Issue: Qualification – Work Conditions (hours of work – shift); Ruling Date: October 8, 2014; Ruling No. 2015-4004; 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 2015-4004
October 8, 2014

The grievant has requested a ruling on whether his May 8, 2014 grievance with the Virginia Department of Transportation (the agency) qualifies for a hearing. For the reasons discussed below, the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management finds that this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Transportation Operator II with the agency, and for the past three years has worked on a 10:00-6:00 shift assignment. On May 8, 2014, he initiated a grievance, challenging whether the agency discriminated against him in refusing to allow him to return to his prior shift assignment, 6:00-2:00, as he has requested. He alleges that other employees, of a different race, have been allowed to make the change between shift assignments, while he was not. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. 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, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out 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, or whether a performance evaluation was arbitrary or capricious.[3]

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

Discrimination

The grievant asserts that he has been discriminated against on the basis of race. Grievances that may be qualified for a hearing include actions related to discrimination.[4] To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – 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. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[5]

In this case, the grievant has asserted race as a ground for his discrimination claim. The grievant points to the fact that less than two months prior to the filing of his grievance, one white employee was moved to the 6:00-2:00 shift, and two other employees from another office also made the same move. However, he alleges that when he requested to move to the 6:00-2:00 shift, while initially given approval, subsequently his request was denied.[6] In response, the agency indicates that a new Operations Program Manager has been hired and has determined that because the bid process for all schedule changes needed revision, no schedule changes will be made while this process is underway. Further, the agency asserts that the reassignments of other employees as noted by the grievant were made pursuant to legitimate business need, and points out that not all of those employees reassigned were of the same race.[7] Because there is no indication that the agency's non-discriminatory reasons for the grievant's reassignment were pretextual, the grievant's claims of discrimination do not qualify for a hearing on that basis.

Misapplication of Policy

Fairly read, the grievant's claim raises an allegation that the agency has misapplied or unfairly applied policy in refusing to grant his shift transfer request. 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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[8] 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

[4] *See Grievance Procedure Manual* § 4.1(b).
[5] *See* Hutchinson v. INOVA Health System, Inc., C.A. No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. Apr. 8, 1998).
[6] The agency's Office of Civil Rights investigated the matter pursuant to a call from the grievant, and indicates that during this process, the grievant stated that he did "not really" believe the agency had engaged in discrimination against him, but did not understand why his request was denied.
[7] It appears that one employee receiving a schedule change was the same race as the grievant.
[8] *See Grievance Procedure Manual* § 4.1(b).

significant change in benefits."[9] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[10]

Under the facts presented to EDR, it does not appear that the denial of the grievant's shift change request amounted to an adverse employment action. A transfer or reassignment to a different shift, 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.[11] 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.[12] However, in general, a lateral transfer will not rise to the level of an adverse employment action.[13] Further, subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.[14]

Based on the information presented in this grievance, the grievant was transferred from one shift to another shift at the same location, maintaining his job title and responsibilities. In this instance, the grievant has presented insufficient evidence that these changes have had a significant detrimental effect on his employment. An employee's unmet preference regarding work hours or 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.[15]

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[9] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[10] *See, e.g.*, Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[11] *See id.*
[12] *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).
[13] *See* Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996).
[14] *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).
[15] Va. Code § 2.2-1202.1(5).