Issues: Qualification – Discipline (transfer) and Discrimination (other), and Consolidation of Grievances for a Single Hearing; Ruling Date: January 26, 2011; Ruling No. 2011-2874; Agency: Department of Corrections; Outcome: Partially Qualified, Consolidation Granted.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND CONSOLIDATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2011-2874
January 26, 2011

The grievant has requested a ruling on whether his September 20, 2010 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons set forth below, this grievance is qualified in part for hearing.

FACTS

On or about August 23, 2010, the grievant was given two memoranda. One memorandum indicated that he would be receiving a Group I Written Notice for allegedly insubordinate conduct toward a superior on August 20, 2010.[1] The second memorandum removed the grievant from his former role as the institutional investigator and reassigned him to the regular security rotation. The grievant has submitted two grievances related to these events: 1) a September 15, 2010 grievance that challenges the Written Notice; and 2) a September 20, 2010 grievance that alleges workplace harassment and requests that he be returned to his job as the institutional investigator. The September 15, 2010 grievance has been qualified for a hearing by the agency head. The September 20, 2010 grievance was not qualified for hearing, and, therefore, is the subject of this qualification ruling.[2]

DISCUSSION

In the September 20, 2010 grievance, the grievant challenges two basic issues: 1) his reassignment, and 2) allegations of "workplace harassment." These issues are addressed separately below.

---

[1] The Written Notice was issued on August 24, 2010.

[2] The grievant has also asserted certain issues of procedural noncompliance that allegedly occurred during the management resolution steps. However, these issues, to the extent there was any noncompliance, have been waived because they were not raised prior to the grievance proceeding to this stage. *See Grievance Procedure Manual* § 6.3 ("All claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one may forfeit the right to challenge the noncompliance at a later time."). Therefore, the allegations of party noncompliance will not be addressed in this ruling.

Reassignment

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] 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.[4]

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 the Department of Human Resource Management (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 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[7] against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance).[8]

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."[9] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[10]

Here, the grievant was previously the institutional investigator, but has now been reassigned to the security rotation. As the institutional investigator, the grievant worked a regular Monday through Friday work schedule. Upon being assigned to the security rotation, the

[3] *See* Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).
[5] Va. Code § 2.2-2900 *et seq.*
[6] DHRM Policy No. 1.60, *Standards of Conduct*.
[7] 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).
[8] *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).
[9] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[10] *See, e.g.,* Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

grievant was assigned to twelve-hour shifts, two days on, two days off.[11] The grievant's duties are also significantly changed. The grievant previously reported directly to the Assistant Warden, rather than being part of the line of duty/chain of command. He also had significant responsibilities regarding criminal issues occurring at the facility. In light of these assertions, the grievant has raised a sufficient question as to whether his reassignment from institutional investigator to the security rotation was an adverse employment action.[12]

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. Although the grievant's reassignment was not included on a Written Notice, the grievant received a Written Notice at the same time of the reassignment. Further, it appears that the grievant's reassignment was the result of certain instances of alleged insubordinate behavior with superiors, including the incident on or about August 20, 2010 that resulted in the 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. Should the hearing officer find that the reassignment was adverse, disciplinary and unwarranted and/or inappropriate, he or she may rescind the reassignment, just as he or she may rescind any formal disciplinary action.[13] 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.

Further, the disciplinary action, the grievant's reassignment, and the grievant's alleged insubordinate conduct appear to be significantly intertwined. Because the grievant will be afforded a hearing to challenge the Group I Written Notice in his September 15, 2010 grievance, it simply makes sense to send the grievance challenging the reassignment, which may be related.[14] The grievances appear to share common factual questions about the grievant's alleged insubordination. Sending these related claims to a single hearing (see consolidation discussion below) will provide an opportunity for the fullest development of what may be interrelated facts and issues.

Workplace Harassment

For a claim of hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue

---

[11] The grievant states he has recently been put into a Monday through Friday schedule.

[12] 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 (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).

[13] *See, e.g.*, EDR Ruling No. 2002-127.

[14] *See, e.g.*, EDR Ruling No. 2008-1955; EDR Ruling No. 2005-957.

was (1) unwelcome; (2) based on a protected status; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[15] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[16]

However, the grievant must raise more than a mere allegation of harassment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. The grievant has not presented evidence that the alleged harassment and/or hostile work environment was based on a protected status.[17] Consequently, this claim does not qualify for a hearing. This ruling does not mean that EDR deems the challenged acts of workplace harassment, if true, to be appropriate; only that the claim of workplace harassment does not qualify for a hearing because the grievant has not asserted that the harassment is linked to any protected status.

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.[18] This Department finds that consolidation of the grievant's two grievances, to the extent qualified above, is appropriate. The grievances involve the same parties and share a related factual background. Moreover, consolidation is not impracticable in this instance. Therefore, the grievant's September 15, 2010 and September 20, 2010 grievances will be consolidated for a single hearing for adjudication by a hearing officer to help ensure a full exploration of what could be interrelated facts and issues.

CONCLUSION

The grievant's September 20, 2010 grievance is qualified for hearing to the extent described above and consolidated with his September 15, 2010 grievance for a single 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 in the September 20, 2010 grievance using the Grievance Form B.

---

[15] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[16] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).
[17] As courts have noted, prohibitions against harassment, such as those in Title VII, do not provide a "general civility code" or remedy all offensive or insensitive conduct in the workplace. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); Beall v. Abbott Labs., 130 F.3d 614, 620-21 (4th Cir. 1997); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).
[18] *Grievance Procedure Manual* § 8.5.

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 and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). If the court should qualify any remaining issues not qualified in this ruling, 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.

_____

Claudia T. Farr
Director