Issues: Qualification – Work Conditions (Hours of Work/Shift) and Retaliation (Other Protected Right); Ruling Date: May 13, 2011; Ruling No. 2011-2905; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2011-2905
May 13, 2011

The grievant has requested a ruling on whether his October 27, 2010 grievance with the Department of Corrections (DOC or the agency) qualifies for hearing. The grievant asserts that when he complained about how he was treated by his Sergeant, the agency never responded to his complaint. In addition, the grievant asserts that as a result of his complaint, he was moved to the night shift. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Corrections Officer with the agency. On or about July 30, 2010, the grievant requested that his Sergeant allow him to leave work as he was purportedly ill. The grievant asserts that the Sergeant refused his request. The grievant repeated his request several hours later and it was again denied. Accordingly, the grievant approached the Lieutenant and asked to be relieved of duty. The Lieutenant allegedly informed the Sergeant that the grievant could not be forced to stay at work if he was ill and the grievant was subsequently allowed to leave.

The grievant asserts that upon his return to work from sick leave, the Sergeant approached him and stated that she had heard that he had complained about having to work different posts. The grievant denied this accusation but asserts that afterward he was assigned to posts for which he had never worked nor received proper training.

Several months later, following a dispute with the Sergeant over a leave/overtime issue, the grievant contacted the Human Resource Department, who in turn contacted the Major about trying to resolve the leave/overtime dispute. The Major met with the grievant and Sergeant and decided that it would be best if the grievant and Sergeant were separated. On October 22, 2010 the grievant was transferred to the night shift.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[1] Thus, all claims relating to issues such

[1] Va. Code § 2.2-3004(B).

as the methods, means, and personnel by which work activities are to be carried out 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 or applied unfairly.[2] Here, the grievant asserts that the agency has misapplied policy by failing to respond to his harassment complaint and by allowing the harassment to continue. Additionally, the grievant asserts that management has retaliated against him for voicing his concerns about the purported harassment. The grievant's claims are discussed below.

Misapplication of Policy

For a claim of policy misapplication or unfair application of policy to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy provision, or evidence that management's actions, in their totality, are so unfair as to amount to a disregard of the intent of the applicable policy. In this case, the grievant alleges that he has been harassed by the Sergeant and that the agency has misapplied and/or unfairly applied policy by failing to take appropriate action to eliminate the harassment.

While grievable through the management resolution steps, claims of workplace harassment qualify for a hearing only if an employee presents sufficient evidence showing that the challenged actions are based on race, sex, color, national origin, religion, age, veteran status, political affiliation, or disability.[3] Here, the grievant has not sufficiently alleged that management's actions were based on any of these factors nor has this Department found evidence of such. Rather, the facts cited in support of the grievant's claim can best be summarized as describing general work-related conflict between the grievant and management.[4]

In addition, the grievant asserts that management has violated the workplace harassment policy by allowing the workplace harassment to continue and/or failing to take appropriate action. Even if this Department were to assume that the workplace harassment policy would apply to this case and that the grievant has suffered an adverse employment action,[5] the grievant has failed to present sufficient evidence that the agency has misapplied and/or unfairly applied the workplace harassment policy in this case. Under the workplace harassment policy, management is responsible for taking "immediate action to eliminate any hostile work environment where there has been a complaint of workplace harassment."[6] In other words, the

[2] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b)-(c).
[3] *Grievance Procedure Manual* § 4.1(b)(2); *see also* DHRM Policy 2.30 Workplace Harassment.
[4] *See* Va. Code § 2.2-3004 (A).
[5] The General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions." Va. Code § 2.2-3004(A). An adverse employment action is defined as a "tangible employment action constitute[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, 524 U.S. 742, 761 (1998). A misapplication of policy may constitute an adverse employment action if, but only if, the misapplication results in an adverse effect *on the terms, conditions, or benefits* of one's employment. *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[6] DHRM Policy 2.30

workplace harassment policy is generally intended to protect the party that has made a complaint of workplace harassment from further harassment.

In this case, the agency has provided evidence that it did investigate the grievant's complaint. In fact, the Warden himself investigated the grievant's complaint about the denial of relief of duty, finding it unfounded. Moreover, the agency has taken steps to stop any alleged harassment from continuing. In particular, the agency asserts that it first attempted to find a position on the other day shift where the grievant could be transferred. When it became clear that no such vacancies existed, the agency unsuccessfully attempted to find a volunteer to move to the grievant's original shift, thereby creating a vacancy into which the grievant could move. (The agency declined, however, to force another officer to transfer given that the grievant's complaint was deemed unfounded.) In addition, the agency has offered to allow the grievant to return to the second day shift if a vacancy arises. Finally, the agency has repeatedly offered to move the grievant to a day shift position at an adjacent facility, an offer that the grievant has not acted upon.

Based on the foregoing, this Department concludes that the grievant has failed to present sufficient evidence that he has been subjected to workplace harassment under DHRM Policy 2.30 and/or that management has violated the workplace harassment policy.[7] Accordingly, this grievance does not qualify for a hearing.

