

Issue: Compliance/agency not timely with third-step response; Qualification/transfer to another facility constituted retaliation, harassment and was disciplinary; Ruling Date: May 14, 2004; Ruling #2004-659; Agency: Department of Corrections; Outcome: Compliance/agency already corrected compliance error-agency in compliance; Qualification/ issue of transfer is qualified; issue of harassment not qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling Number 2004-659  
May 14, 2004

The grievant has requested a ruling on whether her December 31, 2003 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that her transfer to another facility constituted retaliation, harassment, and was disciplinary. Additionally, she claims that the agency has failed to comply with the rules of the grievance procedure by not providing a timely third-step response to her grievance.

**FACTS**

The grievant is employed as a Corrections Lieutenant. On two separate occasions, in May and June, 2003, the grievant participated in meetings with the Deputy Director and employees of the correctional field unit to discuss the performance of the field unit superintendent. Later in August 2003, she met with the Regional Administrator in a follow-up meeting on those same issues.

On November 18, 2003, she appeared as a witness for an employee grievant at a grievance hearing. During the course of her testimony, in response to a question, she cited instances in which her subordinates failed to perform assigned duties, resulting in her having to personally accomplish the assigned security function herself or assign the task to someone else.

On December 3, 2003, she was asked to meet with the Regional Administrator. She contends that during the meeting, the Regional Administrator informed her that he had listened to the tapes of the November 18, 2003 hearing and had several concerns about her performance in the situations she had described during her testimony. Specifically, the Regional Administrator expressed concern that she had failed to fulfill her responsibility as a Shift Commander to report violations by her subordinates while on duty. Consequently, he decided to reassign her to a larger facility effective December 9, 2003.<sup>1</sup> The grievant claims that the underlying reason for her transfer was not her failure to report alleged violations by her subordinates, but her participation in meetings with other employees to raise concerns about the field unit superintendent's performance. On

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<sup>1</sup> At field units, Lieutenants serve as Shift Commanders, while at larger facilities this role is filled by Captains.

December 31, 2003, she initiated the present grievance alleging that her transfer constituted retaliation, harassment, and was disciplinary.

### DISCUSSION

#### *Compliance*

#### Timeliness of Third-Step Response

As an initial point, grievant contends that the agency failed to provide a third-step response within the required five workday time period. The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>2</sup> That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.<sup>3</sup> For example, if the grievant believes that an agency has not provided its third-step response within five workdays (as the grievant believed in this case), a grievant must notify the agency head of the alleged noncompliance.

Before seeking a compliance ruling from this Department, the grievant must allow the agency five workdays after receipt of the written notice to correct any noncompliance. If after five workdays the grievant believes that the agency has failed to correct the alleged noncompliance, the grievant may request a ruling from this Department. Furthermore, should this Department find that the agency violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may resolve the grievance in the grievant's favor unless the agency can establish just cause for its noncompliance.

In this case, the grievant met with the third-step respondent on January 28, 2004, to discuss the issues of her grievance.<sup>4</sup> Accordingly, the third-step response was due by February 4, 2004. Although the third-step response is dated February 6, the grievant claims that it was not received by her until February 11, 2004. In any event, the third-step respondent did not provide a response within five workdays following his meeting with the grievant, as required by the grievance procedure.

However, it was not until February 23, 2004, long after the agency had already corrected its noncompliance by providing a third-step response that the grievant notified the agency that it was out of compliance with the grievance procedure. Thus, the

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<sup>2</sup> *Grievance Procedure Manual*, § 6, pages 16-18.

