JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of George Mason University
Ruling Number 2023-5478
November 23, 2022

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") on whether his August 11, 2022 grievance with George Mason University (the "university" or "agency") qualifies for a hearing. For the reasons discussed below, this grievance is partially qualified for a hearing.

FACTS

The grievant is a Sergeant with the University's police department. On or about July 21, 2022, the agency delivered to the grievant the results of an Internal Affairs ("IA") investigation involving his conduct on February 11, 2022, particularly during a phone call with a supervisor, a Deputy Chief. During this call, the grievant questioned an order from the Deputy Chief, but ultimately complied. However, the Deputy Chief perceived the grievant's response as disrespectful. The grievant hung up on the Deputy Chief, after which the two exchanged text messages that showed frustration on both sides and both believing the other was disrespectful and unprofessional.

Following this incident, the grievant reported the conversation with the Deputy Chief to another Deputy Chief ("Deputy Chief 2"), who indicated the grievant had "disrespected his chain of command by calling her and questioning [the] Deputy Chief['s] order." Following this, the university initiated an IA investigation of the incident. The investigation resulted in findings that the grievant's behavior toward the Deputy Chief had violated the university's standards of conduct. Additionally, on March 4, 2022, the grievant was transferred from one campus to another for patrol duties. The grievant stated that he received no training for this new role prior to the transfer.

The grievant argues that the university's substantiated findings were inaccurate, that the subsequent transfer was a result of retaliation for addressing the incident to Deputy Chief 2, and that the transfer, the IA investigation, and its subsequent results have all resulted in an adverse employment action. In particular, the grievant alleges that the transfer was adverse because it resulted in different duties, hours, and location, and he alleges that the IA investigation was adverse primarily because it prevents him from being eligible for an open Lieutenant position within the agency. Thus, the grievant seeks relief in the form of removing documentation related to the IA

investigation and its findings from his file. After the grievance proceeded through all three management steps, with each step respondent denying any form of adverse employment action and affirming the substantiated violation,[1] the agency head denied further requested relief and 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] The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] 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."[4] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[5]

Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[6] Thus, claims relating to issues such as the means, methods, 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 decision, whether state policy may have been misapplied or unfairly applied, or whether a performance evaluation was arbitrary and/or capricious.[7]

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 DHRM.[8] For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.[9] 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

---

[1] The second- and third-step respondents both indicated that the lateral transfer was not an adverse employment action because the transfer was done as a mode of remedial training to improve upon the grievant's policing skills.
[2] *See Grievance Procedure Manual* § 4.1.
[3] *See Grievance Procedure Manual* § 4.1(b); *see also* Va. Code § 2.2-3004(A).
[4] Ray v. Int'l Paper Co. 909 F.3d 661, 667 (4th Cir. 2018) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).
[5] Laird v. Fairfax County, 978 F.3d 887, 893 (4th Cir. 2020) (citing Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007)) (an adverse employment action requires more than a change that the employee finds "less appealing").
[6] Va. Code § 2.2-3004(B).
[7] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[8] Va. Code §§ 2.2-2900-2905.
[9] DHRM Policy 1.60, *Standards of Conduct*.

Notice, a hearing is required where the grieved management action resulted in an adverse employment action against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance).[10]

There is little dispute that the memo the grievant received as a result of the substantiated IA investigation against him, though not formal discipline, was disciplinary in nature. Therefore, the primary matter to discuss is whether there was any adverse employment action sufficient to qualify the grievance for a hearing. EDR concludes that the record sufficiently alleges an adverse employment action based on the effect of the IA investigation on the grievant's eligibility for promotion.

