Issues: Qualification – Management Actions (non-disciplinary transfer), Discrimination (gender), and Retaliation (complying with any law); Ruling Date: August 18, 2014; Ruling No. 2015-3946; Agency: Department of Corrections; 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 Corrections
Ruling Number 2015-3946
August 18, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") on whether her May 5, 2014 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

On or about May 5, 2014, the grievant initiated a grievance challenging her transfer to another facility, as well as other alleged conduct by the agency. After the grievance proceeded through the management steps without resolution, the grievant asked the agency head to qualify the grievance for hearing. The agency head declined to qualify the grievance for a hearing and the grievant now appeals that determination.

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

Transfer

The grievant asserts that her transfer to another facility is both disciplinary in nature and the result of gender discrimination. The grievance procedure generally limits grievances that

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

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, 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]

Under the facts presented to EDR, it does not appear that the grievant's transfer amounted to an adverse employment action, as it did not affect her title, salary or responsibilities. While EDR is sympathetic to the fact that the grievant's transfer creates additional driving and inconvenience for the grievant, nevertheless, the grievant has presented insufficient evidence that these changes have had a significant detrimental effect on her employment. An employee's unmet preference regarding job location is not enough to result in an adverse employment action. Accordingly, the grievant's claims regarding her transfer do not qualify for hearing.

Sexual Harassment

The grievant further asserts that a regional director engaged in sexually harassing conduct toward her. For a claim of a discriminatory hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[11] In the analysis of such a claim, the "adverse employment action" requirement is satisfied if the facts raise a sufficient question as to whether the conduct at issue was sufficiently severe or pervasive so as to alter the

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[4] *See Grievance Procedure Manual* § 4.1(b).
[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] 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).
[11] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).

conditions of employment and to create and abusive or hostile work environment.[12] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[13] However, the grievant must raise more than a mere allegation of harassment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status.

In this case, the grievant challenges a regional director's questioning of her by telephone regarding her alleged relationship with the warden. Rather than questioning her himself, the grievant alleges, the regional director should have asked a female manager to contact the grievant and/or should have had a witness to the questioning.[14] Even assuming that the grievant's allegations regarding the regional director's actions are true, however, the actions do not appear to be based on the grievant's gender, as there is no basis to conclude that the regional director elected to question the grievant himself *because of* her gender. Further, the grievant has not demonstrated that the conduct was so severe or pervasive that it altered the conditions of her employment. Prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[15] For these reasons, the grievant's claim of sexual harassment does not qualify for a hearing.

Retaliatory Harassment

In addition, the grievant asserts that she was subjected to a course of retaliatory workplace harassment by supervisors, which included changing her shifts and work duties and making unfounded allegations regarding her relationship with the warden.[16] The grievant alleges that this conduct was in response to her complaints about management. For a claim of a retaliatory hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on protected activity; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[17]

After reviewing the facts, EDR cannot find that the alleged actions rose to a sufficiently severe or pervasive level such that an unlawfully abusive or hostile work environment was

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[12] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142-43 (4th Cir. 2007).
[13] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).
[14] The grievant also appears to challenge the regional director's involvement in the decision to transfer her to another facility. As the grievant's claims regarding transfer have already been addressed in this ruling, they will not be addressed again.
[15] Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("[C]onduct must be extreme to amount to a change in the terms and conditions of employment . . . ."); *see* Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).
[16] To the extent the grievant asserts a generalized claim of "workplace harassment," such claims must be based on either a protected status (such as gender, race, or age) or protected conduct. *See, e.g.*, EDR Ruling No. 2014-3793.
[17] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).

created at this time.[18] Further, even if the grievant had established the existence of an abusive or hostile work environment at her previous facility, she has now been transferred and has not alleged the existence of a continuing hostile environment at her new facility. Additionally, with respect to the grievant's claims regarding the allegations about her relationship with the warden, there is no meaningful relief that could be provided by a hearing officer. A hearing officer may not order the agency to discipline or take action against any employees who made the allegations, nor would a hearing officer be capable of undoing any harm caused by such allegations.[19] Further, any directive by the hearing officer for the allegedly harassing conduct to cease would have little effect because the grievant no longer works at the facility where the alleged conduct occurred. For all of these reasons, the grievant's retaliatory harassment claim does not qualify for a hearing.[20]

CONCLUSION

For the foregoing reasons, the grievant's request for qualification of her grievance for hearing is denied. EDR's qualification rulings are final and nonappealable.[21]

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Office of Employment Dispute Resolution

[18] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142-43 (4th Cir. 2007).
[19] *See Rules for Conducting Grievance Hearings* § VI; EDR Ruling No. 2003-078.
[20] However, this ruling does not preclude the grievant from presenting the issues raised here as background evidence, if relevant, in any future grievance about subsequent agency actions.
[21] Va. Code § 2.2-1202.1(5).