Issue: Qualification – Management Actions (non-disciplinary transfer); Ruling Date: January 6, 2016; Ruling No. 2016-4255; 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 the Department of Motor Vehicles
Ruling Number 2016-4255
January 6, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) on whether his August 3, 2015 grievance with the Department of Motor Vehicles (the agency) qualifies for a hearing. For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The grievant was employed by the agency as a Motor Carrier Service Center (MCSC) Station Manager. At some point prior to July 17, 2015, the agency received complaints of a hostile work environment at the station from several employees, including the grievant, and conducted an investigation which determined that several personnel changes would be implemented "to improve the working environment." The grievant indicates that he was notified on July 17, 2015, that he was being transferred to a different supervisory position located at agency headquarters. The grievant's salary, pay band, and benefits have not been affected by the transfer; however, his job duties, work title, and reporting structure have now changed.

On or about August 3, 2015, the grievant initiated a grievance challenging his reassignment and requesting that he be reinstated to his former position as MCSC Station Manager. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[1] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out and the reassignment or transfer of employees within the agency 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.[2]

[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

For state employees subject to the Virginia Personnel Act,[3] appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the policies and procedures promulgated by DHRM.[4] For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.[5] These safeguards are in place to ensure that disciplinary actions are appropriate and warranted.

Where an agency has taken informal disciplinary action against an employee, a hearing cannot be avoided for the sole reason that a Written Notice did not accompany the disciplinary action. Rather, even in the absence of a Written Notice, a hearing is required where the grieved management action resulted in an adverse employment action[6] against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance).[7] 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."[8] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9] Depending on all the facts and circumstances, a reassignment or transfer with significantly different responsibilities can constitute an adverse employment action.[10] In this case, the grievant presents evidence demonstrating that the reassignment at issue was arguably both an adverse employment action[11] and disciplinary in nature. For purposes of this ruling, we will assume that the grievant's transfer constitutes an adverse employment action.

The grievant argues that the agency's primary intent in reassigning him was essentially to correct perceived unsatisfactory job performance, "as it was a result of an investigation for false allegations by a disgruntled employee" under his management authority. In response, the agency disputes that the transfer was disciplinary and affirmatively states that the reassignment was made solely to improve the work environment at the grievant's prior station. EDR has thoroughly reviewed all documentation provided and, while the grievant's perception that the transfer appears to be disciplinary in nature is understandable, we have not reviewed any documentation that shows the agency's stated purpose in reassigning him to be untrue or pretextual.

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[3] Va. Code § 2.2-2900 *et seq.*
[4] *See id.* §§ 2.2-2900, 2.2-2901.
[5] *See* DHRM Policy 1.60, *Standards of Conduct*.
[6] The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions." *See Grievance Procedure Manual* § 4.1(b).
[7] *See, e.g.*, EDR Ruling Nos. 2007-1516, 2007-1517; EDR Ruling Nos. 2002-227, 2002-230; *see also* Va. Code § 2.2-3004(A) (stating that grievances involving "transfers and assignments . . . resulting from formal discipline or unsatisfactory job performance" may qualify for a hearing).
[8] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[9] *See, e.g.*, Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[10] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 376 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 Fed. Appx. 726, 729 (4th Cir. 2004).
[11] For instance, in the grievant's new role, he supervises only one person, whereas in his old role, he managed a team consisting of six or seven people. His reporting structure has also changed, and he alleges that he now reports to a manager who previously was a peer.

Rather, we must examine the question of whether the grievant's reassignment constitutes a misapplication or unfair application of state policy. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. The primary policy implicated in this grievance 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.[12] Though we are sympathetic to the grievant's situation, EDR has found no mandatory policy provision that the agency has violated by reassigning the grievant in this instance. It is undisputed that the grievant's role title, salary, and pay band have remained the same following his transfer. After reviewing the extensive documentation provided by the grievant, we cannot conclude that sufficient evidence exists supporting a theory that the grievant's transfer was based upon any improper motivation, such as discrimination or retaliation. As such, because EDR cannot find that the agency has misapplied or unfairly applied policy, the grievance does not qualify for hearing.[13]

Further, there are some cases where qualification may be inappropriate even if an agency has misapplied policy. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate where the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

Even though a hearing officer is not limited to the specific relief requested by the grievant,[14] this is a case where it appears further effectual relief may be unavailable. EDR thanks the parties for having attempted to locate an alternative work arrangement for the grievant; however, the only opportunity comparable to the grievant's old position that is presently available, according to the agency, would involve a round-trip commute of roughly 300 miles. The grievant, understandably, has declined this position. Were the grievant successful at a hearing, the hearing officer's remedy would most likely be limited to ordering the agency to reinstate the grievant to his former position, or if filled, to an equivalent position. As the grievant's former position has been filled, the options available at this point would likely include the offer declined by the grievant and his current position. Therefore, it may be that a hearing officer could not provide the grievant with any further meaningful relief. With all this in mind, EDR is hopeful that the agency will provide the grievant opportunities to succeed on assignments appropriate to his role level and knowledge, skills, and abilities. Similarly, EDR is hopeful that the grievant will provide the agency with top-notch performance and work product on those assignments and duties he is given.

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[12] DHRM Policy 3.05, *Compensation.*

[13] This ruling only determines that under the grievance statutes this grievance does not qualify for a hearing. This ruling does not address whether the grievant may have some other legal or equitable remedy.

[14] *Rules for Conducting Grievance Hearings* § VI(A).

EDR's qualification rulings are final and nonappealable.[15]

Christopher M. Grab
Director
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[15] *See* Va. Code § 2.2-1202.1(5).