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## QUALIFICATION RULING

In the matter of the Department of Corrections  
Ruling Number 2020-5102  
June 24, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”)<sup>1</sup> on whether his March 7, 2020 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

### FACTS

Prior to the events of this grievance, the grievant was a canine handler at one of the agency’s prisons. In August 2019, the agency placed the grievant on paid administrative leave based on allegations it discovered during an investigation.<sup>2</sup> The grievant returned to work in October 2019 with a temporary reassignment as a corrections officer, pending the conclusion of the investigation. The grievant was notified on March 4, 2020 that he was being permanently reassigned as a corrections officer effective March 10. The grievant’s Role and Pay Band were unchanged by the reassignment, though canine handler duties were removed from his job responsibilities and he ceased receiving a salary supplement of \$1,200 per year for canine handlers.<sup>3</sup> As of the date of this ruling, the investigation that led to the grievant’s reassignment appears to be ongoing.

On or about March 7, 2020, the grievant filed a grievance alleging that “[f]alse allegations” led to his “unfair removal” as a canine handler. The grievant argues that he “was not given proper due process,” an “objective investigation,” or “evidence to defend” himself. As relief, he seeks to be “reinstated to [a] canine position.”<sup>4</sup> Following the management resolution steps, the agency

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<sup>1</sup> The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

<sup>2</sup> The grievant does not appear to be the sole subject of the investigation.

<sup>3</sup> It is unclear whether the grievant continued to receive the \$1,200 salary supplement between October 2019 and March 2020. When the grievant ceased receiving the supplement is immaterial to EDR’s analysis of the issues.

<sup>4</sup> The grievant also claims that the agency did not provide him with due process pursuant to the Correctional Officer Procedural Guarantee Act (“COPGA”). See Va. Code §§ 9.1-508 through 9.1-512. Although EDR lacks the authority to enforce the COPGA, we will address claims regarding due process as a matter of the grievance procedure and

head determined that the grievance record did not contain evidence demonstrating that a misapplication or unfair application of policy had occurred and declined to qualify the grievance for a hearing.<sup>5</sup> The grievant now appeals that determination to EDR.

### DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>6</sup> Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out and the reassignment or transfer of employees within the agency 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.<sup>7</sup>

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."<sup>8</sup> 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."<sup>9</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>10</sup>

Here, the grievant essentially argues that the agency removed him from his canine handler position as a form of disciplinary action, without first conducting a proper investigation or affording him due process. For state employees subject to the Virginia Personnel Act, 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 DHRM.<sup>11</sup> For example, when an agency issues disciplinary action to an employee, it must follow certain policy provisions.<sup>12</sup> These safeguards are in place to ensure that disciplinary actions are appropriate and warranted.

When an agency has taken informal disciplinary action against an employee, it cannot avoid a hearing solely because a Written Notice did not accompany the disciplinary action. 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

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DHRM Policy 1.60, *Standards of Conduct*. This ruling does not address whether there may be some other legal or equitable remedy available to the grievant regarding his assertions about the COPGA.

<sup>5</sup> The step-respondents characterized the grievant's reassignment as a change in his post assignment rather than a change in his position. A post is an assignment in a prison where an employee works during their shift; it does not impact the employee's job description. The grievant, on the other hand, was reassigned to a different position with a different job description.

<sup>6</sup> See Va. Code § 2.2-3004(B).

<sup>7</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>8</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>9</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>10</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>11</sup> Va. Code §§ 2.2-2900 though 2.2-2905.

<sup>12</sup> See DHRM Policy 1.60, *Standards of Conduct*.

management action was disciplinary (*i.e.*, taken primarily to correct or punish perceived poor performance).<sup>13</sup> Depending on the facts and circumstances, a reassignment or transfer with significantly different responsibilities can constitute an adverse employment action.<sup>14</sup> Here, the reassignment caused a substantial change in the grievant's job responsibilities: the removal of his canine handler duties. The grievant's salary was also reduced by \$1,200 per year despite the lack of impact on his Role and Pay Band. Accordingly, EDR finds that the grievant has raised a sufficient question whether he experienced an adverse employment action for purposes of this ruling.

Nonetheless, the evidence does not raise a sufficient question whether the agency's primary intent in reassigning the grievant was to correct or punish perceived unsatisfactory job performance or misconduct. Although the reassignment occurred in the context of an investigation, the evidence before EDR does not indicate that the reassignment was disciplinary in nature. The agency is engaged in an investigation of alleged misconduct at the prison where the grievant works. The investigation has not concluded and concerns sensitive information, and thus the agency cannot disclose the specific details of the allegations at this time. Because the investigation is still ongoing, the agency has also not yet made a determination whether formal disciplinary action (*i.e.*, a Written Notice) is warranted for agency employees; as a result, the agency was not required to provide the grievant with due process pursuant to DHRM Policy 1.60, *Standards of Conduct*, prior to his reassignment. Regardless of whether the grievant has actually engaged in misconduct, the agency determined that there is unacceptable risk for the grievant to continue working as a canine handler during the investigation.

Although the grievant's frustration with the agency's decision is understandable, the evidence provided by the agency supports a conclusion that the reassignment was based on operational concerns regarding both the subject of the investigation and the security of the prison. In addition, no evidence in the grievance record suggests that the reassignment was a misapplication or unfair application of policy. The grievant has not identified a mandatory policy provision that would prevent the agency from reassigning him under these circumstances, nor has EDR identified such a policy. As stated above, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government, including the methods, means and personnel by which work activities are to be carried out.<sup>15</sup> Similarly, the agency's Operating Procedure 102.2, *Recruitment, Selection, and Appointment*, specifically provides that employees may be transferred "to a position in the same [Pay B]and based on [agency] operational needs."<sup>16</sup> Due to the legitimate concerns articulated, the agency reassigned the grievant consistent with the discretion granted by state and agency policy. Accordingly, EDR finds that the facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.<sup>17</sup>

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<sup>13</sup> 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) (stating that grievances involving "transfers and assignments . . . resulting from formal discipline or unsatisfactory job performance" may qualify for a hearing).

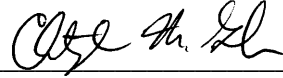
<sup>14</sup> See *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999); see also *Edmonson v. Potter*, 118 Fed. Appx. 726, 729 (4th Cir. 2004).

<sup>15</sup> Va. Code § 2.2-3004(B).

<sup>16</sup> Department of Correctional Operating Procedure 102.2, *Recruitment, Selection, and Appointment*, at 8.

<sup>17</sup> See *Grievance Procedure Manual* § 4.1.

EDR's qualification rulings are final and nonappealable.<sup>18</sup>



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<sup>18</sup> See Va. Code § 2.2-1202.1(5).