

Issues: Qualification – Management Actions (non-disciplinary transfer), and
Compliance – Grievance Procedure (5-Day Rule); Ruling Date: August 18, 2015;
Ruling No. 2016-4203, 2016-4206; Agency: Department of Taxation; Outcome: Not
Qualified, No Ruling on Compliance Issue (moot).



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION AND COMPLIANCE RULING

In the matter of the Virginia Department of Taxation
Ruling Numbers 2016-4203, 2016-4206
August 18, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) on whether her grievance filed on or about February 12, 2015 with the Virginia Department of Taxation (the “agency”) qualifies for a hearing. Further, the agency has requested a ruling related to a second grievance filed on or about February 13, 2015, alleging that the grievant has failed to comply with the time limits set forth in the grievance procedure for advancing or concluding her grievance.

FACTS

EDR has received two grievances, dated February 12, 2015, and February 13, 2015, both signed by the grievant and both referring to various attachments accompanying each Grievance Form A. Much confusion exists about the issues the grievant intends to be challenging in each grievance. Based upon EDR’s review of the documentation, it appears that the February 12, 2015 grievance primarily challenges the grievant’s transfer from one of the agency’s local offices to another. Though the grievant works from her home, she is now required to report to a different supervisor, and attend staff meetings in another district, while maintaining the caseload from her original district. As relief, the grievant requests reassignment to her previous office district and previous supervisor. 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.

The February 13, 2015 grievance appears to challenge the grievant’s 2014 performance evaluation. On or about June 25, 2015, the agency issued the grievant its third step response to this grievance. On July 9, 2015, the agency sent an email to the grievant, indicating that the agency had not received a response from her and requesting a response from the grievant within five workdays. In her response, it appears that the grievant disputed the agency’s allegation of non-compliance. On August 1, 2015, the agency again sent an email to the grievant, indicating that if the Grievance Form A was not returned to the agency within five days, it would request from EDR permission to administratively close this grievance.

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 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

Further, the grievance procedure generally limits grievances that 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

February 12, 2015 Grievance

In January 2015, the grievant was informed that she would be transferred from one office district to another, effective March 2, 2015. Following this transfer, the grievant began reporting to a new supervisor, but maintained her caseload from her old office district. The grievant asserts that she does not know why she was transferred and claims that the transfer is a set up so that eventually she will be required to work a caseload in the new office district. Through her grievance, she requests to be reassigned to her old office district.⁷ The agency indicates that the grievant was transferred due to "ongoing issues" with her former supervisor and advised the grievant she would have a "fresh start in a different district and ... a 'win win' for all involved."

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.⁸ A reassignment or transfer with significantly different responsibilities, or one providing reduced opportunities for promotion

¹ See *Grievance Procedure Manual* §§ 4.1.

² See Va. Code § 2.2-3004(B).

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

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 Although the Grievance Form A lists a number of issues, the only management action for which the grievant apparently seeks qualification is her transfer.

⁸ See *id.*

can constitute an adverse employment action, depending on all the facts and circumstances.⁹ However, in general, a lateral transfer will not rise to the level of an adverse employment action.¹⁰ Further, subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.¹¹

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 the nature of her job responsibilities. An employee's unmet preference regarding her chain of command or maintaining a particular caseload is not enough to result in an adverse employment action.¹² Accordingly, the grievant's claims regarding her transfer do not qualify for hearing under the applicable grievance statute.¹³

February 13, 2015 Grievance

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹⁴ That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without EDR's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.¹⁵ If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from EDR, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EDR's order.¹⁶

In this case, the confusion between the issues grieved and the responses received renders it difficult for EDR to determine either party's compliance with the grievance procedure. However, in this instance, the grievant's compliance is immaterial. Where a grievant presents no

⁹ 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).

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

¹¹ 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).

¹² See, e.g., EDR Ruling No. 2015-3946; EDR Ruling No. 2015-3936.

¹³ Va. Code § 2.2-3004(A); see also *Grievance Procedure Manual* § 4.1(b).

¹⁴ *Grievance Procedure Manual* § 6.3.

¹⁵ See *id.*

¹⁶ While in cases of substantial noncompliance with procedural rules the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party, EDR favors having grievances decided on the merits rather than procedural violations. Thus, EDR will typically order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, EDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

evidence of an adverse action relating to a performance evaluation, such a grievance does not qualify for a hearing. In this case, although the grievant may disagree with some of the information contained in her performance evaluation, she has presented no evidence that the performance evaluation itself or any procedural abnormalities in the creation of the performance evaluation have detrimentally altered the terms or conditions of her employment. Consequently, this grievance does not qualify for a hearing and shall not proceed further.¹⁷

CONCLUSION

For the foregoing reasons, neither the February 12, 2015 grievance nor the February 13, 2015 grievance qualify for a hearing and both grievances shall be closed as of the date of this ruling. EDR's qualification rulings are final and nonappealable.¹⁸



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¹⁷ Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that he wishes to challenge, correct or explain information contained in his personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).

¹⁸ Va. Code § 2.2-1202.1(5).