<sup>3</sup> *Grievance Procedure Manual*, § 6.3, page 17

<sup>4</sup> The grievance form indicates that the third-step respondent received the grievance on January 15, 2004. Accordingly, the third-step respondent should have responded to the grievance within 5 workdays of receiving the grievance. In this case, the parties apparently agreed to hold an optional face-to-face meeting. While such meetings are often helpful and productive, in the absence of an agreement to extend the timeframe for a response, the 5-day response time is not enlarged; thus the third-step respondent should have responded no later than January 22, 2002.

grievant provided the agency head with no timely written notice of noncompliance, and the agency has already corrected its error. In light of these facts and the procedures established in the *Grievance Procedure Manual*, there is no basis for this Department to rule against the agency on any qualifiable issue presented in this grievance.<sup>5</sup> This Department's rulings on matters of compliance are final and nonappealable.<sup>6</sup>

### *Qualification*

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>7</sup> Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out (to include the best utilization of personnel) 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 influenced management's decision, or whether state policy may have been misapplied.<sup>8</sup> In this case, the grievant asserts that her transfer was effectuated, in part, for disciplinary and retaliatory reasons and was unwarranted.

### Informal Disciplinary Action

For state employees subject to the Virginia Personnel Act, a transfer must be either voluntary, or if involuntary, must be based on objective methods and must adhere to all applicable statutes and to the policies and procedures promulgated by the Department of Human Resource Management (DHRM).<sup>9</sup> Applicable statutes and policies recognize management's authority to transfer an employee for disciplinary and performance purposes as well as to meet other legitimate operational needs of the agency.<sup>10</sup>

For example, when an employee is transferred as a disciplinary measure, certain policy provisions must be followed.<sup>11</sup> All transfers accomplished by a Written Notice

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<sup>5</sup> Generally speaking, if a party has corrected any purported non-compliance prior to this Department's (EDR's) receipt of a ruling request, we typically consider the non-compliance to be cured and, thus, there is no reason for EDR to take further action. An exception might be a case in which the non-compliant party has violated a substantial procedural requirement of the grievance procedure. In such cases, this Department has the authority to render a decision against the non-complying party on any qualifiable issue. *Grievance Procedure Manual* § 6.3(5), page 17. EDR would generally consider such an action only where the non-compliant party engaged in bad faith or significantly prejudiced the other party. This is not such a case. The parties are, however, advised that the time requirements of the grievance procedure are to be followed, and that repeated disregard of procedural rules *could* serve as evidence of bad faith. See EDR Ruling #2003-026.

<sup>6</sup> Va. Code § 2.2-3003 (G).

<sup>7</sup> Va. Code § 2.2-3004(B).

<sup>8</sup> Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (C), page 11.

<sup>9</sup> Va. Code § 2.2-2900 *et seq.*

<sup>10</sup> Va. Code § 2.2-3004 (A) and (C); DHRM Policy 3.05, Compensation, DHRM Policy No. 1.60, Standards of Conduct.

<sup>11</sup> DHRM Policy No. 1.60, Standards of Conduct (VII).

automatically qualify for a hearing if challenged through the grievance procedure.<sup>12</sup> In the absence of an accompanying Written Notice, a disciplinary action qualifies for a hearing only if there is a sufficient question as to whether it was an “adverse employment action” and was taken primarily to correct or punish behavior, or to establish the professional or personal standards for conduct of an employee.<sup>13</sup> These policy and procedural safeguards are designed to ensure that the discipline is merited. A hearing cannot be avoided for the sole reason that a Written Notice did not accompany the involuntary transfer, where there is a sufficient question as to whether the transfer was an “adverse employment action” and was in effect disciplinary in nature, i.e., taken primarily to correct or punish perceived behavior. The issues of whether the grievant’s transfer constituted an adverse employment action and was disciplinary in nature are discussed below.

