

Issue: Qualification – Work Conditions (hours of work/shift); Ruling Date: December 9, 2014; Ruling No. 2015-4051; 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 2015-4051  
December 9, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether his August 28, 2014 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

The grievant is employed by the agency as an Operations Worker. Based on the information provided to EDR, the agency has implemented a new bid system to assign work shifts for the grievant’s work group, by which employees select their shifts based partially on seniority and partially on a random number assignment. The agency asserts that it has a “business need to ensure a consistent presence of organizational knowledge and experience across all . . . shifts,” and that the bid system was designed with this goal in mind. On or about August 28, 2014, the grievant filed a grievance to challenge “[t]he procedure designed for shift/days off” arguing that “[t]he order of choosing shifts/days off [] was determined by factors which included a random card” and alleging that “the process is discriminative [sic] to . . . senior employees.” After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.

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, as well as the contents of statutes, ordinances, personnel policies, procedures, rules, and regulations, 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

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

<sup>2</sup> See Va. Code § 2.2-3004(B).

management's decision, or whether state policy may have been misapplied or unfairly applied.<sup>3</sup> The grievant has not alleged discrimination, retaliation, or discipline. Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.<sup>4</sup>

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."<sup>5</sup> 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."<sup>6</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>7</sup>

Under the facts presented to EDR, it does not appear that the agency's bid system or the grievant's shift assignment are adverse employment actions. A transfer or reassignment to a different shift may constitute an adverse employment action if a grievant can show that there was some significant detrimental effect on the terms, conditions, or benefits of his/her employment.<sup>8</sup> For example, a reassignment or transfer with significantly different responsibilities, or one providing reduced opportunities for promotion, may, depending on all the facts and circumstances, be considered an adverse employment action.<sup>9</sup> However, in general, a lateral transfer will not rise to the level of an adverse employment action.<sup>10</sup> Subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.<sup>11</sup>

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

<sup>4</sup> While the grievant claims that the bid system has resulted in discrimination against him on the basis of his seniority, the grievance procedure provides that grievances alleging discrimination on the grounds of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, genetics, disability, or veteran status may be qualified for a hearing. *See Grievance Procedure Manual* § 4.1(b); *see also* Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*. The grievant's assertion that he has experienced discrimination on the basis of his length of service as a state employee does not fall within one of these categories and, thus, we will not address this claim further.

<sup>5</sup> *See Grievance Procedure Manual* § 4.1(b).

<sup>6</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>7</sup> *See, e.g., Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

<sup>8</sup> *See id.*

<sup>9</sup> *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).

<sup>10</sup> *See Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996).

<sup>11</sup> *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).

In this case, the grievant has not indicated that his shift assignment had an effect on his job title and responsibilities, and it does not appear that they were modified in any way as a result of his shift assignment. Furthermore, he has not presented evidence to show that the bid system itself has resulted in a significant detrimental impact on the terms, conditions, or benefits of his employment. To the contrary, it would appear from EDR's review that the bid system, which appears to have been explained to the grievant and other facility employees before it went into effect, is reasonably designed to distribute experienced employees across all shifts as a method of ensuring that facility operations are effectively carried out. While we understand the grievant's concerns, 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.<sup>12</sup>

EDR's qualification rulings are final and nonappealable.<sup>13</sup>



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<sup>12</sup> It appears the agency plans to address some of the grievant's concerns about the shift selection process in the future. The third step-respondent, for example, indicated to the grievant that "the ranking process would be conducted in a more open way next year."

<sup>13</sup> Va. Code § 2.2-1202.1(5).