Issue: Qualification – Management Actions (non-disciplinary transfer); Ruling Date: February 20, 2013; Ruling No. 2013-3521; 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 2013-3521
February 20, 2013

The grievant has requested a ruling on whether his September 7, 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 (ASAC) with the agency. On August 22, 2012, the grievant was informed that pursuant to a reorganization of the unit in which the grievant worked, he was being assigned to a new division. However, the grievant did not approve of the new supervisor[1] under whom he was to be assigned. The grievant states he had submitted a complaint against the new supervisor for making a false statement about having attempted to contact the grievant by phone unsuccessfully. As such, the grievant reminded management that he had requested a transfer in 2011 to Region H. Management indicated that the transfer request would be approved and the grievant "gladly" accepted instead of having to serve under the new supervisor. As a result, it does not appear the grievant ever moved to the new division under the new supervisor, but rather, transferred to Region H. On September 7, 2012, the grievant initiated a grievance challenging the agency's action in planning to assign him to the new division under the new supervisor. The grievant alleges many theories why the agency's action was improper, including retaliation, misapplication and/or unfair application or policy, and discrimination.[2]

The September 7, 2012 grievance proceeded through the management steps of the grievance process without resolution and the agency head denied the grievant's request for

[1] Although the grievant never ended up serving under this "new supervisor," for ease of reference, in this ruling the supervisor under which the grievant would have been assigned in the new division will be referred to as the "new supervisor."

[2] The grievance also includes an allegation that the agency has not adopted a grievance procedure consistent with Chapter 5 of Title 9.1 of the Code of Virginia. Such a claim does not qualify for a hearing because it relates solely to the content of a statute, personnel policy, procedure, and/or rule. *See Grievance Procedure Manual* § 4.1(c). This ruling does not address to what extent the grievant may be able to raise such a claim in another forum. In addition, this ruling does not address whether the grievant has been denied any procedural right under the Law-Enforcement Officers Procedural Guarantee Act, Va. Code §§ 9.1-500, et seq., as that is not a claim raised in this grievance beyond challenging the agency's grievance policies or lack thereof.

hearing on January 4, 2013. 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.[3] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[4] 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.[5]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8] A transfer or reassignment may constitute an adverse employment action if a grievant can show that the transfer/reassignment had some significant detrimental effect on the terms, conditions, or benefits of her employment.[9] A reassignment or transfer with significantly different responsibilities, or one providing reduced opportunities for promotion can constitute an adverse employment action, depending on all the facts and circumstances.[10]

With regard to the proposed transfer of the grievant to a new division, we cannot find that the move would have had a significant detrimental effect on the terms, conditions, or benefits of his employment. Rather, for example, although the focus and territory of the grievant's duties would have changed, it appears that the grievant would have retained the same rank, title, and pay. The only negative aspect of this position the grievant has alleged is the new supervisor under whom he was to be transferred. However, we have reviewed nothing to suggest that serving under the new supervisor was about to be so significantly negative such that an adverse

[3] *See Grievance Procedure Manual* § 4.1 (a) and (b).
[4] *See* Va. Code § 2.2-3004(B).
[5] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).
[6] *See Grievance Procedure Manual* § 4.1(b).
[7] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[9] *See id.*
[10] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 F. App'x 726 (4th Cir. 2004) (unpublished opinion).

employment action would have occurred simply by being assigned under him.[11] The grievant has alleged that he submitted a complaint against the new supervisor and disputes the new supervisor's management abilities when the grievant used to work for him. If true, the grievant has raised legitimate concerns with the new supervisor's past performance and history with the grievant. However, we are unable to find that these issues would be sufficient enough to rise to the level of creating some kind of threat of an adverse employment action in the proposed transfer to the new division. As such, the grievant's challenge to the proposed transfer to the new division does not qualify for a hearing.

The grievant also stated that he was "not qualified" for the position in the new division. There has been nothing presented that would support the grievant's contention. For example, under DHRM Policy 1.30, whether an employee is considered "minimally qualified" for placement in a new position in lieu of layoff, is determined by whether the employee has the necessary knowledge, skills, and abilities to perform the job now OR "be able to satisfactorily perform the duties of the position after a six-month period of orientation in the new position."[12] The agency's assessment of the grievant's abilities, to which we must give deference, is that he would be capable of performing the job. Although there could have been a learning curve for the grievant, had he gone to the new division, EDR has reviewed nothing that would indicate an employee with the grievant's experience and training would be incapable of developing the skills necessary to satisfactorily perform the job within six months.

The grievant argues that as a result of the proposed transfer to the new division, he was forced to seek an alternate transfer to Region H. Such a claim is novel, and we analyze the grievant's claim as one similar to an argument of constructive discharge. To prove constructive discharge, an employee must at the outset show that the employer "deliberately made [his] working conditions intolerable in an effort to induce [him] to quit."[13] The employee must therefore demonstrate: (1) that the employer's actions were deliberate, and (2) that working conditions were intolerable.[14] An employer's actions are deliberate only if they "were intended by the employer as an effort to force the [employee] to quit."[15] Whether an employment environment is intolerable is determined from the objective perspective of a reasonable person.[16]

Applying this analytical model to the grievant's claim, for his argument to have any merit, at a minimum, he must be able to show that the working conditions in the new division would have been intolerable. The grievant's claim is lacking in this regard. As discussed above, the grievant alleges he had filed a complaint against the new supervisor[17] and disputes the new supervisor's management abilities. Taking the grievant's allegations as true, we can understand

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[11] See additional discussion below.
[12] DHRM Policy 1.30, *Layoff*.
[13] Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 272 (4th Cir. 2001) (internal quotation marks omitted).
[14] *See* Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 186-87 (4th Cir. 2004); Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 244 (4th Cir. 1997).
[15] *Matvia*, 259 F.3d at 272.
[16] *See* Williams v. Giant Food Inc., 370 F.3d 423, 434 (4th Cir. 2004).
[17] The grievant disputed a statement the new supervisor had made, i.e., that he had attempted to call the grievant, and asserts, therefore, that the new supervisor made a false statement. The agency states that the complaint was unfounded.

his reluctance to work under this new supervisor again. If what the grievant says is accurate, there are certainly reasonable grounds on which to question whether the new supervisor performs in a trusting, supportive, and competent manner. However, upon review of these facts submitted for this ruling, while the grievant may describe a hypothetically unpleasant work environment, we cannot find that the grievant has alleged any kind of activities that could be objectively viewed as intolerable.[18]

Because the grievant cannot show that the move to the new division would have been tantamount to a constructive transfer to Region H, any resulting harm the grievant alleges as a result of his move to Region H is not appropriate for consideration as an adverse action by the agency. We can view the grievant's transfer to Region H as nothing more than a management-granted voluntary transfer request. As such, the grievant's move to Region H should not be considered an adverse action or a matter that could be grieved by itself, as it was an action sought by the grievant.[19]

As there is no evidence of an adverse employment action by the agency, the grievant's September 9, 2012 grievance does not qualify for a hearing. EDR's qualification rulings are final and nonappealable.[20]

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[18] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 378 (4th Cir. 2004) ("[D]issatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign.") (citations omitted); *see also*, Williams 370 F.3d at 434 (not intolerable working condition where "supervisors yelled at [employee], told her she was a poor manager, and gave her poor [performance] evaluations, chastised her in front of customers, and once required her to work with an injured back").

[19] It is additionally notable that in September 2012, the agency offered the grievant another alternative of moving to a different division under his former supervisor, with whom he had a good working relationship, in a region which would not have required the grievant to move. The grievant was not willing to accept this alternative.

[20] Va. Code § 2.2-1202.1(5).