

Issue: Qualification – Discipline (Other); Ruling Date: August 1, 2013; Ruling No. 2014-3653; Agency: Virginia Department of Transportation; Outcome: Not Qualified.



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

**QUALIFICATION RULING**

In the matter of the Virginia Department of Transportation  
Ruling Number 2014-3653  
August 1, 2013

The grievant has requested a ruling on whether his April 25, 2013 grievance with the Virginia Department of Transportation (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

At some point before March 27, 2013, the agency’s Civil Rights Division investigated a complaint that the grievant and other employees had engaged in race discrimination. An investigator interviewed several employees in the grievant’s work unit, including the grievant. The grievant was not informed that a complaint of discrimination had been made, nor, to his knowledge, was anyone else in his work unit.

The grievant received a letter from the agency on or about April 2, 2013 stating that it had completed its investigation and determined that the grievant had engaged in race discrimination. To date, the agency has taken no other action, either formal or informal, to discipline the grievant, and the letter has not been officially placed in his personnel file.

On or about April 25, 2013, the grievant filed a grievance challenging the agency’s handling of the investigation and its findings. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management.

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.<sup>1</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>2</sup> Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not

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<sup>1</sup> See *Grievance Procedure Manual* § 4.1.

<sup>2</sup> Va. Code § 2.2-3004(B).

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.<sup>3</sup>

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."<sup>4</sup> 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."<sup>5</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>6</sup> In general, "the terms, conditions, or benefits of a person's employment do not typically, if ever include general immunity from the application of basic employment policies or exemption from a state agency's disciplinary procedures."<sup>7</sup> Consequently, the grieved management action, an internal agency investigation, is not an action that would typically be considered adverse.<sup>8</sup>

In this case, the grievant primarily argues that the agency's investigation was not conducted properly and its finding that he discriminated against a co-worker is incorrect. He also claims that the investigator who conducted the investigation was biased and only gathered information that supported the conclusion he was seeking. For example, the grievant asserts that the investigator interviewed only some, but not all, employees with potentially relevant information, and that he was offered but refused documentation regarding training opportunities and assignments of tasks and equipment. The agency, however, has taken no corrective action such as formal discipline, demotion, or transfer as a result of the investigation's findings, and information about the investigation has not been placed in the grievant's personnel file. Even though he has raised potentially legitimate questions about the investigation and its conclusions, the grievant has not presented any evidence to suggest that the investigation has had an effect on the terms, conditions, or benefits of his employment. As such, EDR must conclude that the investigation was not an adverse employment action.<sup>9</sup>

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<sup>3</sup> *Id.* at § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

<sup>4</sup> *See Grievance Procedure Manual* § 4.1(b).

<sup>5</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>6</sup> *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>7</sup> *Von Gunten v. Maryland*, 243 F.3d 858, 869 (4th Cir. 2001).

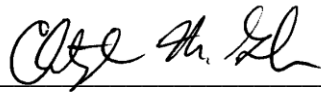
<sup>8</sup> *See Lyle v. County of Fairfax Va.*, No. 05-1134, 2006 U.S. App. LEXIS 6025, \*19-20 (4th Cir. Mar. 10, 2006) (holding that an allegedly discriminatory investigation, "conducted pursuant to routine practice and procedure," was not an adverse employment action); *Blakes v. City of Hyattsville*, 909 F. Supp. 2d 431, 436-37 (D. Md. 2012) ("Although an investigation of an employee may constitute an adverse employment action in certain circumstances, disciplinary investigations 'reasonably rooted in articulable facts justifying such an investigation' typically do not rise to the level of adverse employment actions." (citing *Settle v. Baltimore County*, 34 F. Supp. 2d 969, 992 (D. Md. 1999)); *Dawson v. Rumsfeld*, No. 1:05cv1270, 2006 U.S. Dist. LEXIS 17305 at \*19-20 (E.D. Va. Feb. 8, 2006) (stating that "the mere decision to initiate an investigation is not an adverse employment action").

<sup>9</sup> To the extent that the grievant's qualification request may be construed as a request for an opportunity to clear his name or otherwise present evidence challenging the investigator's conclusions, such a hearing is not warranted in this case. *See Sciolino v. City of Newport News*, 480 F.3d 642, 646 (4th Cir. 2007), for further discussion of an employee's right to a name-clearing hearing in cases involving damage to his reputation and integrity.

While the findings of the investigation have not at this time had an adverse impact on the grievant's employment, they could be used later to support an adverse employment action against the grievant. Should the grievant later experience an adverse employment action based on the agency's investigation and findings that he discriminated against a co-worker, such as a formal Written Notice, a transfer or demotion, or a "Below Contributor" annual performance rating, he may contest the investigation's methods and findings through a subsequent grievance challenging the related adverse employment action.

Further, EDR will consider re-opening this grievance and potentially reconsider this qualification decision so that the grievant has the opportunity to fully contest future adverse action based on the Civil Rights Division investigation. EDR will assess those questions based on further facts and circumstances as they develop or are discovered, either at the request of the grievant or on its own motion. Such considerations are appropriate given the seriousness of the allegations involving a founded complaint of race discrimination and EDR's review of the grievance record. Based on the information presented by the grievant, it does not appear that he was provided a meaningful opportunity to contest the investigation.

EDR's qualification rulings are final and nonappealable.<sup>10</sup>



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<sup>10</sup> See Va. Code § 2.2-1202.1(5).