Issue: Qualification – Retaliation (Other Protected Right) and Work Conditions (Other); Ruling Date: February 9, 2010; Ruling No. 2010-2480; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2010-2480
February 9, 2010

The grievant has requested a ruling on whether his September 15, 2009 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is a Probation and Parole Officer (PO) with the agency. On or about August 4, 2009, a new PO began working with the agency and was assigned office space with the grievant and another employee.[1] Shortly thereafter, the grievant commented to the Deputy Chief PO that perhaps the new PO, who was apparently much younger than the grievant, "would be more comfortable in another office with someone closer to her age." On August 17, 2009, the grievant was allegedly informed that because of his comment, he was being moved to another office.

According to the grievant, the new office is the smallest two-person office available and his movement to this office was unjustified and punitive as well as retaliatory and discriminatory. In addition, the grievant asserts that there was a much larger office available that he should have been assigned given his seniority with the agency and that he has been treated unfairly with regard to office assignments.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out and the reassignment or transfer of employees within the agency generally do not qualify

[1] The grievant and two other employees were assigned to work in the conference room. According to the grievant, the conference room "does not have a window, is close to the backdoor, copy machine, urination-testing room and can be noisy." However, the grievant had been working in the conference room for quite some time and actually preferred to work there while others apparently "moved at the first opportunity they had."
[2] *See* Va. Code § 2.2-3004(B).

for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[3] The grievant claims that in assigning him a new office, the agency misapplied policy, and discriminated and retaliated against him.

Adverse Employment Action

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

Moreover, "not everything that makes an employee unhappy is an actionable adverse employment action."[8] As one court has put it, 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."[9]

Here, although the grievant was transferred to another office space at his current location, there was no significant change in his employment status – his job compensation, benefits and responsibilities remained the same. Further, while we do not question the grievant's extreme distress over the agency's decision to move him from one office to another, the grievant's individual preference for his former office is not determinative. This Department concludes that no adverse employment action was taken, and accordingly, the grievant's discrimination and policy misapplication claims cannot qualify for a hearing.

Retaliation

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[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).

[4] *See Grievance Procedure Manual* § 4.1(b).

[5] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538. The grievant's retaliation allegations are discussed below.

[6] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[7] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

[8] Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir. 1996).

[9] 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)).

The grievant has also alleged that the change in office location was retaliatory. 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;[10] (2) the employee suffered a materially adverse action;[11] and (3) a causal link exists between the materially adverse action and the protected activity.

In this case, it appears that the grievant was moved to a different office location as a result of expressing his opinion that a younger co-worker might feel more comfortable in an office with employees of a similar age. Assuming without deciding for purposes of this ruling only that the grievant engaged in a protected activity when he expressed his opinion to management,[12] a transfer to a less desirable work space is not a materially adverse action.[13] 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.

Mediation

Finally, although this grievance does not qualify for a hearing, mediation may be a viable option for the parties to pursue. EDR's mediation program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. For more information on this Department's Workplace Mediation program, the parties should call 888-232-3842 (toll free) or 804-786-7994.

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

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[10] *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).

[11] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); s*ee, e.g*., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. A materially adverse action is one that might dissuade a reasonable employee from engaging in the protected activity. *See* Burlington, 548 U.S. at 68.

[12] *See* Va. Code 2.2-3000(A) ("employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management").

[13] *See e.g*., Gilbert v. Des Moines Area Community College, 495 F.3d. 906, 918 (8th Cir. 2007) (movement to a less desirable work space is not a materially adverse action under *Burlington*). While this determination can depend on the particular circumstances of each case, in this case, moving the grievant from the conference room to another office in the same building does not rise to the level of being materially adverse – the grievant admits that most all other employees preferred to have their office located somewhere in the building other than the conference room.

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