Issue: Qualification/Methods and Means/Transfer(not under S.O.C. or Perf. Policy); Ruling Date: April 18, 2003; Ruling #2002-125; Outcome: not qualified

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of George Mason University
No. 2002-125
April 18, 2003

The grievant has requested a qualification ruling on whether his grievance initiated on April 11, 2002 with George Mason University (GMU or the agency), qualifies for hearing. The grievant claims he was "demoted" from Police Investigator to Patrol Sargeant because of his age, for retaliatory reasons, and in violation of state and agency policy. For the reasons set forth below, this grievance does not qualify for hearing.

FACTS

The grievant was employed as a Police Investigator until he was transferred to the position of Patrol Sargeant. In February of 2002, the grievant claims that he was directed to meet with the Chief of Police. During this meeting, the Chief indicated that he was intending to reassign the grievant from the position of Police Investigator to Patrol Sergeant. The grievant objected to this reassignment based on his perception that the transfer was tantamount to a demotion. He viewed the transfer as causing a "loss of status" and as "adverse to his career," despite the fact that the move did not affect his salary.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[1] Thus, claims relating to issues such as the method, means and personnel by which work activities are to be carried out (to include the best utilization of law enforcement personnel) 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 influenced management's decision, or whether state policy may have been misapplied.[2] The

[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1 (C), page 11.

grievant asserts that the agency has improperly transferred him because of his age, for retaliatory reasons, and in violation of state and agency policy.

Misapplication of Policy

For an allegation of misapplication 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.

It is the Commonwealth's policy to ensure "a system of personnel administration based on merit principles and objective methods of appointment, promotion, *transfer*, layoff, removal, discipline, and other incidents of state employment."[3] Furthermore, for state employees subject to the Virginia Personnel Act, a transfer must be either voluntary, or, if involuntary, must be based on objective methods and must adhere to all applicable statutes and to the policies and procedures promulgated by the Department of Human Resource Management (DHRM).[4] Applicable statutes and policies recognize management's authority to transfer an employee for disciplinary and performance purposes as well as to meet other legitimate operational needs of the agency.[5] For instance, DHRM Policy 3.05 states that "Reassignment within the Payband" is a "management initiated-action" used when "agency business (staffing or operational) needs may require the movement of staff."[6]

In this case, the agency deemed it necessary to move the grievant from the position of Investigator to one of two newly created Patrol Sargeant positions in order to "provide supervision to the distributed campuses."[7] Furthermore, as part of a Departmental re-structuring, the position from which the grievant was moved, Police Investigator, was moved from Payband 4 to 3. The agency notes that this change was more in keeping with the "industry standard" as reflected by the Commission on Accreditation for Law Enforcement Agencies. The Sergeant position was and remains a Payband 4 position.

The grievant's transfer did not affect his salary or change the payband under which he was assigned—he moved from a Payband 4 position into a Payband 4 position and his salary was not decreased. While the grievant may have been disappointed with the move, the transfer did not violate any mandatory state (DHRM) policy provision nor was it so unfair as to amount to a disregard of the intent of the applicable policy. The

[3] Va. Code § 2.2-2900 (Emphasis added).
[4] Va. Code § 2.2-2900 *et seq.*
[5] Va. Code §§ 2.2-3004 (A) and (C); DHRM Policy No. 3.05, Compensation; DHRM Policy No. 1.60, Standards of Conduct.
[6] *See* DHRM Policy 3.05, pages 17-18 of 21. "Reassignment within the Payband" is defined as "an action of agency management to move an employee from one position to a different position in the same Role or Pay Band (formerly Lateral Transfer.)" DHRM Policy 3.05, page 4 of 21.
[7] *See* Second-step Response, dated 4/29/02.

move is properly viewed as management's exercise of the discretion granted under Policy 3.05. In addition, the grievant has not identified any specific agency policy that he contends was potentially violated by the transfer.

Retaliation

While DHRM Policy 3.05 affords management great discretion in moving employees, it does not allow transfer of employees for improper reasons such as unlawful discrimination or retaliation. In this case, the grievant claims his transfer was retaliatory. For the reasons explained below, this claim fails.

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[8] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.[9] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[10]

In this case, the grievant claims that the purported adverse action, the transfer to Patrol Sargeant, was a result of his objecting to the proposed transfer. This argument ignores the fact, however, that the decision to move him to Patrol Sergeant had been made *prior* to his engaging in the arguably "protected activity" of objecting to the move. Because the decision to transfer the grievant occurred *prior* to his objection, there can be no causal link found between the alleged adverse action (transfer) and the alleged protected activity (objection to the transfer).

Age Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination on the basis of age.[11] To qualify his grievance for hearing, there must be more than a mere allegation of discrimination—there must be facts that raise a sufficient

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[8] *See* Va. Code § 2.2-3004(A)(v*)*. 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.

[9] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656 (4th Cir. 1998).

[10] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

[11] *See* Grievance Procedure Manual, § 4.1(b), page 10.

question as to whether the grievant suffered an "adverse employment action"[12] as the result of age discrimination.[13] If the agency provides a nondiscriminatory reason for the alleged disparity in treatment, the grievance should not be qualified for hearing, unless there is sufficient evidence that the agency's professed reason is merely a pretext or excuse for discrimination.[14]

In this case, it is undisputed that as a male over the age of forty, the grievant is a member of a protected class. However, the grievant has presented no evidence showing that he was treated differently than other employees not in his protected class (under age 40) with respect to the assignment of his duties. Furthermore, the grievant has not offered any evidence that the agency's stated reason for the transfer, to "provide supervision to the distributed campuses," was pretextual.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that he wishes to conclude the grievance.

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Claudia T. Farr
Director

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William G. Anderson, Jr.
EDR Consultant, Sr.

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[12] An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. Von Gunten v. Maryland Department of the Environment 243 F.3d 858, 866 (4th Cir. 2001)(citing Munday v. Waste Mgmt. Of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

[13] A general framework for establishing a prima facie case of discrimination requires the employee to establish: (1) membership in a protected group (e.g. over the age of forty); (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination. Cf. McDonnell Douglas, 411 U.S. at 802; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-254, n. 6, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). *See also* Swierkiewicz v. Sorema, 534 U.S. 506, 509-513 (2002) for discussion on the prima facie case.

[14] Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).