

Issue: Qualification – Discrimination (Gender); Ruling Date: June 3, 2009;
Ruling #2009-2314; Agency: Department of Corrections; Outcome: Not
Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2009-2314
June 3, 2009

The grievant has requested a ruling on whether his January 23, 2009 grievance with the Department of Corrections (DOC or the agency) qualifies for hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed by the agency as a CHNT. On January 23, 2009, the grievant initiated a grievance challenging the agency's policy of allowing female corrections officers to frisk search male employees, while male corrections officers are not allowed to frisk search female employees. The grievant, a male, asserts that this policy constitutes gender discrimination, and asks that the policy revert back to its original "same gender" approach.

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

Grievances that may qualify for a hearing include those alleging discrimination on the basis of sex.¹ For a grievance alleging discrimination to qualify for a hearing, however, there must be facts that raise a sufficient question as to whether an "adverse employment action" resulted from prohibited discrimination based on the grievant's protected status.²

¹ See *Grievance Procedure Manual*, § 4.1 (b)(2).

² If the agency provides a legitimate, nondiscriminatory business reason for the alleged disparity in treatment, the grievance should not be qualified for hearing, unless there is sufficient evidence that the agency's stated reason is merely a pretext or excuse for improper discrimination. *Hutchinson v. INOVA Health System, Inc.*, Civil Action 97-293-A, 1998 U. S. Dist. LEXIS 7723, at *4 (E.D. Va. April 8, 1998).

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.”³ In this case, the grievant conduct—the agency’s policy on frisk-searching—was not such an act, as it did not constitute a significant change in the grievant’s employment status. Accordingly, because this threshold requirement has not been met, we conclude that the grievant’s January 23, 2009 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

³ Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).