

Issue: Qualification/management actions/assignment of duties; work conditions/
physical, environmental safety; Ruling Date: September 22, 2006; Ruling #2007-1407;
Agency: University of Virginia; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the University of Virginia
Ruling No. 2007-1407
September 22, 2006

The grievant has requested a ruling on whether his May 12, 2006 grievance with the University of Virginia (UVA or the university) qualifies for hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed by the university as a Trades Technician III-Carpenter. On May 12, 2006, the grievant initiated a grievance challenging the alleged misapplication of safety and environmental regulations by management.

The grievant asserts that in November 2005, he and several co-workers were directed to drive metal fence poles into the ground at a baseball field. The grievant states that while they were attempting to carry out their assignment, he and his co-workers realized that there was a live electric line in the area where the poles were to be placed. The grievant was not injured in this incident, as he and his co-workers discovered the electric line before making contact between the metal poles and the line.

The grievant asserts that management should have determined whether there were electric lines in the area before giving the grievant and his co-workers the assignment. The university states that prior to directing the grievant and his co-workers to perform this assignment, the grievant's supervisors apparently completed the appropriate excavation permits, including contacting "Miss Utility." The university further states that the "incident occurred due to an unrecorded utility installation unknown to the Universities [sic] Utilities Department."

The grievant alleges that subsequently, on April 24, 2006, he and a co-worker were directed to climb into a dumpster to retrieve a refrigerator and three air-conditioning units. The university explains that "[d]irection ... to retrieve the articles from the dumpster" was given because the items had not been "properly evacuated of contaminants." The grievant states that he advised his supervisor that climbing into the

dumpster to retrieve the refrigerator and air-conditioning units would constitute a safety violation, and that his supervisor did not thereafter insist that he do so. The grievant admits that he has not been retaliated against as a result of his actions, and states that he does not expect to be retaliated against in the future.

The grievant argues that management has demonstrated a “general negligence” in enforcing safety and environmental regulations, directed duties that violate safety and environmental regulations and put his personal safety at risk, and failed to properly supervise his work. He further asserts that the initial instruction to remove the refrigerator and air-conditioning units from the dumpster constituted a misapplication of policy because the instruction was given by a supervisor who is not in the grievant’s own direct “chain of command.”

During the course of the management resolution steps, the university advised the grievant that his allegations with respect to the November 2005 incident were untimely, as the incident occurred more than 30 days prior to the initiation of his May 12, 2006 grievance. The grievant does not dispute that any claims relating to the November 2005 incident are untimely, but asks that the incident be considered as background information.

After the parties did not resolve the grievance in the management resolution steps, the grievant requested qualification of the grievance for hearing. The agency head denied the grievant’s request, and the grievant has appealed to this Department.

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 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 or unfairly applied.²

Further, the General Assembly has limited issues that may qualify for a hearing to those that involve “adverse employment actions.”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

A misapplication of policy may constitute an adverse employment action only if the misapplication results in a significant change in employment status. Although the

¹ See Va. Code § 2.2-3004(B).

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

³ Va. Code § 2.2-3004(A).

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

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grievant's concern about being asked to perform work he considered to be unsafe is understandable, he has not shown that the grieved conduct resulted in such a change. We note that the grievant admits that he was not in fact injured; that once he advised his supervisor that the direction to retrieve the items from the dumpster would constitute a safety violation, he was not required to carry out the supervisor's instruction; and that he has not been retaliated against for his actions (and does not expect to be retaliated against in the future). Under these circumstances, we cannot find that the grieved conduct constitutes an adverse employment action. Accordingly, because the grievant has failed to satisfy this threshold requirement, we conclude that his May 12, 2006 grievance does not qualify for 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 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