Issue: Qualification – Management Actions (non-disciplinary transfer); Ruling Date: October 22, 2013; Ruling No. 2014-3721; Agency: Department of Juvenile Justice; Outcome: Qualified in part.

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 2014-3721
October 22, 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 his July 30, 2013 grievance with the Department of Juvenile Justice (the "agency") qualifies for a hearing. For the reasons set forth below, this grievance is qualified for hearing in part.

FACTS

The grievant was employed by the agency as a Court Services Unit ("CSU") Director. At some point prior to July 15, 2013, the agency, upon receiving complaints from CSU employees and the judges of the grievant's Judicial District, conducted an investigation and determined that the grievant was not performing satisfactorily in his position. The grievant was notified of the results of the investigation on July 15, 2013 and was reassigned to a different position. The agency has taken no other action based on the investigation. The grievant's salary and other benefits have not been affected.

On July 30, 2013, the grievant initiated a grievance alleging that the investigation was "inconclusive and biased" and requesting that he be reinstated to his former position as CSU Director. 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).

Reassignment

For state employees subject to the Virginia Personnel Act, 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.[3] For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.[4] These safeguards are in place to ensure that disciplinary actions are appropriate and warranted.

Further, the Code of Virginia states that "[t]he transfer, demotion, or separation of a court services unit director . . . shall be under the authority of the Director [of the Department of Juvenile Justice] and shall be only *for good cause shown*, after consulting with the judge or judges of that juvenile and domestic relations district court."[5] The agency maintains that the grievant's ability to "lead the CSU and to maintain a cooperative and productive relationship with the judiciary had been irreparably damaged," and that as a result there was good cause to support his reassignment to the Certification Unit. We have no basis to disagree with the agency's assessment that the statutory good cause requirement was satisfied. However, if a grievance raises a question as to whether a reassignment was an informal disciplinary action, the grievance may nevertheless qualify for a hearing even if the reassignment was based on a showing of good cause.

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

[3] Va. Code § 2.2-2900 *et seq.*
[4] *See* DHRM Policy 1.60, *Standards of Conduct*.
[5] Va. Code § 16.1-236.1(A) (emphasis added).
[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).
[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).

case, the grievant's former position as CSU Director and his current assignment as Assistant Certification Manager have significantly different Employee Work Profiles ("EWPs"). Approximately 80% of his core responsibilities have changed; the only two similar areas are supervisory and operational administrative duties. As CSU Director, the grievant's position objective was to direct the work and manage the resources of the CSU consistent with applicable policies and procedures. In his current role as Assistant Certification Manager, the grievant's objective is to "[assist] with the management and supervision of the certification and monitoring process," "conduct certification audits of regulated programs[,] and conduct monitoring visits to assess ongoing compliance with standards." In addition, the grievant's current EWP indicates that he now works in a different setting and as part of a different chain of command.

Furthermore, the reassignment reduced the grievant from Pay Band 6 to Pay Band 5. While the grievant's reassignment cannot rightly be considered a demotion because it was not accompanied by a reduction in salary,[11] it is clearly a tangible change in his employment. Along with the change in Pay Band, the grievant's Role was changed and, as discussed above, his level of responsibility and job duties were modified. Based on our review of the grievant's altered work responsibilities, Role change, and Pay Band reduction, we find that the grievant has raised a sufficient question as to whether his reassignment from CSU Director to Assistant Certification Manager was an adverse employment action.

This grievance also raises a sufficient question as to whether the agency's primary intent in reassigning the grievant to the Certification Unit was to correct or punish perceived unsatisfactory job performance or conduct. Although the grievant's reassignment was not accompanied by a Written Notice, the agency's investigative report details many instances of conduct that could have been addressed with appropriate disciplinary action under DHRM Policy 1.60, *Standards of Conduct*. For example, CSU employees alleged that the grievant sometimes behaved in an unprofessional and demeaning way, made inappropriate comments to staff, and violated agency policies regarding confidentiality of information relating to the employees he supervised. Other than the reassignment, we are unaware of any action taken by the agency to correct or address any of the conduct cited in the investigative report.

Whether the grievant's reassignment was primarily to punish or correct the grievant's behavior or performance is a factual determination that a hearing officer, not this Office, should make. At the hearing, the grievant will have the burden of proving that the reassignment was adverse and disciplinary. If the hearing officer finds that it was, the agency will have the burden of proving that the action was nevertheless warranted and appropriate. Should the hearing officer find that the reassignment was adverse, disciplinary and unwarranted and/or inappropriate, he or she may rescind the reassignment, just as he or she may rescind any formal disciplinary action.[12] This qualification ruling in no way determines that the grievant's reassignment constituted unwarranted informal discipline or was otherwise improper, but only that further exploration of

[11] DHRM Policy 3.05, *Compensation*, states that a demotion may be voluntary or involuntary. An involuntary demotion may only be for disciplinary or performance reasons, and must be accompanied by "a minimum 5% reduction in pay." DHRM Policy 3.05, *Compensation*.
[12] *See, e.g.*, EDR Ruling No. 2002-127.

the facts by a hearing officer is warranted. The grievance is qualified as to the grievant's challenge to his reassignment.[13]

Agency Investigation

The grievant also argues that the agency's investigative report contains "discrepancies in the reporting, discrepancies in the composition of the report as well as discrepancies in the findings." He also claims that "he was excluded from the entire process" and was not interviewed or otherwise permitted to address or explain the issues with the CSU that prompted the investigation. For example, the grievant claims that "the investigative process is not clear and does not appear to follow any particular guideline or procedure" and "makes many insinuations." However, on its own, an internal agency investigation is not an action that would typically be considered adverse.[14] As a result, the grievant's challenge to the investigation itself does not qualify for a hearing. To the extent that it is relevant, the grievant may present information about the investigation as background evidence regarding his claims against the resulting reassignment.

CONCLUSION

The grievant's July 30, 2013 grievance is qualified for hearing to the extent described above. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

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

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Director
Office of Employment Dispute Resolution

[13] *See* 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).
[14] *See* EDR Ruling No. 2014-3653 (and authorities cited therein); EDR Ruling No. 2014-3654; EDR Ruling No. 2014-3655.
[15] *See* Va. Code § 2.2-1202.1(5).