Issue: Qualification/Management Actions/Record Disclosure/Confidentiality; Retaliation/complying with Any law; Discrimination/disability, other discrimination; Ruling Date: January 24, 2007; Ruling #2007-1457; Agency: Department of Corrections; Outcome: All issues qualified

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2007-1457
January 24, 2007

The grievant has requested a ruling on whether his July 21, 2005 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant claims that DOC discriminated against him when it transferred him from one DOC facility (Facility A) to another (Facility B) shortly after his return from active military service. Additionally, the grievant claims that the agency violated policy when it disclosed his confidential medical information and retaliated against him for reporting alleged safety issues at Facility A.[1] For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

The grievant is employed as a Corrections Sergeant with DOC. On March 25, 2005, the grievant returned to his employment at Facility A after a year-long military deployment with the National Guard. While he was deployed, Facility A acquired a new warden, who implemented some operational changes. The grievant disagreed with at least

[1] The management action challenged by this grievance is the grievant's transfer. In response to the third step respondent's conclusion that the grievant was not discriminated against, the grievant challenged the transfer as retaliatory in an attachment to his Form A. In addition, during this Department's investigation, the grievant advised the investigating EDR consultant that he believed that he was being retaliated against for making complaints about safety at Facility A. While the theory of retaliation was not expressly stated on the Form A as filed, the management action being grieved (the transfer) was. For that reason the grievant's theories as to *why* that management action was improper will be addressed in this ruling. *See* EDR Ruling # 2007-1444. In this case, it does not appear that any prejudice will adversely affect the agency's position at hearing, as it has had notice of this issue since mid-September 2005. Moreover, addressing the grievant's theories on the alleged impropriety of the management action is consistent with EDR's strong preference to have grievances challenging management actions decided on their merits, rather than on procedural technicalities. *E.g.*, EDR Ruling No. 2007-1450. This Department's rulings on matters of compliance are final and nonappealable. Va. Code § 2.2-1001(5).

one of the new procedures implemented (i.e., inmate feeding procedures) and voiced his concerns to the new warden.[2]

On July 11, 2005, the grievant met with the warden and three other agency representatives. At this meeting, the grievant was informed that he was being transferred from Facility A to Facility B effective July 12, 2005. After the July 11th meeting, the grievant received a letter stating that he was being transferred from Facility A to Facility B "based on your own admission that you did not think you fit in here at [Facility A]" and out of concern for the grievant. The grievant challenged the transfer by initiating a grievance on July 21, 2005.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[3] Thus, all claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out, and the transfer, reassignment, or scheduling of employees within the agency generally do not qualify for 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.[4] Here, the grievant claims that his transfer from Facility A to Facility B was discriminatory and retaliatory.

Discrimination -- USERRA

The Uniformed Services Employment and Reemployment Rights Act (USERRA)[5] prohibits an employer from discriminating against a member of the armed forces. A person cannot be "denied initial employment, reemployment, retention in employment, promotion, or any *benefit of employment* by an employer" based on the employee's membership in a "uniformed service."[6] A benefit of employment is defined by the Act as:

> any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an

[2] According to the grievant, he felt the new inmate feeding procedures compromised safety as the inmates were allegedly only permitted four minutes to eat.
[3] Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b) and (c).
[5] 38 U.S.C. §§ 4301 et seq. *See also* Executive Order 1, which "specifically prohibits discrimination against veterans," and DHRM Policy 4.50, *Military Leave*, which "[p]ermits employees to take military leave, with or without pay, for active duty in the armed services of the United States, and permits employees who are former and inactive members of the armed services, or current members of the reserve forces of any of the United States' armed services, or of the Commonwealth's militia, or the National Defense Executive Reserve to take military leave in accordance with federal [USERRA] and state law."
[6] 38 U.S.C. § 4311(a) (emphasis added). "Uniformed service" includes the Armed Forces and National Guard. 38 U.S.C. § 4303(16).

> employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or *location of employment*.[7]

In this case, the grievant is challenging his location of employment, which by definition is a "benefit of employment." However, an employer shall be considered to have violated USERRA only if the employee's military status was a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such a military status.[8] If the employee establishes that his military status was a motivating factor in the employer's decision, USERRA shifts the burden of proof to the employer.[9] Therefore, because the agency action denied the grievant a "benefit of employment," to qualify for a hearing, the grievant must present sufficient evidence to raise a question that his military status was a "motivating factor" in the agency's decision,[10] i.e., that the grievant's military status was "one of the reasons" he was transferred from Facility A to Facility B.[11] Further,

> [d]iscriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses.[12]

In the July 11, 2005 letter to the grievant, the agency states that "[y]ou were transferred to [Facility B] based on your own admission that you did not think you fit in here at [Facility A]. The agency is concerned about you and feels that the transfer is in the best interest for you as well as for [Facility A]." The grievant claims that he never said he did not fit in at Facility A as alleged in the July 11th letter. Moreover, during the July 11th meeting regarding the grievant's transfer, the warden allegedly stated that he had concerns for the grievant's well-being and mentioned the grievant having been diagnosed with post-traumatic stress disorder (PTSD).[13] Additionally, the warden allegedly mentioned an e-mail that the grievant had received from an incarcerated inmate's father which cautions the grievant to cease his alleged threats against Muslim

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[7] 38 U.S.C. § 4303(2) (emphasis added).
[8] 38 U.S.C. § 4311(c)(1).
[9] Hill v. Michelin N. Am., Inc., 252 F.3d 307, 312 (4th Cir. 2001)
[10] *See id.*
[11] 20 C.F.R. § 1002.22.
[12] Sheehan v. Dep't of the Navy, 240 F.3d 1009, 1014 (Fed. Cir. 2001).
[13] The grievant claims that he discussed his PTSD with the warden in confidence prior to the July 11, 2005 meeting.

inmates.[14] The incarcerated inmate whose father sent the grievant the threatening e-mail was housed at Facility B at the time the grievant was transferred there and the grievant was on one occasion assigned as the building sergeant for the building where that inmate was housed. As such, transferring the grievant to Facility B with this particular inmate could be viewed as a potentially more dangerous situation rather than a situation that would alleviate any concern on the part of the agency for the grievant's "well-being" if he were to remain at Facility A.

Additionally, during this Department's investigation, the agency stated that the grievant was "temporarily moved" to Facility B because he "was having some difficulty adjusting to the new procedures initiated by the change in Warden." Further, during the second management resolution step, the warden allegedly stated that the grievant was transferred because Facility A is a "more open environment" and felt the grievant "would work better in the environment that [he] left."[15]

In light of all of the above, including the relatively short proximity in time between the grievant's return from military deployment and his transfer (i.e., a little less than 4 months) this Department concludes that the grievant has raised a sufficient question as to whether his military status was a motivating factor in the agency's decision to transfer him from Facility A to Facility B. This qualification ruling in no way determines that the agency's actions were in fact motivated by the grievant's military status, only that further exploration of the facts by a hearing officer is appropriate.

Alternative Theories and Additional Claims

The grievant also asserts, in relation to the agency's actions in transferring him, claims of disability discrimination, misapplication of policy (improper disclosure of confidential medical information) and retaliation (for reporting unsafe work conditions at Facility A). Because the grievant's claim of discrimination based on his military status qualifies for hearing, this Department deems it appropriate to send all alternative theories and claims raised by the July 21, 2005 grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons set forth above, the grievant's July 21, 2005 grievance is qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

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[14] According to the grievant, the alleged complaints by Muslim inmates at Facility A were investigated and were deemed unfounded by internal affairs.

[15] The grievant had allegedly previously worked at Facility B.

Claudia T. Farr
Director