

Issue: Qualification/grievant claims that agency engaged in “unfair and biased treatment” by denying transfer; Ruling Date: March 15, 2005; Ruling #2005-971; Agency: Virginia Department of Transportation; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Virginia Department of Transportation
Ruling Number 2005-971
March 15, 2005

The grievant has requested a ruling on whether his November 5, 2004 grievance with the Virginia Department of Transportation (VDOT or the agency) qualifies for hearing. He alleges that the agency engaged in “unfair and biased treatment” by denying him a previously approved transfer. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed with the agency as a traffic controller at Location X. On September 2, 2004, the grievant e-mailed the interim district administrator to request a lateral transfer to an open traffic controller position at either Location Y or Z. The supervisor, whom the agency alleges misunderstood that the transfer requested by the grievant was not part of a previous grievance settlement but was instead a separate request, asked the district human resources manager to “see what can be done.”¹ The human resources manager identified a vacant position and apparently offered it to the grievant. The agency states that it was only after the position was offered to the grievant that the district administrator realized her error. On October 6, 2004, the grievant was advised that his request to transfer was denied, but that he was free to submit an application and compete for any vacant position advertised for recruitment. The grievant states that the decision to rescind the transfer was communicated to him on what he understood would be his last day of work in his current position.

On November 5, 2004, the grievant initiated a grievance challenging the agency’s actions. He alleges that the agency engaged in “unfair and biased treatment” by granting him a transfer and then revoking the transfer the day before it was to take effect. He states that he would not have objected had the agency not approved his transfer in the first place, but that he believes the agency’s subsequent decision to revoke the transfer was motivated by his previous complaints, his race, and his status as an ex-felon. The agency responds that the

¹ In April 2004, the grievant was given his current position at Location X as part of a settlement of a grievance challenging the agency’s failure to promote the grievant to a traffic controller position. The agency asserts that the administrator misunderstood the grievant’s e-mail to be a complaint that he had not received the position agreed to as part of the settlement. The grievant admits that he received the position promised to him in the settlement. He asserts, however, that his earlier grievance requested a traffic controller position at Location Y or Z, but because no position was available at these locations at the time he settled his grievance, he accepted the position at Location X.

initial decision to grant the grievant the requested lateral transfer was the result of a misunderstanding, and that allowing the non-competitive transfer would improperly accord the grievant preferential treatment. The parties did not resolve the grievance in the course of the management resolution steps, and the agency head denied the grievant's request for qualification. The grievant now appeals the denial of qualification.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.² Thus, all claims relating to issues such as the methods, means, and personnel by which work activities are to be carried out, or to the transfer or reassignment of employees within the agency generally do not qualify for 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 applied unfairly.³ In addition, for a grievance to qualify for hearing, the grievant must show that the conduct grieved involves an "adverse employment action."⁴ An adverse employment action is defined as a "tangible employment act constituting 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

In this case, the grievant has not shown that the agency's decision to deny the requested lateral transfer resulted in an adverse employment action. While the grievant's frustration and anger over the agency's actions are understandable, there is no evidence that he has experienced any significant and materially adverse change in employment status as a result of the agency's conduct.

We note that the grievant has admitted that part of the reason he sought the transfer was to escape the consequences of a possible outsourcing of work at the facility to which he is currently assigned. Although the denial of the requested transfer arguably denies the grievant the opportunity to place himself in a better position than his co-workers with respect to any future layoff, this consequence does not constitute an adverse employment action. First, it is not an adverse employment action to deny an employee preferential treatment. Moreover, any claim of harm is premature, as the grievant has not yet experienced any adverse consequence from any potential future outsourcing. Accordingly, because the grievant has failed to make the threshold showing of an adverse employment action, this grievance is not qualified for a hearing.

² Va. Code § 2.2-3004(B).

³ Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b) and (c).

⁴ Va. Code § 2.2-3004(A).

⁵ *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

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 the qualification 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 wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

Gretchen M. White
EDR Consultant