While courts have held that IA investigations, by themselves, do not rise to the level of an adverse employment action, those holdings are premised on the absence of any related "adverse effect on the terms and conditions of employment …"[11] Such an effect could include a failure to promote or other significant detrimental effect on the grievant's opportunities for promotion or professional development.[12] Here, university policy states that, to be eligible for a promotion to Lieutenant in the Police Department, the applicant must have "served with good conduct evidenced by no sustained IA cases in the past twelve months, and/or no active Group Discipline notices."[13] As the substantiated results of the IA investigation would appear to make the grievant ineligible for promotion under this policy, a sufficient question exists as to whether the grievant has experienced a tangible adverse effect on the terms, conditions, or benefits of his employment with the university.[14] Because this result appears to be disciplinary in nature, this adverse employment action satisfies the standards to qualify for a hearing.

On the other hand, we cannot conclude that the grievant's transfer constitutes an adverse employment action. In general, a lateral transfer will not rise to the level of an adverse employment action,[15] and subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.[16] However, a transfer or reassignment to a different position 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.[17] For example, a reassignment or transfer with significantly different responsibilities, or one providing

[10] *See, e.g.*, EDR Ruling Nos. 2007-1516, 2007-1517; EDR Ruling Nos. 2002-227, 2002-230; *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 a hearing).
[11] *See* Handley v. Baltimore Police Dep't, No. DLB-20-1054, 2022 U.S. Dist. LEXIS 154373, at *23 (D. Md. Aug. 26, 2022) (and authorities cited therein).
[12] *See Ellerth*, 524 U.S. at 761; James v. Booz-Allen & Hamilton, 368 F.3d 371, 376 (4th Cir. 2004).
[13] University Police Department General Order 34, at 2.
[14] *See Ellerth*, 524 U.S. at 761; *James*, 368 F.3d at 376.
[15] *See* Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996); *e.g.*, Sercer v. Holder, 104 F. Supp. 3d 746, 751 (E.D. Va. 2015).
[16] *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.
[17] *See* Holland v. Wash. Homes, Inc., 487 F.3d 208, 2019 (4th Cir. 2007) (citation omitted).

reduced opportunities for promotion, may, depending on all the facts and circumstances, be considered an adverse employment action.[18]

In this case, the grievant experienced a lateral transfer, apparently maintaining his rank of Sergeant and his salary. He argues that he was also reassigned to markedly different duties, his hours changed significantly, and he was no longer a short drive away from home, limiting his ability to spend time with his family. However, to constitute an adverse employment action, a lateral transfer must result in *significantly different* responsibilities. The grievant claims that his duties changed from a community police officer to a patrol officer, where he now leads a small squad and answers calls in the vicinity. Based on the facts given, however, these changes in duties do not reach the level of "significantly different." Similarly, although the grievant states that his commute went from a 5-minute drive to being "farther away from home," and his hours went from a Monday-Friday 3pm-11pm shift to a 7-day rotating shift from 6am-6pm, these changes are not significant enough to be considered an adverse employment action. Thus, unlike the IA findings described above and their effect, the lateral transfer does not meet the threshold standard to qualify independently for a hearing.

In conclusion, the grievant's August 11, 2022 grievance is qualified for a hearing as to the issues described above. At the hearing, the university will have the burden of proving that the results of the IA investigation and its impact were warranted and appropriate.[19] To the extent the grievant asserts a claim of retaliation at hearing or other defenses, the grievant will have the burden to prove by a preponderance of evidence that the university's actions were the result of retaliation.[20] Should the hearing officer find that the university's actions were retaliatory, unwarranted, and/or inappropriate, he or she may order rescission, as warranted by the applicable record evidence, just as he or she may rescind any formal disciplinary action.[21] This qualification ruling in no way determines that the grievant's claims are supported by the evidence, but only that further exploration of the facts by a hearing officer is warranted.

The university is directed to request the appointment of a hearing officer by submitting a fully completed Form B **within five workdays** of the date of this ruling.

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

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[18] *See James*, 368 F.3d at 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).
[19] *See Grievance Procedure Manual* § 5.8.
[20] *Id.*
[21] *See, e.g.*, EDR Ruling No. 2002-127.
[22] *See* Va. Code § 2.2-1202.1(5).