

Issue: Qualification – Management Actions (Non-Disciplinary Transfer); Ruling Date: August 4, 2014; Ruling No. 2015-3936; Agency: Department of State Police; 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 State Police
Ruling Number 2016-3936
August 4, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) on whether his March 28, 2014 grievance with the Department of State Police (the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

On or about February 28, 2014, the agency issued a memorandum to the grievant advising him that, effective March 10, 2014, he would be transferred from his current assignment to a new assignment in a different location over 200 miles away. At the time, the grievant was on administrative suspension from the agency, pending an investigation into criminal charges brought against him. On or about March 28, 2014, the grievant initiated a grievance challenging the transfer and alleging that it constituted an informal disciplinary action. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing and the grievant now appeals that determination.

DISCUSSION

For state employees subject to the Virginia Personnel Act,¹ 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 the Department of Human Resource Management (DHRM). For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.² 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

¹ Va. Code § 2.2-2900 *et seq.*

² See DHRM Policy No. 1.60, *Standards of Conduct*.

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 against the grievant and the primary intent of the management action was disciplinary (i.e., the action was taken primarily to correct or punish perceived poor performance).³ In this case, the grievant argues that the primary intent of the transfer was disciplinary and points to the agency's statements that "circumstances surrounding the charges [against the grievant] have become known to numerous criminal justice entities and citizens" in the grievant's area of assignment, and "[t]hese events have served to diminish [the grievant's] reputation and ability to perform his duties without drawing questions about his character."

However, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁴ Thus, typically, a 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

Under the facts presented to EDR, it does not appear that the grievant's transfer amounted to an adverse employment action. A transfer or reassignment, or denial thereof, 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 his/her employment.⁷ 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.⁸ However, in general, a lateral transfer will not rise to the level of an adverse employment action.⁹ Further, subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.¹⁰

Based on the information presented in this grievance, the grievant was transferred from one area of duty to another area of duty, maintaining his job title and responsibilities. While EDR is sympathetic to the fact that the grievant's transfer will likely require relocation to a

³ 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) (indicating that grievances involving "formal disciplinary actions, including . . . transfers and assignments," as well as "dismissals resulting from formal discipline or unsatisfactory job performance" may qualify for a hearing).

⁴ See *Grievance Procedure Manual* § 4.1(b).

⁵ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ See, *e.g.*, *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁷ See *id.*

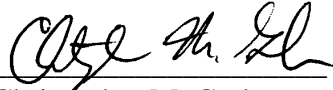
⁸ See *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375-77 (4th Cir. 2004); *Boone v. Goldin*, 178 F.3d 253, 255-256 (4th Cir. 1999); see also *Edmonson v. Potter*, 118 Fed. Appx. 726, 729 (4th Cir. 2004).

⁹ See *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996).

¹⁰ 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).

different region of the Commonwealth, nevertheless, the grievant has presented insufficient evidence that these changes have had a significant detrimental effect on his employment. An employee's unmet preference regarding job location is not enough to result in an adverse employment action. Accordingly, this grievance does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.¹¹



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¹¹ Va. Code § 2.2-1202.1(5).