

Issue: Qualification/Grievance 1 – retaliation and misapplication of state policy;
Grievance 2 – management actions/hostile work environment/disparate treatment; Ruling
Date: November 9, 2004; Ruling #2004-736, 2004-737; Agency: Department of
Corrections; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULINGS OF DIRECTOR

In the matter of Department of Corrections/ No. 2004-736, 2004-737
November 9, 2004

The grievant has requested a ruling on whether his grievances dated February 17, 2004 (Grievance 1) and March 10, 2004 (Grievance 2) with the Department of Corrections (DOC) qualify for a hearing. In Grievance 1, the grievant claims that the agency (i) retaliated against him and (ii) misapplied state policy by taking a series of actions against him that were disciplinary in nature. In Grievance 2, the grievant asserts management has (i) taken certain actions in order to orchestrate his failure, (ii) created a hostile work environment and (iii) subjected him to disparate treatment. For the following reasons, these grievances do not qualify for a hearing.

FACTS

The grievant is the Building and Grounds Superintendent at a DOC facility. In February 2004, an employee who reported to the grievant informed the Assistant Warden that the grievant was subjecting his staff to a "hostile work environment." DOC claims this same assertion had been made during the summer of 2003 by other members of the grievant's staff, at which time the grievant expressed resolve to reverse this perception.¹ However, when the issue was raised again in February, management felt compelled to remove the grievant from the work area, adjust how he interacts with staff, and conduct a thorough investigation.

Subsequently, the grievant initiated a grievance asserting management removed him from his position unfairly without due process, retaliated against him and subjected him to disparate treatment. He lists the following alleged management actions in support of his claims: (i) removal from his position as Building and Grounds Superintendent, (ii) removal from his private office to a secretarial cubicle (iii) the requirement of a

¹ During the investigation for this ruling, management clarified that the "hostile work environment" claims are not based upon the grievant's alleged mistreatment of his staff based upon their membership in a protected class, but rather describe the employees' perceptions that they are being intimidated and subjected to inappropriate outbursts by the grievant.

uniformed security escort to obtain access to his office,² (iv) the creation of an environment that fueled rumors of his dismissal, (v) public notification to remove his set of institutional keys from the master control keyboard, and (vi) prevention of his use of his rights and privileges as back up Site Administrator to assist other employees with computer problems.

Shortly after the initiation of Grievance 1, the grievant initiated a second grievance. In Grievance 2, the grievant claims management has taken actions designed to ensure he fails at his assignments. Specifically, the grievant claims management has (i) established unrealistic and arbitrary deadlines, (ii) withheld critical information and micro-managed his assignments, (iii) made contradictory statements, (iv) created a hostile work environment, (v) engaged in disparate treatment (by treating the grievant different from another employee) and (vi) created crisis management due to poor planning and lack of prioritization.

In response, the agency maintains that management's actions were not retaliatory, but were necessitated by the allegations lodged against the grievant. Furthermore, DOC asserts the grievant remains the Building and Grounds Superintendent and no adverse actions have been taken against him. With respect to the allegations in Grievance 2, management denies the creation of a hostile work environment and any disparity in the grievant's treatment. Also, management asserts the assignments and timeframes given the grievant are reasonable and fall within management's discretion regarding the means, methods and personnel by which work activities are undertaken.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.³ Therefore, grievances challenging management's assignment and monitoring of duties do not qualify for a hearing unless there is evidence raising a sufficient question as to whether discrimination, retaliation, or a misapplication of policy has occurred.⁴ Here, the grievant challenges management's actions as a misapplication and/or unfair application of policies, retaliatory and/or discriminatory.

Grievance 1

Misapplication of Policy

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether

² The Assistant Warden or other staff escorted the grievant when he met with his staff because of the nature of the allegations lodged by those employees who report to the grievant. However, the grievant is no longer escorted to meet with staff.

³ Va. Code § 2.2-3004(B).

⁴ *Grievance Procedure Manual* § 4.1 (b) and (c).

management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. A mere misapplication of policy itself, however, is insufficient to qualify for a hearing. The General Assembly has limited issues that may qualify for a hearing to those that involve “adverse employment actions.”⁵ The threshold question, therefore, is whether or not the grievant has suffered an adverse employment action.

An adverse employment action is defined as a “tangible employment act constituting 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.”⁶ As a matter of law, adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁷

In this case, the management actions challenged in Grievance 1 do not rise to the level of adverse employment actions. The grievant asserts that certain actions by management were disciplinary in nature and so altered his duties as to essentially remove him from his position as Building and Grounds Superintendent without due process.⁸ We disagree.

The grievant’s Employee Work Profile (EWP) lists the following Core Responsibilities and corresponding Measures for Core Responsibilities for the position of Building and Grounds Superintendent B:⁹ *Performance Management* (completes assigned performance evaluations and addresses performance issues); *Facility Maintenance and Documentation* (ensures maintenance staff are assigned maintenance tasks, oversees and monitors all maintenance activities to ensure they are cost effective, timely and of outstanding quality and ensures reports and policies are produced as directed by facility management); *Supervision/Safety of Staff and Inmates* (provides direction to staff to meet unit goals/objectives and ensures that staff function as an

⁵ Va. Code § 2.2-3004(A).

⁶ *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

⁷ *Von Gunten v. Maryland Department of the Environment*, 243 F.3d 858, 866 (4th Cir. 2001)(citing *Munday v. Waste Management of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997)).

