Issue: Qualification – Discipline (Transfer); Ruling Date: December 9, 2009; Ruling #2010-2397; Agency: Department of Corrections; Outcome: Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2010-2397
December 9, 2009

The grievant has requested a ruling on whether his February 26, 2009 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons set forth below, this grievance is qualified for hearing.

FACTS

In or around November 2008, the agency received a complaint filed against the grievant by a subordinate. The agency reportedly investigated the complaint and determined that some of the allegations were founded. The agency notified the grievant of its findings in a memo dated January 30, 2009. In the memo, the agency indicated that "appropriate discipline will be issued." In a "Written Counseling" memo dated February 3, 2009, the grievant was transferred from his former position involving training to security operations. The grievant initiated this grievance on or about February 26, 2009 to challenge the transfer, the agency's findings, and the surrounding circumstances and background of the events and investigation. After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and he has 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 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]

[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).

Reassignment

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 actions are 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[5] against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance).[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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8]

Here, the grievant asserts that he was previously in charge of training at the facility, but now is assigned in a building in the compound in security operations. The grievant states that he has had to work evening shifts at times, which was not the case when he was in charge of training. The grievant also alleges that his credibility and promotional opportunities will be impacted by the founded charges. In light of these assertions, the grievant has raised a sufficient question as to whether his reassignment from training to security operations was an adverse employment action.[9]

This grievance also raises a sufficient question as to whether the agency's primary intent was to correct or punish perceived unsatisfactory job performance or conduct. In particular, the

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[3] Va. Code § 2.2-2900 *et seq.*
[4] *See* DHRM Policy No. 1.60, *Standards of Conduct*.
[5] The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions." *See Grievance Procedure Manual* § 4.1(b).
[6] *See, e.g.*, EDR Ruling No. 2007-1516, 2007-1517; EDR Ruling Nos. 2002-227 & 230; *see also* Va. Code § 2.2-3004(A) (indicating that grievances involving "transfers and assignments … resulting from formal discipline or unsatisfactory job performance" can qualify for hearing).
[7] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[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. *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 376 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 Fed. Appx. 726, 729 (4th Cir. 2004) (unpublished opinion).

agency's "Written Counseling" memo indicates that the grievant was transferred "[a]s a result of the findings of the [founded workplace harassment] complaint," which immediately followed a memo stating that "appropriate discipline will be issued." It appears that as a result of the investigation, the agency found that the grievant had violated two policies.

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 transfer, just as he or she may rescind any formal disciplinary action.[10]

This qualification ruling in no way determines that the grievant's reassignment constituted unwarranted informal discipline or was otherwise improper, but only that further exploration of the facts by a hearing officer is warranted.

Alternative Theories and Claims

The grievant has also included on his Grievance Form A additional statements of past events and occurrences apparently involving an alleged "intimidating and hostile work environment." Because the grievant's claim regarding the reassignment qualifies for hearing, this Department deems it appropriate to send alternative theories and claims raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues. Indeed, it would appear the grievant is alleging that the reassignment is the last management action (at the time of the initiation of the grievance) in this ongoing course of alleged harassment. Therefore, the grievant's claim of an ongoing "intimidating and hostile work environment" also qualifies for hearing.

However, while the grievant may have this argument about the ongoing course of alleged harassment addressed at hearing, a hearing officer will not be able to uphold or provide relief for these acts individually (such as affirming, overturning, or modifying). The February 26, 2009 grievance is untimely to challenge these actions substantively because they occurred more than 30 calendar days prior to the initiation of the grievance.[11] A hearing officer may only consider the facts and circumstances surrounding the past actions as background evidence of the "intimidating and hostile work environment claim."[12]

[10] *See, e.g.*, EDR Ruling No. 2002-127.
[11] The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance. Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4. This Department's rulings on matters of compliance are final and nonappealable. *See* Va. Code § 2.2-1001(5), 2.2-3003(G).
[12] *See, e.g.*, EDR Ruling No. 2008-1984; EDR Ruling No. 2003-098 & 2003-112.

CONCLUSION

The grievant's February 26, 2009 grievance is qualified for hearing to the extent described above. 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.

Claudia T. Farr
Director