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## **QUALIFICATION RULING**

In the matter of the Department of Corrections  
Ruling Number 2021-5222  
June 11, 2021

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether her November 30, 2020, grievance with 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 worked at one of the agency’s institutions (“Institution 1”). On or about November 7, 2020, the grievant was involved in an altercation outside of work with the family member of another employee at Institution 1. The incident was reported to management and, following an investigation, the agency transferred the grievant to another institution (“Institution 2”) on or about November 25. There is no indication that the transfer to Institution 2 affected the grievant’s pay, job title, or responsibilities.

The grievant filed a grievance on November 30, 2020, challenging her transfer to Institution 2. She argues that commuting there has created a hardship for her because Institution 2 is 45 minutes away from her home and that management assumed she had a conflict with the employee at Institution 1 whose family member was involved in the incident, which was not actually the case. As relief, the grievant requested to continue working at Institution 1. Following the management resolution steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

While this ruling was pending, the grievant contacted EDR to request a delay in the issuance of the ruling, apparently because she was on an approved leave of absence from work. EDR staff attempted to contact the grievant multiple times by phone and email to gather additional information and request the amount of time she needed, but did not receive a response from her. EDR has since learned that the grievant has returned to work following an absence. Since the grievant has not responded to EDR or followed up to request additional time to provide a response, we will proceed with issuing a ruling on this matter.

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

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, 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>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>

In her grievance, the grievant challenges her lateral transfer to Institution 2. A transfer or reassignment to a different position 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 their 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

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

<sup>2</sup> Va. Code § 2.2-3004(B).

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

<sup>4</sup> Although the grievant claims that management engaged in "retaliation" against her, she has not identified any protected activity on which the transfer was allegedly based. See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).

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

<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).

detrimental effect.<sup>11</sup> In this case, the grievant has not indicated that her reassignment to Institution 2 has had an effect on her job title and responsibilities, and it does not appear that they were modified in any way because of the reassignment. An employee's unmet preference regarding work hours or job location is not enough to result in an adverse employment action under the facts presented in this case.<sup>12</sup> In the absence of an adverse employment action, the grievant's challenge to her reassignment does not qualify for a hearing.

Moreover, even assuming that the grievant has raised a question as to whether the transfer was an adverse employment action, she has not presented evidence to show that the agency misapplied or unfairly applied policy. The grievance procedure accords much deference to management's exercise of judgment, including matters such as the assignment of employees. Thus, a grievance that challenges an action like the transfer in this case does not qualify for a hearing unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.<sup>13</sup> The grievant was involved in an altercation outside of work with the family member of another employee at Institution 1 in November 2020. Although the facts of that encounter seem to be in dispute, management determined that the incident created a potential for disruption in the workplace and conflict between the grievant and the employee whose family member was involved. The agency determined that, under the circumstances, transferring the grievant to Institution 2 was consistent with its business need to promote trust, teamwork, and professionalism in the work environment.

Although the grievant may disagree with the agency's decision to transfer her to Institution 2, she has not raised a question whether the agency misapplied or unfairly applied policy, acted in a manner that was inconsistent with other decisions regarding the reassignment of employees, or was otherwise arbitrary or capricious. It therefore appears that the agency's decision to reassign the grievant to Institution 2 is consistent with the discretion granted by policy. Accordingly, the grievance does not qualify for hearing on these grounds.

EDR's qualification rulings are final and nonappealable.<sup>14</sup>

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<sup>11</sup> See, e.g., *Jones v. D.C. Dep't of Corr.*, 429 F.3d 276, 281 (D.C. Cir. 2005); *James*, 368 F.3d at 377.

<sup>12</sup> See, e.g., EDR Ruling Nos. 2016-4203, 2016-4206; EDR Ruling No. 2015-3946.

<sup>13</sup> See *Grievance Procedure Manual* § 9 (arbitrary or capricious is defined as a decision made "[i]n disregard of the facts or without a reasoned basis").

<sup>14</sup> See Va. Code § 2.2-1202.1(5).