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[7] The grievant's belief that his complaint was never addressed may be linked to potential ambiguities contained in two memoranda, dated October 22, 2010 and November 4, 2010, written by the Assistant Warden that discuss the grievant's transfer. The October 22nd memorandum, addressed to the grievant, states in pertinent part that:

> I spoke with [the Major], today's date, October 22, 2010, at approximately 2:50PM in regards to your shift assignment. He advised me that you did not feel satisfied with the manner in which [the Lieutenant] and I handled allegations of harassment received from [the Sergeant].
> I say we did manage the complaint satisfactorily and the conditions discussed were mutually agreed upon by both parties.
> The Major requested that you and [the Sergeant] be placed on different breaks as soon as possible. Based on the aforementioned, I support the Major's request and you are being reassigned to another shift/break.

On November 4, 2010, the Assistant Warden wrote the Warden a letter of clarification in which he wrote:

> This memorandum serves to clarify the attached memo written to [the grievant], dated 10/22/10.
> - [The grievant] did not, at any time, advise me of any allegations of harassment.
> - I was informed of these allegations by [the Major], 10/22/10; specifically that [the grievant] wanted a shift change due to alleged harassment by [the Sergeant]. I immediately followed-up with [the Lieutenant] who advised that [the grievant] had given him a written requested [sic], dated 10/21/10, requesting a shift change (attached).
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> Based on the aforementioned, I scheduled a meeting with [the Lieutenant], [the grievant] and myself on October 22, 2010 at 2:30PM, to grant [the grievant] a shift change. The only vacancies were on A Break/Night Shift. This meeting was dismissed at approximate [sic] 2:55PM.
> Please advise if further information is needed.

The grievant asserts that the November 4th memo contradicts the October 22nd memo. The grievant points to the language "the conditions discussed were mutually agreed upon by both parties." The grievant asserts that the Assistant Warden "NEVER met with [the grievant] and [the Sergeant] to discuss this issue. Based on this

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[8] (2) the employee suffered a materially adverse action;[9] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[10] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[11]

The grievant argues that because he raised concerns with human resources and management about how he was treated by management, the agency retaliated against him. Raising concerns about employment matters with agency management or human resources can be viewed as protected activity.[12] However, assuming without deciding that the transfer to the night shift position constitutes a materially adverse action,[13] this Department cannot conclude that the grievant has presented sufficient evidence to warrant a hearing on the question of whether the transfer was effectuated in retaliation for his complaint. It appears undisputed that the grievant and Sergeant had several conflicts. The Warden himself looked into the grievant's complaint about being required to work while ill. The Warden found the complaint without merit. Following another complaint several months later, the agency determined that the grievant and Sergeant needed to be separated. In the absence of vacancies or a volunteer to

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Department's review of these memoranda, we cannot conclude that these memoranda individually or collectively reveal evidence of misapplication of policy or retaliation. The November memo appears to merely clarify that the complaint was brought to the Assistant Warden's attention by the Major, rather than the grievant. Moreover, while one might read the October 22nd memorandum as the Assistant Warden asserting that he had met jointly with the grievant and Sergeant, other readings are possible. For example, one might read that memo as stating that the Assistant Warden had met with "parties" but not necessarily simultaneously. (This Department is unaware of any requirement that such investigations include a joint meeting of the accused and accuser.) Furthermore, it is not clear who the Assistant Warden considers to be the "parties." Ultimately, such ambiguities are irrelevant as the Warden himself investigated the grievant's complaint.

[8] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).

[9] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); *see, e.g.* EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

[10] *See* EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

[11] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (Title VII discrimination case).

[12] Va. Code § 2.2-3000(A) ("It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management.").

[13] For the grievance to qualify for hearing, the action taken against the grievant must have been materially adverse to a reasonable employee, such that he or she might be dissuaded from engaging in the protected activity. *See* Burlington N., 548 U.S. at 68.

move, the agency appears to have had little option other than moving the grievant to night shift.[14] Moreover, the agency has offered to move the grievant back to the day shift when a vacancy opens and has repeatedly offered a transfer to a day shift position at an adjacent center. Accordingly, there simply does not appear to be sufficient evidence of retaliatory intent to warrant sending this matter to hearing.[15] Accordingly, this issue is not qualified for hearing.

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.

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Claudia T. Farr
Director

[14] The remaining option of forcing another officer to move from one day shift to the other in order to create a slot for the grievant was rejected given the Warden's conclusion that the harassment complaint was unfounded.

[15] The result is the same if this case is reviewed using an informal discipline analysis. *See* EDR Ruling No. 2010-2397. Using such an analysis, there is insufficient evidence to warrant a hearing on the question of whether the primary intent of the transfer was disciplinary (i.e., taken primarily to correct or punish perceived poor performance). *See* EDR Ruling No. 2010-2397. *See also* EDR Ruling No. 2002-160.