#### Adverse Employment Action

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment, such as a discharge, demotion, cut in pay or benefits, or a failure to promote.<sup>14</sup> Thus, a transfer may constitute an adverse employment action if a grievant can show that the transfer had some significant detrimental effect on the terms, conditions, or benefits of her employment.<sup>15</sup> Significantly, a transfer with dramatic shift in working hours, appreciably different responsibilities, or one providing reduced opportunities for promotion can constitute an adverse employment action, depending on all the facts and circumstances.<sup>16</sup>

In this case, there is no evidence that the grievant’s transfer resulted in a cut in pay or benefits. However, in her prior assignment, she functioned in the capacity of a Day Shift Watch Commander, with 95 percent of her core responsibilities allocated to management-related functions. In contrast, in her current position as Operation Supervisor, she works under the supervision of a shift commander and only 50 percent of her core responsibilities are allocated to management-related functions. Therefore, this grievance raises a sufficient question as to whether the transfer, with its appreciable reduction in the level and scope of responsibilities, is an “adverse employment action” that may impact future promotional opportunities.

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<sup>12</sup> Va. Code § 2.2-3004 (A); DHRM Policy No. 1.60, Standards of Conduct (IX); *Grievance Procedure Manual* § 4.1 (a), page 10.

<sup>13</sup> Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (B) and (c), pages 10-11.

<sup>14</sup> *Burlington Industries, Inc., v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

<sup>15</sup> *Von Gunten v. Maryland Department of Employment*, 243 F.3<sup>rd</sup> 858, 866 (4<sup>th</sup> Cir. 2001)(citing *Munday v. Waste Mgmt. of North America, Inc.*, 126 F.3d, 239, 243 (4<sup>th</sup> Cir. 1997)).

<sup>16</sup> See *Boone v. Goldin*, 178 F.3d 253 (4<sup>th</sup> Cir. 1999); *Webster v. Henderson*, 2000 U.S. Dist. LEXIS 5777 (D. Md. 2000) aff’d 2002 U.S. App. LEXIS 287 (unpublished opinion). See also *Garrison v. R.H. Barringer Distributing Co.* 152 F. Supp. 2d 856 (M.D. N.C. 2001).

### Disciplinary Basis

In this case, it is undisputed that the transfer of the grievant was to address perceived performance problems, and thus, could be viewed as disciplinary. In fact, the grievant's third-step respondent stated that the reason for transferring the grievant was her unsatisfactory performance. Specifically, he stated that "you [the grievant] testified at this hearing that you as a supervisor were aware of violations by employees of Unit while you were on duty; however, you failed to address those violations." The third-step respondent further stated that the grievant was being transferred to a facility where she would not be utilized as a Shift Commander. These statements are enough to raise a sufficient question of disciplinary intent towards the grievant. Therefore, the issue of the grievant's transfer is qualified for hearing for a determination of whether the transfer was primarily disciplinary in nature, and if so, whether the discipline was warranted.

### Retaliation

The grievant has advanced retaliation as an alternate theory related to her transfer. Because the issue of disciplinary transfer qualifies for a hearing, this Department deems it appropriate to send this alternate issue for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and claims.

### Harassment

The grievant also claims that her transfer constituted harassment. A claim of workplace harassment qualifies for a grievance hearing only if an employee presents evidence raising a sufficient question as to whether the challenged action is based on race, color, religion, political affiliation, age disability, national origin, or sex.<sup>17</sup> The grievant does not assert, however, that the alleged harassment was based on any of these factors. Rather, her claim essentially describes actions leading up to her transfer. Such a claim of workplace conflict is not among the issues identified by the General Assembly that may qualify for a grievance hearing.

Finally we note that as part of the relief she requests, the grievant asks that the Regional Administrator "be dealt with by his superiors." However, even if the grievance is qualified for hearing, the hearing officer has no authority to direct that disciplinary action be taken against another employee.

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<sup>17</sup> Va. Code § 2.2-3004 (A)(iii). *See also* Department of Human Resource Management (DHRM) Policy 2.30, which defines workplace harassment as conduct that "denigrates or shows hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status or pregnancy."

CONCLUSION

For the reasons discussed above, the issues of disciplinary transfer and retaliation qualify for a hearing. This qualification ruling in no way determines that the agency's decision to transfer the grievant was disciplinary, retaliatory, or otherwise improper, only that a further exploration of the facts by a hearing officer is appropriate. For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

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Claudia T. Farr  
Director

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