Issues: Qualification – Management Actions (non-disciplinary transfer) and Retaliation (grievance activity participation); Ruling Date: November 2, 2017; Ruling No. 2018-4630; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2018-4630
November 2, 2017

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") on whether her July 12, 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 by the agency as a Superintendent. On or about June 28, 2017, the grievant was notified that she would be transferred to a different agency facility in another part of the state, effective July 25. The grievant filed a grievance on July 12, alleging that the transfer was "involuntary" and would require her to relocate, thus "negatively impacting [her] benefits" and resulting in a "family income reduction . . . ."[1] The grievant further argues that the transfer constituted a "[m]isapplication or [m]isuse" of agency policy and was "the result of retaliation and harassment" based on her previous use of the grievance procedure.[2] After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EEDR.

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.[3] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[4] 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 decision, or whether state policy may have been misapplied or unfairly applied.[5]

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[1] While the grievant does not appear to have explicitly challenged her ability to be reimbursed for relocation expenses, she may be eligible for such reimbursement pursuant to the agency's Operating Procedure 240.2, *Moving and Relocation Expenses*.

[2] The grievant filed a second grievance challenging the transfer on July 28, 2017. In EEDR Ruling Number 2018-4600, this Office determined that the July 28 grievance was duplicative because it did not dispute a new management action or omission and should be administratively closed. That ruling further noted that additional theories as to why the transfer was improper that were articulated in the July 28 grievance could be presented going forward in the July 12 grievance.

[3] *See Grievance Procedure Manual* § 4.1.

[4] Va. Code § 2.2-3004(B).

[5] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

Alleged Substantial Noncompliance

In her request for a qualification ruling, the grievant asserts there is a "conflict of interest" that would make it impossible for her to prevail at a grievance hearing, if the grievance is qualified. More specifically, the grievant argues that the agency "allowed DHRM to participate and respond to" the grievance because it received a policy interpretation from DHRM addressing the grievant's challenge to her transfer, and, as a result, DHRM is "prejudiced . . . against the issues of th[e] grievance." However, there is nothing in the grievance procedure that prevents an agency from soliciting guidance from DHRM with regard to matters raised in a pending grievance. Indeed, such a practice could potentially allow issues with an agency's application of policy to be identified and corrected earlier in the grievance process, thus obviating the need for a hearing or further grievance proceedings.[6] Furthermore, this Office has the authority to render a decision on any qualifiable issue against a party to a grievance only in situations involving a "failure to comply with a substantial procedural requirement of the grievance procedure without just cause . . . ."[7] In this case, the grievant has not presented information to indicate that the agency engaged in substantial procedural noncompliance that would justify such extreme action. Thus, to the extent the grievant is requesting that EEDR render a decision against the agency because it requested guidance from DHRM about her grievance, the request is denied.

Adverse Employment Action

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[8] 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."[9] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[10]

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.[11] 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 adverse employment action.[12] However, in general, a lateral transfer will not rise to the level of an adverse

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[6] In addition, DHRM is "[t]he State agency authorized to develop and interpret human resource policies" in compliance with the Code of Virginia. DHRM Policy 1.01, *Introduction*; *see* Va. Code § 2.2-1201(A)(13). Consequently, agencies should contact DHRM for guidance when issues arise regarding the application or interpretation of state policy, as appears to have occurred here.
[7] Va. Code § 2.2-3003(G).
[8] *See Grievance Procedure Manual* § 4.1(b).
[9] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[10] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[11] *See Holland*, 487 F.3d at 219 (citation omitted).
[12] *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).

employment action.[13] Subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.[14] In this case, the grievant has not indicated that her reassignment to another facility has had an effect on her job title and responsibilities, and it does not appear that they were modified in any way as a result of the reassignment. The agency has additionally indicated that the grievant's Role title, job title, salary, and other benefits have remained the same. An employee's unmet preference regarding work hours or job location is not enough to result in an adverse employment action.[15] In the absence of an adverse employment action, the grievant's challenge to her reassignment does not qualify for a hearing. Nevertheless, EEDR will address the grievant's arguments regarding the agency's application of policy, as well as her her claim of retaliatory harassment.

Misapplication and/or Unfair Application of Policy

The grievant alleges that the agency has misapplied and/or unfairly applied policy by transferring her to another facility. In particular, she asserts that the provisions of agency Operating Procedure ("OP") 175.2, *Layoffs and Reduction in Workforce*, should have applied to allow her to reject the transfer due to its geographic distance from her previous work location. In addition, the grievant claims that the agency's practice of transferring employees in certain management positions is not "based on merit principles such as job performance or disciplinary action."