⁸ The grievant asserts management has violated the following policies: Governor’s Executive Order (01), DHRM Policy 1.60 (III)(C), and the EDR objective that “complaints arising in the workplace should be resolved fairly and promptly.” Additionally, he claims his alleged removal from his position was disciplinary in nature and occurred without due process. When an employee’s duties are significantly altered as a disciplinary measure, certain policy provisions must be followed. *See* DHRM Policy 1.60 (VII). In the absence of an accompanying Written Notice, a challenged reassignment of duties qualifies for a hearing only if there is a sufficient question as to whether the reassignment was an “adverse employment action” and that management’s primary motivating factor was to correct or punish behavior, or to establish professional or personal standards for the conduct of the employee. *See* Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b)(5) and (c)(4), (a claim of disciplinary transfer, assignment, demotion or suspension, or other action similarly affecting the employment status of an employee may qualify for a hearing if there are sufficient supporting facts).

⁹ Grievant’s EWP, effective date October 29, 2002. During the investigation for this ruling, management at the facility indicated that the EWP was misdated and the effective date should read October 29, 2003.

integral part of the total facility, ensures facility equipment is operated in a safe manner and makes facility rounds to include seven inmate Housing Units and all areas on the inside of the facility a minimum of once weekly); *Budget Management* (ensures the maintenance budget is managed responsibly and within budget allotments); *Construction Coordination* (ensures that facility modifications and new construction are thoroughly planned and developed) and *Preventive Maintenance Program* (plans, develops and monitors preventive maintenance schedules). Additionally, under the category of Other Assignments the grievant is responsible for vehicle appearance, maintenance and repair, as well as serving as the Computer Site Administrator. Based upon the EWP, he is also responsible for the appearance and upkeep of facility grounds.¹⁰

According to both the grievant and management, the grievant continues to perform the core responsibilities outline above.¹¹ He continues to assign maintenance tasks to his staff, monitor their work, complete EWPs and provide counseling or issue discipline when necessary. Additionally, the grievant continues to supervise the same number of employees as he did prior to management's investigation into the grievant's alleged creation of a hostile work environment.¹² Furthermore, the grievant has not suffered any loss of pay or position title. While the grievant disputes his relocation to another area of the facility (Operations), which is some distance from his staff, and management's authority to remove his keys to the maintenance area and tell him when he must hold staff meetings, these sorts of actions are not adverse employment actions. He has not been reassigned with significantly different responsibilities, nor have management's actions caused a significant change in the grievant's benefits. Therefore, this issue does not qualify for a hearing.

Additional Theories for Removal of Grievant's Duties

The grievant has advanced alternative theories related to the actions taken by management – retaliation for his prior participation in the grievance procedure and disparate treatment.¹³ However, in order to prevail in a claim of retaliation or disparate treatment, the grievant must show that he suffered an adverse employment action. As

¹⁰ During the investigation for this ruling, the grievant disputed that he handles the upkeep of the grounds. Although he did acknowledge it is listed on his EWP, he stated that security personnel have handled the upkeep of the grounds for several years.

¹¹ In Grievance 1, the grievant challenges management's removal of his rights and privileges as a back up Site Administrator to assist other employees with computer problems. This responsibility of the grievant is included under the category "Other Assignments" in his EWP. In response, management stated during the resolution step process that this was a secondary duty assigned to the grievant and it was not necessary to the performance of his job as Building and Grounds Superintendent. This Department agrees that the removal of this responsibility did not impact the grievant's performance of his core responsibilities, nor did significantly alter his position. Furthermore, in September 2003, this function was taken over by VITA staff.

¹² One of the grievant's direct reports has left the facility.

¹³ During the investigation for this ruling, the grievant informed the investigating consultant that his claim of disparate treatment was not based upon his membership in a protected class. Instead, he used the term to indicate his belief that management, under the same circumstances, has treated other similarly situated individuals differently.

discussed above, the grievant has not done so. Therefore, these issues may not be qualified for a hearing.

Grievance 2

Misapplication or unfair application of policy

In Grievance 2, the grievant asserts that management is attempting to orchestrate his failure. Specifically, he challenges the following alleged management actions that can best be categorized as misapplications or unfair applications of policy: (i) establishing unrealistic and arbitrary deadlines, (ii) withholding critical information and micro-managing the process, (iii) giving contradictory statements concerning how the grievant is to perform his job, and (iv) engaging in crisis management due to poor planning and lack of prioritization.

In this case, the grievant basically contests management's authority to make determinations regarding how he should perform his assigned tasks. However, as discussed above, management has the exclusive right to manage the affairs and operations of the agency, which includes assigning work to employees and monitoring their performance. While the grievant provides instances where he clearly disagrees with the level of management's involvement in his work and with the directives he has been given, he has failed to present evidence of an adverse employment action because none of the incidents raised by the grievant have had an effect on the terms, conditions, or benefits of his employment. Therefore, this issue does not qualify for a hearing.

However, should the alleged incidents challenged by the grievant later serve to support an adverse employment action against him, such as a formal Written Notice or a "Below Contributor" annual performance rating, this ruling does not foreclose the grievant from attempting to present these issues as background evidence in support of such a challenge.

Disparate Treatment and Hostile Work Environment

The grievant also claims that management has created a hostile work environment and subjected him to disparate treatment. However, because this grievance neither alleges nor presents sufficient evidence of improper discrimination based upon the grievant's membership in a protected class (i.e., race, color, religion, political affiliation, age, disability, national origin or sex) the disparate treatment and hostile work environment claims do not qualify for a hearing.¹⁴ Rather, the facts cited in support of this grievance can best be summarized as ongoing conflict and disagreement with management about how the grievant should perform his job.

¹⁴ See *Grievance Procedure Manual* § 4.1(b).

Indeed, the grievance record reflects significant interpersonal conflict between the grievant and management. Mediation through EDR may be a viable option to pursue. EDR's mediation program is a voluntary and confidential process in which the mediator, a neutral from outside the grievant's agency, helps the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work units involved.

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 this 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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