Issue: Qualification – Work Conditions (hours of work/shift); Ruling Date: March 7, 2018; Ruling No. 2018-4682; Agency: Department of Corrections; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2018-4682
March 7, 2018

The grievant has requested a ruling from the Office of Equal and Employment Dispute Resolution ("EEDR") at the Department of Human Resource Management on whether his August 7, 2017 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a correctional officer at one of the agency's facilities. On or about August 7, 2017, he initiated a grievance alleging that the agency had "failed to provide accommodation to follow [a] court order" for child custody and visitation and requesting a change in his work schedule that would allow him to comply with the court-ordered visitation schedule. After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EEDR.[1]

DISCUSSION

Compliance Issues

In his request for qualification, the grievant argues that several of the management step-respondents failed to provide him with a written response to the grievance within five workdays. The *Grievance Procedure Manual* states that "[a]ll claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time."[2] Even accepting the grievant's claims regarding the untimeliness of the agency's responses as true, there is

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[1] In an attachment appealing the agency head's qualification decision to EEDR, the grievant attempts to challenge additional issues relating to alleged harassment that he claims has occurred since he filed the grievance at issue in this ruling. Because additional management actions or omissions cannot be added to a grievance after it is filed, this ruling will not address the grievant's arguments regarding these additional issues. *Grievance Procedure Manual* § 2.4. The grievant may file another grievance, if timely, to challenge additional management actions or omissions. Any such grievance must comply with the initiation requirements of the grievance procedure, as set forth in Section 2.4 of the *Grievance Procedure Manual*.

[2] *Grievance Procedure Manual* § 6.3; *see also*, *e.g.*, EDR Ruling No. 2004-752; EDR Ruling No. 2003-042; EDR Ruling No. 2002-036.

nothing to show that he notified the agency of the alleged noncompliance as required by the *Grievance Procedure Manual* or otherwise demanded that the alleged noncompliance be corrected at any point during the management resolution steps. Further, as the agency brought itself into compliance by providing the appropriate responses at each step, there would be no finding of noncompliance on the issues raised by the grievant.[3] As a result, EEDR finds that any claims of noncompliance with regard to those issues have been either waived by the grievant or brought into compliance by the agency and will not be addressed further.

Grievant's Request for a Work Schedule Change

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[4] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[5] Thus, by statute and under the grievance procedure, complaints relating solely to issues such as the hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to a hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[6] The grievant has not alleged discrimination, retaliation, or discipline. Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied 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. Further, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."[7] 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."[8] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9]

In this case, the grievant argues that he is required by a court order to have visitation with his children at certain times, and that the agency has declined to modify his schedule and/or assign him to a shift that will allow him to comply with the court order. A transfer or reassignment to a different shift, or denial thereof, may constitute an adverse employment action if a grievant can show that the transfer/reassignment had some significant detrimental effect on

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[3] The same result would be reached had it been the grievant who missed a five workday deadline.
[4] *See Grievance Procedure Manual* § 4.1.
[5] Va. Code § 2.2-3004(B).
[6] *Id.* § 2.2-3004(C); *See Grievance Procedure Manual* §§ 4.1(b), (c).
[7] *See Grievance Procedure Manual* § 4.1(b).
[8] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[9] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

the terms, conditions, or benefits of his/her employment.[10] 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.[11] However, in general, a lateral transfer will not rise to the level of an adverse employment action.[12] Further, subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.[13]

Under the facts presented to EEDR, it does not appear that the agency's denial of the grievant's request for a change in his work schedule constitutes an adverse employment action. Based on the information in the grievance record, the agency has approved at least two previous schedule changes for the grievant to comply with previous court orders regarding child visitation. The agency has also provided the grievant with a letter explaining the nature of his work schedule for the court to consider in making decisions about visitation arrangements. In general, an employee's unmet preference regarding work hours or job location is not enough to result in an adverse employment action.[14] While it cannot be said in this instance that the grievant's request for changes to his work schedule is solely a matter of his personal preference, the court order does not direct or otherwise require the agency to modify the grievant's shift assignment and/or hours of work. The grievant alone is responsible for ensuring that he complies with the terms of the visitation schedule. Under these circumstances, EEDR finds that the grievant has presented insufficient evidence that the agency's denial of his request for a schedule change has had a significant detrimental effect on his employment. Accordingly, the grievance does not qualify for a hearing on this basis.

In addition, even if EEDR were to assume the agency's denial of the grievant's requested schedule change might constitute an adverse employment action, the grievant has not raised a sufficient question as to whether the agency has misapplied and/or unfairly applied policy. As stated above, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government, including the methods, means and personnel by which work activities are to be carried out.[15] The grievant has not identified a mandatory policy provision that would require the agency to modify the grievant's work schedule to comply with a court order for child visitation, and EEDR has not identified any such policy. Indeed, the agency's Operating Procedure ("OP") 401.2, *Security Staffing*, states that shift assignments are "based on public safety considerations and the needs of the facility."[16] In addition, the policy further provides that "[a]ll shift changes should support efficient and

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[10] *See id.*
[11] *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. Appx. 726, 729 (4th Cir. 2004).
[12] *See* Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996).
[13] *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; Fitzgerald v. Ennis Bus. Forms, Inc., No. 7:05CV00782, 2007 U.S. Dist. LEXIS 875, at *14-15 (W.D. Va. Jan. 8, 2007); Stout v. Kimberly Clark Corp., 201 F. Supp. 2d 593, 602-03 (M.D.N.C. 2002).
[14] *See* EDR Ruling No. 2015-3936.
[15] Va. Code § 2.2-3004(B).
[16] Department of Corrections OP 401.2, *Security Staffing*, § IV(I)(1).

effective facility operations" and explicitly states that "[t]here is no obligation to make staff requested shift changes."[17]

While the grievant clearly disagrees with the agency's decision, he has not raised a sufficient question as to whether the agency misapplied and/or unfairly applied policy, acted in a manner that was inconsistent with other decisions regarding the reassignment of employees, or was otherwise arbitrary or capricious. Under the circumstances presented in this case, it appears that the agency's decision to deny the grievant's request to change his work schedule was consistent with the discretion granted by policy. Accordingly, the grievance does not qualify for hearing on this basis.

EEDR's qualification rulings are final and nonappealable.[18]

Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

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[17] *Id.* § IV(I)(5). In certain circumstances, such as when an employee has requested reasonable accommodation under the Americans with Disabilities Act, the agency may be required by applicable law and/or policy to modify an employee's shift assignment or make other job changes. *See* Department of Corrections OP 150.3, *Reasonable Accommodations*.

[18] Va. Code § 2.2-1202.1(5).