

Issues: Qualification – Compensation (salary dispute) and Management Actions (assignment of duties); Ruling Date: December 12, 2007; Ruling #2008-1849; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: All Issues 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 2008-1849
December 12, 2007

The grievant has requested a ruling on whether her July 25, 2007 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) qualifies for hearing. For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

At the time she initiated her grievance, the grievant was employed as a Licensed Practical Nurse (LPN) with DMHMRSAS.¹ Pursuant to agency policy, in April 2007 the grievant was asked to submit a written list of medications she was taking.² The grievant submitted this list on April 9, 2007. On May 1, 2007, the grievant was temporarily removed from working as an LPN in a direct care capacity to a non-direct care position.³ As a result of this reassignment, the grievant lost a shift differential associated with her work as an LPN.⁴

On May 3, 2007, the grievant and the facility head entered into an agreement “to address indications of stress and patient safety concerns regarding use of medications.” The terms of this settlement agreement are as follows: (1) the grievant will enroll in and stay enrolled in the State’s Employee Assistance Program (EAP) for six months or “until requirements are deemed satisfied by the EAP counselors” and shall verify for her facility that she is attending these counseling sessions; and (2) the grievant will be assigned to non-direct

¹ According to the agency, the grievant was terminated on October 11, 2007. She grieved her termination on October 26, 2007

² Facility Policy HR 053-33 states: “All employees will advise their immediate supervisor, in writing, of any medications they are taking that may affect behavior or ability to perform assigned duties. This notice must occur on the first day the employee begins taking the medication.”

³ While working in a non-direct care capacity, the grievant worked in the information center answering phones, paging, and receiving maintenance requests and contacting the on-duty maintenance employee.

⁴ Facility Policy LD 054-05 states that the facility will pay a shift differential to nursing staff working the wards on the evening and/or night shift Monday through Friday and day, evening, and/or night shift on Saturday and Sunday.

care duties until she is cleared to return to LPN duties. The agreement further states that if the grievant fails to comply with the terms therein, she (1) may be issued a Group I Written Notice for unplanned leave; and (2) she will be reported to the Department of Health Professions, Board of Nursing.

According to the agency, the grievant worked in a non-direct care capacity until June 21, 2007. On July 25, 2007, the grievant initiated a grievance challenging her temporary assignment to working in a non-direct care capacity and the loss of her shift differential during this time. The agency head did not qualify the grievance for hearing and as such, the grievant has asked this Department for a qualification determination.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.⁵ 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 action⁶ 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.⁷ Here, the grievant asserts that the agency's actions were "a form of punishment" and thus, taken for disciplinary reasons.

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.⁸ For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.⁹ 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).¹⁰

⁵ Va. Code § 2.2-3004(B).

⁶ 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).

⁷ Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (C).

⁸ Va. Code § 2.2-2900 *et seq.*

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

¹⁰ *See* EDR Ruling Nos. 2002-227 & 230.

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment.¹¹ Here, while working in a non-direct care capacity, the grievant lost the shift differential she would have received had she continued to work as an LPN. Additionally, the grievant's duties changed dramatically and she appears to have lost significant responsibility while working in a non-direct care capacity (e.g., the grievant no longer worked with patients and was relegated to answering the phone). Based on the foregoing, we conclude that the grievant has raised a sufficient question as to whether her temporary reassignment from an LPN to working in the information center answering phones was an adverse employment action.

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 the agreement specifically states that the grievant is being reassigned to "address indications of stress and patient safety concerns regarding use of medications in the workplace." In addition, in the agreement, the agency essentially states that it is reassigning the grievant to a non-direct care position and requiring her to attend counseling sessions in lieu of reporting her to the Board of Nursing and/or issuing her a Group I Written Notice.

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.

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's July 25, 2007 grievance is qualified for hearing.¹² 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.

Claudia T. Farr
Director

¹¹ 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)).

¹² This Department notes that the grievant received a Group II Written Notice with termination on October 11, 2007. The grievant subsequently challenged her termination by initiating a grievance on October 26, 2007. Because it challenges formal disciplinary action with termination, the grievant's October 26, 2007 grievance will automatically qualify for a hearing. *See Grievance Procedure Manual* § 4.1(a). Further, because the grievant's July 25, 2007 and October 26, 2007 grievances involve the same parties, potential witnesses, and share a common factual background they will likely be consolidated should the grievant continue to advance her October 26, 2007 grievance to the qualification phase of the grievance process.