

Issue: Qualification/management actions/recruitment-selection; Ruling Date: April 13, 2005;
Ruling #2005-988; Agency: Department of Mental Health, Mental Retardation and Substance
Abuse Services; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Mental Health,
Mental Retardation and Substance Abuse Services
Ruling Number 2005-988
April 13, 2005

The grievant has requested a ruling on whether his January 18, 2005 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) qualifies for hearing. He alleges that the agency misapplied and/or unfairly applied agency and facility hiring policies. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed with the agency as a Human Services Care Worker at Facility H. He applied for the position of Transportation Officer (TO) at Facility H and was subsequently interviewed for this position. On December 23, 2004, the grievant was notified by the agency that he had not been selected.

On January 18, 2005, the grievant initiated a grievance challenging the selection process for the TO position. Specifically, the grievant alleges that by selecting a probationary employee for the position, the agency violated the facility's hiring policy, which prohibits lateral transfers for probationary employees. The grievant also alleges that the hiring panel misapplied policy by failing to recommend any candidate for the position. 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.¹ 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

¹ Va. Code § 2.2-3004(B).

management's decision, or whether state policy may have been misapplied or applied unfairly.²

In addition, for a grievance to qualify for hearing, the grievant must show that the conduct grieved involves an "adverse employment action."³ 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."⁴

Although the agency denies that the TO position would have been a "lateral transfer" for the grievant, as that term is used in the facility's hiring policy, the position change sought by the grievant was unquestionably lateral in nature. The TO position is in the same pay band as the grievant's current position, and the minimum salary advertised for the TO position—which is also the salary now paid to the candidate selected for the position⁵—is the same as the grievant's salary at the time of the selection decision. Indeed, during the course of this Department's investigation, the grievant indicated that he did not seek the TO position for improved pay or hours, but rather because it would involve "different" work.⁶

Where a lateral move would represent a promotion or result in higher pay or significantly improved opportunities, the denial of such an opportunity would likely constitute an adverse employment action. In the absence of such a showing, however, the denial of a lateral opportunity is not an adverse employment action.⁷ In this case, there is no evidence that the TO position would have been a promotion for the grievant or would have resulted in higher pay or improved opportunities. Accordingly, this grievance is not qualified for a hearing.

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

² Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b) and (c).

³ Va. Code § 2.2-3004(A).

⁴ *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

⁵ The successful candidate's salary did not change after he assumed the TO position.

⁶ During this Department's investigation, the grievant stated that the TO position paid a "few dollars" more than his current position, but that the difference in pay was so insignificant that he would not have sought the TO position for that reason. Evidence provided by the agency shows that the grievant's salary as of November 25, 2004 was identical to that advertised for the TO position and that ultimately paid to the successful candidate.

⁷ See *Collins v. Dean Foods Co.*, 2001 U.S. Dist. LEXIS 17179, at ** 18-19 (N.D. Ill. Oct. 18, 2001) ("The denial of a lateral transfer does not constitute an adverse employment action..."); *Smith v. Alabama Dept. of Corrections*, 145 F. Supp. 2d 1291, 1298 (M.D. Ala. 2001) ("[A] failure to transfer may constitute an adverse employment action if [the new position] entails an increase in pay, prestige or responsibility." (citation omitted)).

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appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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