



EMILY S. ELLIOTT
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 the Virginia Department of Transportation
Ruling Number 2021-5168
November 5, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management on whether his August 5, 2020 grievance with the Virginia Department of Transportation (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

On or about June 22, 2020, the grievant reported concerns to management about a safety incident that occurred on June 16. The grievant believed that two supervisors had created a risk of injury or death for him and other employees. The agency conducted an investigation and, on July 10, notified the grievant that it would issue corrective action where appropriate to address the issue. The grievant argues that this outcome was unsatisfactory because he and other employees who were involved in the incident were not interviewed. The grievant contacted management again on July 15, 2020 to express his continuing dissatisfaction with the agency’s response to his complaint. Management reiterated that it had investigated the incident and taken appropriate action.

The grievant initiated a grievance on August 5, 2020, describing the above events and alleging that the agency’s response did not appropriately address the two supervisors’ actions, which he believes “recklessly endanger[ed]” employees and violated the agency’s safety rules. As relief, he sought “a full legal investigation” of the incident. The second-step respondent investigated the incident further, interviewed all of the employees involved, and referred the matter to the agency’s Safety Division for review. The third-step respondent met with the grievant to discuss the incident and found management’s initial investigation and the second-step respondent’s additional review had adequately resolved the matter. The agency head subsequently determined that the grievance record did not contain evidence demonstrating that the grievant had experienced an adverse employment action and declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

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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.¹ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² 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 whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.³ The grievant has not alleged discrimination, retaliation, or discipline; therefore, his claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁴ 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."⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁶

Based on the facts presented to EDR, it does not appear that the management actions alleged in the grievance constitute an adverse employment action. The grievant reported a concern about a safety incident to the agency, which investigated the matter several times both before and as part of the grievance process. The agency has notified the grievant that it took appropriate corrective action to address the matter based on its review of the incident. Although the grievant's dissatisfaction with the agency's response to his complaint is understandable, he has not presented any evidence to suggest that its actions in this case have had an effect on the terms, conditions, or benefits of his employment. As such, EDR must conclude that the grievant has not experienced an adverse employment action. Accordingly, EDR finds that this grievance does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.⁷

Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹ See *Grievance Procedure Manual* § 4.1.

² Va. Code § 2.2-3004(B).

³ *Id.* at § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

⁴ See *Grievance Procedure Manual* § 4.1(b).

⁵ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁷ See Va. Code § 2.2-1202.1(5).