Issue: Discipline/suspension/demotion/transfer; transfer/non-disciplinary; discrimination/disability; Ruling Date: October 27, 2006; Ruling #2007-1430; Agency: Department of State Police; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of State Police
Ruling Number 2007-1430
October 27, 2006

The grievant has requested a ruling on whether his June 12, 2006 grievance with the Department of State Police (VSP or the agency) qualifies for a hearing. The grievant claims that VSP misapplied and/or unfairly applied agency policy when it arbitrarily and capriciously denied his request for a transfer. Additionally, fairly read, the grievance makes out a claim of disability discrimination.[1] For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Law Enforcement Manager II with VSP. On August 25, 2005, the grievant requested a transfer to Division Five Headquarters in Chesapeake, Virginia (5th Division). The grievant requested the transfer in order to be closer to home and to help with the care of a sick family member. According to the grievant, a position became available in 5th Division in June 2006. The grievant's request to be transferred to this open position was denied.

According to VSP, granting the requested transfer was not "in the best interest of the Department." More specifically, VSP provided this Department with the following reasons for denying the grievant's request for a transfer: (1) "[a] complaint that [grievant] drove his State vehicle home from Appomattox to Chesapeake was sustained;" (2) "[i]n [grievant's] previous assignment in Division 5, Chesapeake, the Superintendent has become aware of possible detractors in that area;" and (3) [grievant] misrepresented his job responsibilities to the Department Physician in regards to being removed from light

[1] In his grievance, the grievant states that the Superintendent told him that his request for a transfer was being denied because "the job would be too stressful for me since I had been sick and there were many activities being planned for that Division and that he felt it would be better for my health to remain in Appomattox." The grievant also states, "I am fully aware of the responsibilities of that position and of my ability to perform those duties. That, plus the fact that there is no medical or other basis for the Superintendent to think that I cannot handle the position, leads me to conclude that his decision is arbitrary, capricious, and inconsistent with policy."

duty status." In addition, in his third management resolution response, the third step respondent states that the decision to deny the grievant's request for transfer was based upon the "several detractors in Fifth Division that do not desire to see you return as Captain and would have created additional stress for you and possibly made your job more difficult had you been transferred back."

DISCUSSION

The grievance statutes and state personnel policy reserve to management the right to establish workplace policy governing the assignment and transfer of employees, and to provide for the most efficient and effective operation of the facility.[2] Accordingly, decisions regarding the transfer or reassignment of an employee generally do not qualify for a hearing unless there is evidence raising a sufficient question as to whether it resulted from a misapplication and/or unfair application of policy, discrimination, retaliation, or discipline. The grievant asserts that the denial of his request for a transfer was a misapplication and/or unfair application of VSP policy[3] and constituted disability discrimination. Additionally, because it appears that the agency may have denied the grievant's request for transfer as a means of punishment, this ruling will also address whether the grievance raises a sufficient question that the denial of transfer was disciplinary in nature.

The General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."[4] Moreover, claims of disability discrimination require that the grievant suffer an adverse employment action.[5] Likewise, an agency's informal disciplinary action against an employee may qualify for a hearing if the grieved management action resulted in an adverse employment action against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish).[6] The threshold question then becomes whether or not 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."[7]

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[2] *See* Va. Code § 2.2-3004 (B) & (C).
[3] VSP General Order No. 16, *Assignments and Transfer,* allows for employee transfers after serving in the current location for a period of twelve months. According to the grievant, he had met the one-year requirement and as such, was eligible for transfer to 5th Division. Additionally, the grievant claims that he is the only Captain in the past thirty years to be denied a request to transfer.
[4] Va. Code § 2.2-3004(A).
[5] *See* Serrano v. County of Arlington, 986 F. Supp. 992, 996 (E.D. Va. 1997) citing Doe v. University of Maryland Medical System Corp., 50 F.3d 1261, 1264-1265 (4th Cir. 1995) (To establish a prima facie case of discrimination under the ADA, plaintiff must prove that he (i) has a disability, (ii) is otherwise qualified for the job, and (iii) has experienced some adverse employment action as a result of his disability.)
[6] *See* EDR Ruling #2006-1390.
[7] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

According to the grievant, this was a request for a lateral transfer as he would be performing the exact same job in 5th Division that he currently performs in Appomattox and would receive the same pay and benefits. Thus, the denial of the transfer did not deprive him of a significant change in employment status such as a promotion, higher level responsibilities, or an increase in salary or benefits and was therefore not an adverse employment action.[8] Accordingly, the grievant's claims cannot qualify 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 appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

[8] *See* Burger v. Central Apt. Management Inc., 168 F.3d 875, 879 (5th Cir. 1999)("[r]efusing an employee's request for a purely lateral transfer does not qualify as an ultimate employment decision."); Welcome v. Wix Corp., 2006 U.S. Dist. LEXIS 9130 (W.D. N.C. 2006)(denial of employee's request to transfer from third shift to the first shift is not an adverse employment action); and McFall v. Gonzales, 143 Fed. Appx. 604 (5th Cir. 2005)(unpublished opinion)(employer's refusal to grant employee's request for voluntary transfer is not an adverse employment action). *See also* Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir. 1996) (not everything that makes an employee unhappy is an actionable adverse employment action"); and Fallon v. Meissner, 66 Fed. Appx. 348, 352 2003 U.S. App. LEXIS 8277 (3d Cir. 2003)(unpublished opinion)(citing DiIenno v. Goodwill Indus., 162 F.3d 235, 236 (3d Cir. 1998))(an adverse employment action "must be adverse in the right way. In particular, it must not arise from the employee's individual preferences, and must be 'job-related', in the appropriate sense").