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**QUALIFICATION RULING**

In the matter of the Department of Corrections  
Ruling Number 2021-5175  
December 17, 2020

The grievant seeks a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) as to whether her August 23, 2020 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. For the reasons set forth below, the grievance is not qualified for a hearing.

FACTS

The grievant works as a senior probation officer for the agency. She alleges that, on or about June 22, 2020, she learned that her regional administrator was immediately reassigning her to a different facility, where she was to report the following day. On July 31, 2020, the grievant learned that the reassignment would become a permanent transfer, based on the agency’s investigation of a complaint that a hostile work environment existed at her previous facility. On or about August 23, 2020, she filed a grievance alleging that the regional administrator had improperly removed her based on previous “tension and dissent” between them. She challenged the factual basis for management’s finding against her, and she asserts that her interpersonal style was wrongly perceived as overly aggressive because of her race.<sup>1</sup> Finally, she took issue with how management handled her reassignment, claiming that she was in limbo about its duration until July 31 and that management created the impression for others that the grievant had done “something heinous,” which she found humiliating. The grievant sought a meeting with her agency head and a transfer to a different region in order to work under a different administrator. The agency’s third-step respondent concluded that the grievant’s transfer to her current location was appropriate, and the agency head declined to qualify the grievance for a hearing. The grievant now appeals the latter determination.

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.<sup>2</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the

<sup>1</sup> In her grievance attachments, the grievant describes herself as an African American woman.

<sup>2</sup> See § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.

affairs and operations of state government.<sup>3</sup> 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, or whether state policy may have been misapplied or unfairly applied.<sup>4</sup>

Further, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."<sup>5</sup> Typically, then, 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."<sup>6</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>7</sup> Workplace harassment rises to this level if it includes conduct that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."<sup>8</sup>

As an initial matter, EDR cannot conclude that the grievance record creates a sufficient question whether the grievant has experienced an adverse employment action. 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 their employment.<sup>9</sup> 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.<sup>10</sup> However, in general, a lateral transfer will not rise to the level of an adverse employment action.<sup>11</sup> Subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.<sup>12</sup> In this case, the grievant has not indicated that her transfer to a different facility has had an effect on her job title and responsibilities. While she has requested to work instead at a third location, an employee's unmet preference regarding job location is not enough to result in an adverse employment action under the facts presented in this case.<sup>13</sup> In the absence of an adverse employment action, the grievant's challenge to her transfer does not qualify for a hearing.

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<sup>3</sup> Va. Code § 2.2-3004(B).

<sup>4</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>5</sup> Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).

<sup>6</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>7</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>8</sup> *Strothers v. City of Laurel*, 895 F.3d 317, 331 (4th Cir. 2018) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

<sup>9</sup> *See Holland*, 487 F.3d at 219 (citation omitted).

<sup>10</sup> *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. App'x 726, 729 (4th Cir. 2004).

<sup>11</sup> *See Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996).

<sup>12</sup> *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.

<sup>13</sup> *See, e.g., EDR Ruling Nos. 2016-4203, 2016-4206; EDR Ruling No. 2015-3946.* The record suggests that the grievant's non-competitive transfer was to a location closer to her home residence than the previous worksite, where an open position matching the grievant's role and title existed. EDR is not aware that any such opening exists at the third location requested by the grievant, though the agency has represented that the grievant is encouraged to apply for any vacant position in which she is interested.

Although this grievance does not qualify for a hearing under the provisions of the Code of Virginia, the grievant's claims warrant further discussion. In this case, the grievant essentially contends that management's investigation of the work environment at her former facility was improperly motivated by personal animosity and/or racism. The agency's investigative report documents interviews with more than 15 individuals at the grievant's former facility. Assessing various allegations about the grievant as well as other employees, the report concluded that the work culture at the grievant's former facility was problematic for a number of reasons. Among the recommended corrective actions was to transfer the grievant to a different facility closer to her residence, where there was a vacant position for her same role and title. The agency unfortunately characterized this investigation as a finding that the grievant created a "hostile work environment." EDR has not reviewed information in the report or the investigator's verbal explanations provided to the grievant to describe a "hostile work environment" as that term is legally defined. The report would more accurately be described as finding general problems in the work environment at the grievant's former facility, rather than a "hostile work environment." Indeed, although management's explanation of the report and resulting transfer may have focused on misconduct by the grievant, the investigative report suggests a more complex situation. The personnel issues described in the report, of which the grievant was a participant, necessitated personnel actions to address the situation. EDR cannot make determinations in this forum as to whether the actions chosen by agency management (not all of which concerned the grievant) were the best means of addressing the situation. Here, the agency made personnel changes pursuant to its discretion to manage the means by which its work is carried out.<sup>14</sup> As to the issues raised in this grievance, the resulting personnel actions did not result in disciplinary action against the grievant or an adverse employment action that are within EDR's authority to qualify for a hearing under the grievance procedure.

The grievant asserts numerous complaints about past treatment by the regional administrator who conducted the investigation. The grievant cites a past incident where the regional administrator allegedly blocked her path when she tried to leave a meeting to use the restroom; she has expressed in more general terms that she and the regional administrator have had a challenging relationship. The grievant does not believe she will ever be given a fair assessment in applying for any promotional opportunities in her current region.<sup>15</sup> She also claims the regional administrator took a micromanaging approach to another African American employee in the grievant's chain of command. However, the grievant's claims do not qualify for a hearing under the grievance procedure because EDR has been unable to find that an adverse employment action has occurred. Nevertheless, the grievant's allegations are worthy of attention as they speak to a larger concern in her region that may indeed be beyond the grievant's own employment experience. The agency should review and/or investigate these allegations in that light as appropriate.<sup>16</sup> If the grievant wishes for her concerns in this regard to be reviewed in full, we would recommend submitting a complaint, which includes comprehensive and specific details of her allegations, to the agency's EEO investigation unit or an appropriate authority outside the agency who can review the grievant's allegations of discrimination.

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<sup>14</sup> See Va. Code § 2.2-3004(A).

<sup>15</sup> The improper denial of a promotion could be an adverse employment action that could qualify for a hearing under the grievance procedure, if such a matter arose and was challenged by the grievant in a future grievance.

<sup>16</sup> EDR has not been provided with any information that the investigative findings in this case or the grievant's allegations regarding race-based mistreatment were reviewed by the agency's EEO investigative unit.

EDR's qualification rulings are final and nonappealable.<sup>17</sup>

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<sup>17</sup> See Va. Code § 2.2-1202.1(5).