

Issue: Qualification - Management Actions (Non-Disciplinary Transfer); Ruling Date: July 31, 2009; Ruling #2009-2120; Agency: Virginia Employment Commission; Outcome: Not Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Virginia Employment Commission  
Ruling No. 2009-2120  
July 31, 2009

The grievant has requested a ruling on whether his April 24, 2008 grievance with the Virginia Employment Commission (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In or around April 2008, the agency notified the grievant that it was closing the office in which he worked. Employees in that office were being relocated to other offices. The grievant asked to be transferred to a particular office closer to his home ("alternate office"). However, the grievant was transferred to a different office ("new office"). The grievant initiated his April 24, 2008 grievance to seek reassignment to the alternate office with his current caseload territory. The grievant alleges "disparate treatment" in that three other employees were allegedly transferred to offices closer to their residences.

The agency disputes the grievant's contention of disparate treatment. The agency states that the grievant was not allowed to transfer to the alternate office because the new office would be closer to his caseload territory. Further, two of the three employees who allegedly transferred to offices closer to their residences do not have specific regions to cover, so there was no concern with close proximity to a territory. The third employee transferred to an office that was actually closer to her territory, though it was also closer to her home. The grievant has disputed the agency's assertions.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>1</sup> Thus, by statute and under the grievance procedure, complaints relating solely to hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to hearing"<sup>2</sup> unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. The grievant has asserted claims of discrimination, retaliation, and misapplication or unfair application of policy.

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<sup>1</sup> See Va. Code § 2.2-3004(B).

<sup>2</sup> Va. Code § 2.2-3004(C).

### *Discrimination*

Grievances that may be qualified for a hearing include actions related to discrimination.<sup>3</sup> To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency’s professed business reason was a pretext for discrimination.<sup>4</sup>

The grievant has asserted disparate treatment in his transfer to the new office. However, beyond a bare allegation of “discrimination,” the grievant has presented no facts to support his contention that he was treated differently based on a protected status. Moreover, even if this grievance had presented supporting facts beyond a bare allegation, there is no indication that the agency’s business-related rationale was just a pretext for any status-based discrimination. The agency has stated that the grievant was placed in the new office instead of the alternate office so he would be located closer to the territory he services. Although the grievant has disputed the agency’s stated rationale, the agency’s explanation appears reasonable and supported by the facts as presented to this Department. It appears the grievant’s territory was changed shortly after arriving at the new office. However, the locations he now services are still closer to the new office than the alternate office. In sum, the claims in the grievance are insufficient to raise a question of discrimination and thus do not qualify for hearing.

### *Retaliation*

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;<sup>5</sup> (2) the employee suffered a materially adverse action;<sup>6</sup> and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially 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 presents sufficient evidence that the agency’s stated reason was a mere pretext or excuse for retaliation.<sup>7</sup> Evidence establishing a causal connection

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<sup>3</sup> See Va. Code § 2.2-3004(A) (grievances alleging discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin or sex may be qualified for hearing); See also Executive Order No. 1 (2006) (also including sexual orientation and veteran’s status as protected classes).

<sup>4</sup> See *Hutchinson v. INOVA Health System, Inc.*, C.A. No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at \*3-4 (E.D. Va. Apr. 8, 1998).

<sup>5</sup> See Va. Code § 2.2-3004(A). 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 Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.” *Grievance Procedure Manual* § 4.1(b).

<sup>6</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); see, e.g., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

<sup>7</sup> See, e.g., *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4<sup>th</sup> Cir. 2005).

and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.<sup>8</sup>

The grievant has not stated that he engaged in any protected activity from which a retaliation claim might arise in this grievance.<sup>9</sup> Indeed, it appears that the grievant's retaliation claim may relate to issues that arose after he filed the April 24, 2008 grievance. Such a claim cannot be made part of this grievance.<sup>10</sup> Because this grievance does not raise a sufficient question as to the elements of a claim of retaliation, it does not qualify for a hearing on that basis.

#### *Misapplication or Unfair Application of Policy*

For an allegation of misapplication of policy or unfair application 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. This Department has found no policy provision that the agency violated by denying the grievant's request to transfer to a particular office. Moreover, as indicated in the "Facts" section above, there is insufficient evidence that the agency's denial of the grievant's transfer request was plainly inconsistent with other similar decisions within the agency or was otherwise arbitrary or capricious.<sup>11</sup> While it is understandable that the grievant is concerned about other individuals obtaining transfers closer to their homes, the agency was within its discretion to deny the grievant's request based on the traveling distances required in his particular job. The agency's stated business-related rationale for denying the grievant's request appears reasonable and supported by the facts, not arbitrary or capricious. Consequently, the grievance does not 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 and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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.

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Claudia T. Farr  
Director

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<sup>8</sup> See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

<sup>9</sup> See, e.g., *Grievance Procedure Manual* § 4.1(b).

<sup>10</sup> See *Grievance Procedure Manual* § 2.4.

<sup>11</sup> See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); see also, e.g., EDR Ruling 2008-1879.