Issue: Qualification – Work Conditions (hours of work/shift); Ruling Date: May 26, 2017; Ruling No. 2017-4544; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution[1]

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2017-4544
May 26, 2017

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") of the Department of Human Resource Management ("DHRM") on whether his February 2, 2017 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant is employed as a Correctional Officer at one of the agency's facilities. On or about January 4, 2017, the grievant was notified that he would be transferred from the day shift to the night shift as of January 9. The grievant initiated a grievance on February 2, alleging that the transfer was retaliatory in nature "because of statements [he] made during the 2016 year and for not eating the meal during employee appreciation week." He appears to further claim that he "made a comment" to several other employees about his dissatisfaction with certain practices at the facility in December 2016 that contributed to the agency's decision to transfer him to the night shift, and that the transfer was an act of workplace violence that "caused [him] emotional and physical harm . . . ." After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[2] Additionally, 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 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

[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as "EDR" in this ruling to alleviate any confusion. EDR's role with regard to the grievance procedure remains the same post-merger.
[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).

decision, or whether state policy may have been misapplied or unfairly applied.[4]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action. 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

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 an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment 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.[9] Ultimately, to support a finding of retaliation, EDR must find that the protected activity was a but-for cause of the alleged adverse action by the employer.[10]

For purposes of this ruling only, EDR will assume that the grievant engaged in protected activity by discussing workplace-related concerns with management.[11] Under the facts presented to EDR, however, it does not appear that the grievant's reassignment to the night shift was an adverse employment action. A transfer or reassignment to a different shift may constitute an adverse employment action if a grievant can show that there was some significant detrimental effect on the terms, conditions, or benefits of his/her employment.[12] For example, a reassignment or transfer with significantly different responsibilities, or one providing reduced opportunities for promotion, may, depending on all the facts and circumstances, be considered an

[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[5] *See Grievance Procedure Manual* § 4.1(b).
[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[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 the 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] *See, e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[10] *See id.* (citing Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013)).
[11] *See* Va. Code §§ 2.2-3000(A), 2.2-3004(A).
[12] *See Holland*, 487 F.3d at 219 (citation omitted).

adverse employment action.[13] However, in general, a lateral transfer will not rise to the level of an adverse employment action.[14] Subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.[15] In this case, the grievant has not indicated that his shift assignment had an effect on his job title and responsibilities, and it does not appear that they were modified in any way as a result of the reassignment. An employee's unmet preference regarding work hours or job location is not enough to result in an adverse employment action.[16] In the absence of an adverse employment action, the grievant's challenge to his reassignment to the night shift does not qualify for a hearing on the theory that the agency engaged in retaliation.

Moreover, even assuming that the grievant has raised a question as to whether the transfer was an adverse employment action, he has not presented information to demonstrate a causal link between the transfer and the protected activity. On December 27, 2016, management at the facility circulated a memorandum notifying employees that some staff members would be given "new assignments" to ensure adequate knowledge and training across functions within the facility, with the goal of improving agency operations. The grievant states that management notified him of the transfer after a meeting at which the memorandum was discussed, and that he was specifically told he had been "hand picked" because he was "one of the best officers" at the facility. While the grievant may disagree with the agency's decision to reassign him to a different shift at the facility, EDR has not identified anything that would call into question the agency's justification for the transfer.

In summary, EDR's review of the grievance record shows that the agency's decision to reassign the grievant to the night shift at his facility was based on legitimate, nonretaliatory business reasons, and there is nothing to demonstrate that those reasons were merely a pretext for retaliation. Furthermore, there are no facts that would indicate the grievant's exercise of protected activity was the but-for cause of the transfer. Accordingly, EDR concludes that the grievant's claims related to the transfer do not raise a sufficient question as to whether retaliation has occurred, and they do not qualify for a hearing on this basis.

Workplace Violence

The grievant further asserts that agency management engaged in workplace violence by transferring him to the night shift. Specifically, he claims that the transfer "caused [him] emotional and physical harm" such that he was unable to work and that he had to receive short-term disability benefits under the Virginia Sickness and Disability Program. DHRM Policy 1.80, *Workplace Violence*, requires agencies to provide a safe working environment for their

[13] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 375-77 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253, 255-256 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 Fed. Appx. 726, 729 (4th Cir. 2004).
[14] *See* Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996).
[15] *See, e.g.*, Jones v. D.C. Dep't of Corr., 429 F.3d 276, 284 (D.C. Cir. 2005); *James*, 368 F.3d at 377; Fitzgerald v. Ennis Bus. Forms, Inc., No. 7:05CV00782, 2007 U.S. Dist. LEXIS 875, at *14-15 (W.D. Va. Jan. 8, 2007); Stout v. Kimberly Clark Corp., 201 F. Supp. 2d 593, 602-03 (M.D.N.C. 2002).
[16] *See, e.g.*, EDR Ruling Nos. 2016-4203, 2016-4206; EDR Ruling No. 2016-4240; EDR Ruling No. 2015-3946; EDR Ruling No. 2015-3946.

employees.[17] Federal and state laws also require employers to provide safe workplaces.[18] Thus, an act or omission by an employer resulting in actual or threatened workplace violence against an employee, or an unreasonably unsafe work environment for that employee, can reasonably be viewed as having an adverse effect on the terms, conditions, or benefits of his employment.[19]

"Workplace violence" is defined as "[a]ny physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties."[20] Prohibited conduct includes, but is not limited to engaging in behavior which subjects another individual to extreme emotional distress, including "psychological trauma such as threats" and "harassment of any nature."[21] In this case, the grievant has not alleged that he was the victim of physical assault, threatening behavior, verbal abuse, or other similar conduct. While EDR is sympathetic to the grievant's argument that he required medical treatment as a result of the transfer, an agency's decision to reassign an employee to a different shift is not the type of action that could be considered workplace violence under the circumstances presented in this case. Accordingly, the grievant's claim that the transfer constituted workplace violence does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.[22]

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[17] *See* DHRM Policy No. 1.80, *Workplace Violence*.
[18] Under the Occupational Safety and Health Act of 1970, employers must establish "place[s] of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees. 29 U.S.C. § 654(a)(1). Virginia state employees are covered by the Virginia Occupational Safety and Health Program, which also requires "every employer to furnish to each of his employees safe employment and a place of employment that is free from recognized hazards that are causing or are likely to cause death or serious harm to his employees . . . ." Va. Code § 40.1-51.1(A); *see* 16 Va. Admin. Code § 25-60-30.
[19] *See* Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742, 744 (7th Cir. 2002) (describing a "tangible employment action" as including circumstances where "the employee is not moved to a different job or the skill requirements of his present job altered, but the *conditions* in which he works are changed in a way that subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment . . . ." (emphasis in original)).
[20] DHRM Policy 1.80, *Workplace Violence*.
[21] *Id.*
[22] Va. Code § 2.2-1202.1(5).