The grievant's reliance on OP 175.2 is misplaced. This policy specifically states that it "establishes protocol for a reduction in the [agency]'s work force . . . ."[16] The provisions cited by the grievant that discuss assignments within a certain geographic area apply in situations where employees who are impacted by layoff are offered a placement within the agency that would require relocation.[17] In this case, the grievant's transfer was not connected with a layoff or other reduction in the agency's workforce, but was instead a reassignment based on agency business needs. Accordingly, the primary policy implicated by the grievant's arguments regarding her transfer is DHRM Policy 3.05, *Compensation*, which defines a "Reassignment Within The Pay Band" as an "[a]ction of agency management to move an employee from one position to a different position in the same Role or Pay Band." The policy further provides that, due to operational business needs, agencies may require the movement of staff to different positions within the same salary range, in either the same or a different role.[18]

The grievant further asserts that she has been treated differently than other similarly situated employees because some managers have allegedly "remain[ed] in their positions without being reassigned." As an example, the grievant claims that two agency managers have "never been reassigned or transferred" from their facilities, while she has been singled out for

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[13] *See* Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996).
[14] *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).
[15] *See, e.g.*, EDR Ruling Nos. 2016-4203, 2016-4206; EDR Ruling No. 2016-4240; EDR Ruling No. 2015-3946.
[16] Department of Correction OP 175.2, *Layoffs and Reduction in Workforce*, § I.
[17] *See id.* §§ III, IV(B).
[18] DHRM Policy 3.05, *Compensation*. The agency has an internal policy that similarly authorizes management to initiate non-competitive transfers of employees "to a position in the same band based on DOC operational needs." OP 102.2, *Recruitment, Selection, and Appointment*, § D(2).

reassignment. Having considered the information provided by the parties, EEDR finds that the agency's actions here constituted a reasonable exercise of discretion under the circumstances. The agency has provided EEDR with information to show that there were unique situations at the facilities where the two comparator employees (who have allegedly never been reassigned) worked such that, in the agency's judgment, transferring those employees would have been disruptive to operations. The agency has further explained to EEDR that it generally reassigns individuals in leadership positions to different facilities every several years, depending on the needs of individual facilities and the knowledge, skills, and abilities of particular employees. While timeframes may vary from case to case, the agency's practice of periodically transferring such employees appears to be based on legitimate business and operational needs.

Having reviewed the information provided by the parties, EEDR has found no mandatory policy provision that the agency has violated by reassigning the grievant to another facility. It is undisputed that the grievant's Role title, salary, and pay band have remained the same following her transfer. In addition, the agency's practice of transferring certain managers applies not only to the grievant, but to all employees who work in similar leadership positions across the agency. As a result, there is no basis for EEDR to conclude that the agency has treated the grievant differently than other similarly situated employees.

Although the grievant disagrees with the agency's assessment of how to best distribute and transfer managers to meet its operational needs, she has not raised a question as to whether the agency misapplied and/or unfairly applied policy, acted in a manner that was inconsistent with other decisions regarding the reassignment of employees, or was otherwise arbitrary or capricious. In summary, it appears that the agency's decision to reassign the grievant to a position at another facility is consistent with the discretion granted by policy. Accordingly, the grievance does not qualify for hearing on this basis.

Retaliation/Hostile Work Environment

In addition, the grievant also claims the agency has engaged in retaliation and/or harassment that has created an alleged hostile work environment. For a claim of hostile work environment or workplace harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or prior protected activity;[19] (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[20] In the analysis of such a claim, the "adverse employment action" requirement is satisfied if the facts raise a sufficient question as to whether the conduct at issue was sufficiently severe or pervasive so as to alter the conditions of employment and to create and abusive or hostile work environment.[21] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is

[19] *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).
[20] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[21] *See generally id.* at 142-43.

physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[22]

Here, the grievant argues that the agency has retaliated against her because of her past grievance activity and related judicial actions. In addition to her transfer, the grievant also cites the issuance of a written counseling memorandum in 2016 as another example of the allegedly retaliatory and/or harassing behavior she has experienced. Having reviewed the facts as presented by the grievant, EEDR cannot find that the grieved management actions either rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment or were based on a retaliatory motive. As discussed above, the agency has presented legitimate business reasons to support the grievant's transfer, and there is nothing to indicate the agency's decision constituted a misapplication of policy or was inconsistent with its treatment of other similarly situated employees. Indeed, according to information provided by the agency, the grievant worked at her previous facility from June 2011 to July 2017, although she was briefly transferred to a different facility between April 2015 and February 2016.[23] Given the agency's business practice of periodically transferring employees in leadership positions for operational reasons, EEDR has no basis to conclude that the grievant's transfer here was an inappropriate exercise of discretion under the circumstances. Though the grievant may reasonably disagree with the agency's decision-making process and actions, prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[24] For these reasons, the grievance does not qualify for a hearing on this basis.[25]

EEDR's qualification rulings are final and nonappealable.[26]

Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

[22] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[23] While the specific details of the grievant's position and assignment are connected with her past grievance activity and subsequent judicial actions, the length of her employment at her previous facility does not appear to be in dispute.
[24] Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("[C]onduct must be extreme to amount to a change in the terms and conditions of employment . . . ."); *see* Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).
[25] Should additional management actions occur that the grievant believes are retaliatory and/or harassing, this ruling does not limit the grievant's right to initiate subsequent grievances challenging those actions.
[26] Va. Code § 2.2-1202.1(5).