Because the only potential adverse employment action that occurred in this instance was as a result of the transfer accompanying the Notice of Improvement, we consider below whether this transfer was sufficiently adverse to be qualified for a hearing.

[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)-(c).

In this case, the agency transferred/reassigned the grievant by the Notice of Improvement. Including the transfer within the informal disciplinary action itself raises 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 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.[8] 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 her employment.[9] 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.[10]

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 she has not suffered a cut in pay or benefits as a result of the transfer/reassignment. Moreover, there is no evidence that her promotional opportunities have decreased as a result of the transfer. While the grievant has identified that her ability to take certain days off has changed in her new position, there is no evidence that the effect has been materially adverse.

The grievant alleges that her transfer/reassignment resulted in a change in duties and responsibilities. Specifically, prior to her transfer, the grievant worked with clients who were able to perform more life functions unassisted or with limited assistance. In her new position, the grievant is required to undertake more care for clients, such as changing those who are incontinent. Her day-to-day activities with clients are also different in her new position. Whereas she used to be able to converse with clients and take them to activities and classes, in her new position, the clients she cares for are non-verbal and do not engage in the same types of behavior.

Although the grievant's schedule and duties may have changed somewhat, the evidence fails to raise a sufficient question as to whether there was any detrimental effect on the terms, conditions or benefits of her employment. Namely, there appears to have been no change in her 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. While the grievant is now caring for clients with different functional capabilities, her role has essentially remained the same in

[8] Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 761 (1998).
[9] 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)).
[10] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 Fed. Appx. 726 (4th Cir. 2004) (unpublished opinion).

that she still provides assistance and care to residents of the facility. The mere fact that a new job assignment is less appealing to an employee does not constitute an adverse employment action.[11] Based upon the foregoing, the transfer, even though potentially disciplinary in nature, does not qualify for a hearing.

We note, however, that while this Notice of Improvement Needed/Substandard Performance does not have an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against the grievant. According to DHRM Policy 1.60, Standards of Conduct, repeated misconduct may result in *formal* disciplinary action, which would have a detrimental effect on the grievant's employment and automatically qualifies for a hearing under the grievance procedure.[12] Moreover, according to DHRM Policy 1.40, Performance Planning and Evaluation, a supervisor may consider informal documentation of perceived performance problems when completing an employee's performance evaluation.[13] Therefore, should the Notice of Improvement Needed in this case later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of the informal disciplinary action through a subsequent grievance challenging the related adverse employment action.[14]

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.

---

[11] James, 368 F.3d at 376.

[12] *See generally* DHRM Policy 1.60, Standards of Conduct; *see also Grievance Procedure Manual* § 4.1(a).

[13] DHRM Policy 1.40, Performance Planning and Evaluation, "Documentation During the Performance Cycle," page 4 of 16.

[14] Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that she wishes to challenge, correct or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).

_____
Claudia T. Farr
Director