Issue: Qualification – Management Actions (Non-disciplinary Transfer) and Separation from State (Layoff); Ruling Date: July 18, 2013; Ruling No. 2014-3647; Agency: Department of Juvenile Justice; 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 Juvenile Justice
Ruling Number 2014-3647
July 18, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether her February 28, 2013 grievance with the Department of Juvenile Justice (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In May 2012, the grievant was transferred from one of the agency's facilities ("Facility A") to another ("Facility B"). The grievant claims that she was told it would be a temporary reassignment and not a permanent transfer. The agency did not notify the grievant in writing that the transfer was permanent. The grievant's internal position number classification reflected that she was assigned to Facility A until January 2013, when it was changed to show her assignment to Facility B.

On February 13, 2013, the grievant received a "Notice of Layoff or Placement" form from the agency stating that she would be transferred to a third facility ("Facility C") as part of an agency restructuring plan. The grievant's placement offer was made based on her status and seniority at Facility B. The grievant filed a grievance on February 28, 2013 to challenge her initial transfer to Facility B and her placement through the layoff process at Facility C. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing, and the grievant now appeals that determination to EDR.

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

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

whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[3]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6] 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.[7] A transfer or reassignment with significantly different responsibilities, or one providing reduced opportunities for promotion, may constitute an adverse employment action, depending on the facts and circumstances.[8]

Transfer to Facility B

In this case, the grievant has challenged her transfer from Facility A to Facility B in May 2012.[9] The grievant argues that the agency stated she would be assigned to Facility B temporarily and did not explain that she was being permanently transferred. The grievant also claims that, prior to receiving her Notice of Layoff or Placement form on February 13, 2013, she was not aware that she had been transferred permanently to Facility B. The grievant further argues that her position number in the Virginia Personnel Management Information System ("PMIS") reflected that she was assigned to Facility A until January 2013, approximately eight months after she was transferred, at which point it was updated to show her assignment to Facility B. The agency states that it verbally notified the grievant that she was being permanently transferred to Facility B, but acknowledges that this information was not given to the grievant in writing at the time of the transfer. The agency also claims that the agency's human resources office, which is responsible for updating position numbers in PMIS, was properly notified of the grievant's transfer and the failure to change her position number was an administrative oversight. The agency further argues that the grievant never sought information about when her reassignment to Facility B would end and worked at Facility B for nine months prior to receiving notice of her transfer in lieu of layoff to Facility C, and consequently she knew or should have known that she had been transferred and not temporarily reassigned.

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[3] *Id.* at § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).
[4] *Grievance Procedure Manual* § 4.1(b).
[5] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[7] *See id.*
[8] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371 (4th Cir. 2004); *see also* Edmonson v. Potter, 118 F. App'x 726 (4th Cir. 2004).
[9] While the grievant explicitly stated that she is not grieving her transfer, but rather the lack of notice that she was being permanently transferred, the relief she requested includes reinstatement of her position number at facility A and placement according to DHRM Policy 1.30, *Layoff* (the "Layoff Policy"), as if she were assigned to Facility A. Because she essentially seeks to invalidate her transfer to Facility B, this ruling will address the grievant's claims as challenging the transfer.

Assuming without deciding that the agency's notice of transfer was deficient, it does not appear that the grievant's transfer to Facility B constituted an adverse employment action. The grievant has not argued that she experienced a loss in salary or other benefits or that her job duties or responsibilities at Facility B were significantly different, and EDR has reviewed nothing that would suggest otherwise. While the circumstances of the grievant's apparent misunderstanding about her status at Facility B are regrettable, the transfer does not appear to have had a significant detrimental impact on the terms, conditions, or benefits of her employment.

Furthermore, even if the grievant's transfer to Facility B were an adverse employment action, the grievant has not raised a question as to whether the transfer was tainted by an improper motive or whether state policy was misapplied or unfairly applied. She has not argued that discrimination, retaliation, or discipline was a motivating factor for the transfer, nor has EDR identified a specific state or agency policy that may have been misapplied or unfairly applied.[10] While the agency may not have provided clear and unequivocal notice about the nature of the grievant's assignment to Facility B, this omission, on its own, does not raise a question as to whether the transfer was improper. The grievance procedure accords much deference to management's exercise of judgment, including management's assessment of its business needs in balancing and reassigning personnel resources during agency reorganizational efforts, and EDR must defer to the agency's judgment in this case. As a result, the grievant does not qualify for a hearing on this basis.

