Issue: Qualification – Retaliation (Other Protected Rights); Ruling Date: January 2, 2013; Ruling No. 2013-3457; Agency: Department of Motor Vehicles; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of Department of Motor Vehicles
Ruling Number 2013-3457
January 2, 2013

The grievant has requested a ruling on whether his April 14, 2012 grievance with the Department of Motor Vehicles (the agency) qualifies for a hearing. For the following reasons, the grievance does not qualify for hearing.

FACTS

The grievant is employed as an Assistant Special Agent in Charge with the agency. On April 14, 2012, the grievant initiated a grievance, challenging whether the agency retaliated against him when it transferred the grievant from its A center to its B center. The grievant asserts that the agency's rationale for the transfer was due to the fact the grievant and his wife worked in the same office, which the agency alleges was a purported violation its anti-nepotism policy. The grievant argues that he has worked in the same office as his wife for the past twelve years and the nepotism issue was not raised by the agency until after the grievant had raised a complaint with the agency Commissioner. Moreover, the grievant alleges that he is being treated differently than similarly situated employees at the agency's central headquarters. The grievant also presents other theories of retaliation for the transfer.

The agency alleges that the primary reason the grievant was transferred to the B center was because a leadership position at the B center became vacant and it needed the grievant, who was in a leadership position in the A center, to fill the void in its B center. As such, the agency allowed the grievant to use an agency car to travel to and from his residence to the B center, allowed the grievant to use his work hours to commute to and from his residence to the B center, provided him with the same rate of pay and benefits, and granted him liberal discretion to telework as long as the grievant filled the leadership vacancy in its B center.

The grievant also challenges whether the agency retaliated against him when it drafted a letter of allegation on April 9, 2012, alleging the grievant had violated its workplace harassment policy. The agency states that the allegation letter has only been kept in the grievant's supervisor's supervisory file, and has not been placed in the grievant's personnel file. The grievant also appears to challenge whether the agency has discriminated against and/or harassed him by raising the fact he is "in the protected classes of age and veteran."

The April 14, 2012 grievance proceeded through the management steps of the grievance process without resolution and the agency head denied the grievant's request for hearing on June 15, 2012. The grievant now seeks a qualification determination from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management in this case.

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, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as to the methods, means, and personnel by which work activities are to be carried out and the hiring, promotion, transfer, assignment, and retention of employees 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.[3]

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;[4] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity;[5] 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.[6] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[7]

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[1] *See Grievance Procedure Manual* § 4.1 (a) and (b).
[2] *See* Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).
[4] *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).
[5] As noted in EDR Ruling Nos. 2013-3446, 2013-3447, although for the past six years EDR has used the "materially adverse action" standard for retaliation claims, we are returning to the "adverse employment action" standard for the assessment of all claims, including retaliation, as to whether they qualify for hearing. *See* Va. Code § 2.2-3004(A).
[6] *E.g.,* EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).
[7] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

1. Transfer

In this case, the grievant alleges agency management retaliated against him when it transferred the grievant from its A center to its B center on March 16, 2012. Reporting an incidence of fraud, abuse, or gross mismanagement is clearly a protected activity.[8] However, in order for a retaliation claim to qualify for a hearing, an adverse employment action must be involved. 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] In this case, because the agency knew the transfer would cause some inconvenience for the grievant, it offered the grievant the ability to use an agency car, pay for the gas expenses of the commute, use his work hours for the commute time back and forth from the B center, and the ability to maintain his same rate of pay and benefits. While it is not clear that the inconveniences of the transfer would have amounted to an adverse employment action, here, the agency mitigated those impacts on the grievant and his job through these efforts.

In addition, the grievant asserts that upon his transfer he assumed the role of a senior agent, which would have been a demotion. The grievant states that he was performing agent-level investigatory work in picking up the caseload of a former agent. While we understand the grievant's claims, these allegations do not appear to amount to a true demotion. Rather, it appears that the grievant simply assumed some agent-level work, i.e., performing primary investigatory functions, in addition to his normal duties as the ASAC for his division. In short, EDR has not reviewed any information that would indicate the grievant was removed from his ASAC position or duties. Therefore, we cannot find that the agency's transfer had a significant detrimental effect on the terms, conditions, or benefits of the grievant's employment. As such, the grievant's claim that the transfer was retaliatory does not qualify for a hearing because it does not challenge an adverse employment action.[11]

2. Allegation Letter

The grievant alleges agency management retaliated against him when it drafted a workplace harassment allegation letter on April 9, 2012. However, this allegation letter is also not an adverse employment action because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[12] The agency further asserts that the grievant "suffered no adverse employment action in association with the allegations" set forth in the letter, but instead only received a letter that was "a thoughtful,

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[8] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).
[9] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[10] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[11] To the extent the grievant has challenged this transfer also as a misapplication of policy, i.e., the anti-nepotism policy, this claim similarly does not qualify for a hearing due to the lack of an adverse employment action.
[12] *Cf.* EDR Ruling No. 2012-3191 (holding similarly in the case of an employee's receipt of a notice of intent to take disciplinary action).

measured letter from [named Director] clearing him of harassment that candidly admitted that the situation was one that 'surely could have been better handled by everyone involved.'" Moreover, the allegation has only been kept in the grievant's supervisor's supervisory file, and it has not been placed in the grievant's personnel file. Therefore, it does not appear that the April 9, 2012 allegation letter had a significant detrimental effect on the terms, conditions, or benefits of the grievant's employment. As such, the grievant's claim that the allegation letter was retaliatory does not qualify for a hearing as it does not challenge an adverse employment action.

Workplace Harassment/Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination and/or workplace harassment.[13] To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination or workplace harassment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination or workplace harassment.[14]

The grievant must raise more than a mere allegation of discrimination or workplace harassment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status such as race, sex, color, national origin, religion, age, veteran status, political affiliation, or disability.[15] In his Grievance Form A attachment, the grievant states that he is a victim of workplace harassment because he has "received unwelcome verbal and written conduct that denigrates, shows hostility, and aversion towards me on the basis of my age and veteran status." However, beyond a bare allegation of "workplace harassment," the grievant has presented no claim or evidence that he was treated differently *based on a protected status*. Therefore, the claims in the grievance are insufficient to raise a question of workplace harassment and/or discrimination and thus do not qualify for hearing.

APPEAL RIGHTS AND OTHER INFORMATION

EDR's qualification rulings are final and nonappealable.[16] The nonappealability of such rulings became effective on July 1, 2012. Therefore, because the grievant's April 14, 2012 grievance was initiated prior to that date, it is not EDR's role to foreclose any appeal rights that may still exist for the grievant under prior law. If the grievant wishes to attempt to appeal the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal with

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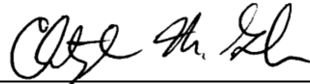
[13] *See Grievance Procedure Manual* § 4.1(b).
[14] *See* Hutchinson v. INOVA Health System, Inc., C.A. No. 97-293 A, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. Apr. 8, 1998).
[15] *See* DHRM Policy 2.30, *Workplace Harassment* (defining "Workplace Harassment" as conduct that is based on "race, sex, color, national origin, religion, age, veteran status, political affiliation, or disability").
[16] Va. Code § 2.2-1202.1(5).

the circuit court pursuant to former Va. Code § 2.2-3004(E). EDR makes no representations as to whether such an appeal is proper or can be accepted by the circuit court. Such matters are for the circuit court to decide. If the court should qualify the April 14, 2012 grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.



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