Layoff

The grievant seems to further argue that the agency misapplied the Layoff Policy in transferring her from Facility B to Facility C. Specifically, she argues that she should have been considered for placement at Facility A based on her length of service and seniority at Facility A. 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. Importantly, the grievance procedure accords much deference to management's exercise of judgment, including decisions as to what work units will be affected by layoff and the business functions to be eliminated or reassigned. Such matters are generally within the agency's discretion. EDR has repeatedly held that when an agency has significant discretion to make decisions (for example, an agency's assessment of a position's job duties), qualification is warranted only where the grievance raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[11]

The Layoff Policy is intended to allow "agencies to implement reductions in the work force according to uniform criteria when it becomes necessary to reduce the number of employees or to reconfigure the work force . . . ."[12] The Layoff Policy mandates that each agency identify employees for layoff in a manner consistent with business needs and the policy's

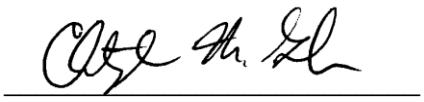
[10] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b), (c).
[11] *See Grievance Procedure Manual* § 9 (defining an arbitrary or capricious decision as one made "[i]n disregard of the facts or without a reasoned basis"); *see also, e.g.*, EDR Ruling No. 2011-2856; EDR Ruling No. 2008-1879.
[12] DHRM Policy 1.30, *Layoff*.

provisions, including provisions governing placement opportunities within an agency prior to layoff.[13] During the time between Initial Notice and Final Notice of Layoff, the agency shall attempt to identify internal placement options for its employees.[14] After an agency identifies all employees eligible for placement, the agency must attempt to place them "by seniority to any valid vacancies agency-wide in the current or a lower Pay Band."[15] The placement must be "in the highest position available for which the employee is *minimally qualified* at the same or lower level in the same or lower Pay Band, regardless of work hours or shift."[16]

As part of its restructuring, the agency decided to relocate Facility B to a new location with other existing programs at Facility C. Facility B is a unique program that cares for juveniles with developmental disabilities and behavioral disorders, and for this reason agency management concluded that it would best serve the agency's business needs to move Facility B's existing staff, including the grievant, to Facility C. In accordance with her transfer to Facility B, as discussed above, the grievant's Notice of Layoff or Placement notified her that she would be transferred to Facility C with Facility B's other staff.[17]

The grievant has not identified any provision of the Layoff Policy that may have been misapplied, nor has she presented other information that would raise a question as to whether her transfer to Facility C was inconsistent with other similar decisions by the agency or was otherwise arbitrary or capricious. Her argument seems to be based solely on the claim that she was unaware that her assignment to Facility B was permanent until February 13, 2013. While it is true that, if the grievant had remained assigned to Facility A she may have received a placement offer consistent with that position, such was not the case. EDR must consider any claims regarding the agency's application of the Layoff Policy in light of her transfer to Facility B in May 2012. The grievant has presented no evidence that the Layoff Policy was misapplied, and in the absence of such evidence EDR must defer to the agency's exercise of judgment and assessment of its business needs. Because the facts do not raise a question as to whether the agency's decision to transfer the grievant to Facility C was inconsistent with the Layoff Policy, the grievance does not qualify for a hearing on this basis.

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



Christopher M. Grab
Director
Office of Employment Dispute Resolution

[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* (emphasis in original).
[17] After receiving notice of her transfer to Facility C, the grievant requested that she and another employee be allowed to trade their respective transfer offers, with the result that the grievant would be transferred to yet another facility ("Facility D") and the other employee would be transferred to Facility C. The agency approved this request and, on April 1, 2013, the grievant was transferred to Facility D.
[18] Va. Code § 2.2-1202.1(5).