

Issues: Qualification – Management Actions (Recruitment/Selection and Non-Disciplinary Transfer); Ruling Date: March 25, 2010; Ruling #2010-2506; Agency: Department of Alcoholic Beverage Control; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Alcoholic Beverage Control
Ruling Number 2010-2506
March 25, 2010

The grievant has requested a ruling on whether her May 21, 2009 grievance with the Department of Alcoholic Beverage Control (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant challenges the agency's actions related to her transfer from Store U to Store G, request for transfer to Store D, and her nonselection for a transfer to Store D in a competitive process. In May 2008, the grievant states she was told by her supervisor that she was going to be transferred to Store D. That location's sales had reached a level that qualified it for a manager position. Because the grievant was a manager at an overstaffed location (Store U), she was up for transfer when there was an opening in another store. However, the agency decided to wait to fill the manager position at Store D to determine first whether the increased sales could be maintained. About the same time, an opening occurred at Store G, and the agency transferred the grievant to Store G in the same position she held at Store U. The grievant asserts that the agency had agreed to transfer her to Store D and should have done so.

Early in 2009, the agency determined that it would fill the manager position at Store D. The grievant requested a transfer to that open position. It appears that the agency refused to grant her request. Instead, the agency opened the position for a competitive selection. The grievant submitted an application and was granted an interview. The grievant claims there were abnormalities in this process, and states she was misled to believe the interview would take place at an incorrect location. In any event, the grievant discovered the correct location and attended the interview at the appropriate place and time. The grievant was the agency's second choice for the position; another candidate was awarded the position. The grievant asserts that the agency should have granted her transfer request to the position at Store D. She also states that she should have been selected for the Store D position during the competitive selection because she was the best qualified candidate.

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted

discipline, or a misapplication or unfair application of policy.¹ In this case, the grievant challenges management actions regarding transfers on the grounds of misapplication and/or unfair application of policy and discrimination based on age. Further, during this Department's investigation for this ruling, the grievant raised the additional theory of retaliation.²

Misapplication/Unfair Application of Policy; Discrimination

Under the above two theories, a threshold question is whether the grievant has suffered an "adverse employment action."³ 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."⁴ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁵

It does not appear that the grievant's transfer to Store G, the denial of her transfer request to Store D, or the failure to be selected for the position in Store D are adverse employment actions. A transfer or reassignment, or denial thereof, may constitute an adverse employment action if a grievant can show that the transfer/reassignment had some significant detrimental effect on the terms, conditions, or benefits of his employment.⁶ A reassignment or transfer with significantly different responsibilities, or one providing reduced opportunities for promotion can constitute an adverse employment action, depending on all the facts and circumstances.⁷

Based on the information presented in this grievance, the grievant was laterally transferred into the exact same job at another store. The denial of the grievant's request to transfer to Store D was similarly a denial of a lateral transfer. Further, the failure to select the grievant for the position at Store D was, in effect, a denied request for the same lateral transfer to

¹ Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1(c).

² During the ruling investigation, the grievant indicated that she was "in trouble" because she stands up and disputes things that go on in the agency, that she did not just say "ok" when she was transferred to Store G, but instead tried to ask questions of her supervisor whom, she claims, got angry with her. The grievant also says that she raised her concerns with others in management. The agency objected to the consideration of retaliation stating that the grievant did not raise a claim of retaliation on the Grievance Form A and, therefore, this claim should not be addressed. As this Department has previously ruled, however, the "claims" raised by a grievance are the management actions being challenged, not the supporting theories as to why those management actions are allegedly improper. *See, e.g.*, EDR Ruling Nos. 2007-1561 & 2007-1587; EDR Ruling No. 2007-1457; EDR Ruling No. 2007-1444. While the theory of retaliation was not expressly stated on the Form A as filed, the management actions being grieved were. As such, retaliation is not a new "claim" being added at this time, and the grievant's theories, including retaliation, as to *why* the management actions were improper will be addressed in this ruling. *See, e.g.*, EDR Ruling No. 2007-1444. We note that the agency was given the opportunity to respond to this theory and its response was incorporated into this Department's investigation.

³ The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions." *See Grievance Procedure Manual* § 4.1(b). 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.

⁴ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁵ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁶ *See id.*

⁷ *See James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371 (4th Cir. 2004); *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999); *see also Edmonson v. Potter*, 118 Fed. Appx. 726 (4th Cir. 2004) (unpublished opinion).

the exact same position she held already in another store. Thus, it does not appear that the agency's actions had a significant detrimental effect on the grievant's employment status or deprived her of a significant change in employment status such as a promotion, higher level responsibilities, or an increase in salary or benefits. Therefore, the actions challenged by the grievant are not adverse employment actions.⁸ Accordingly, this grievance cannot qualify for a hearing on the grounds of policy misapplication/unfair application or discrimination.

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;⁹ (2) the employee suffered a materially adverse action;¹⁰ 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.¹¹ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹²

The grievant argues that because she raised concerns with various members of agency management, including her supervisor, about her initial transfer to Store G, the agency retaliated by not selecting her for a competitive transfer to Store D. Raising concerns about employment matters with agency management can be viewed as protected activity.¹³ Although the grievant's original transfer to Store G could not have been impacted by this protected activity (because that transfer decision occurred before the protected activity), the nonselection for the manager position at Store D occurred after she raised her employment concerns with management, and thus, must be considered further.

To qualify for hearing under a retaliation theory, the management actions grieved must also be "materially adverse." This standard is an objective one: an action is materially adverse if it "well might have dissuaded a reasonable worker" from engaging in protected activity.¹⁴ Again, in this case, the position the grievant sought was a lateral one, thus it cannot be said that

⁸ An allegation that a transfer to Store D would reduce the grievant's commuting distance would not appear to be an adverse employment action. See *Byers v. HSBC Fin. Corp.*, 416 F. Supp. 2d 424, 439 (E.D. Va. 2006) (citing *Boone*, 178 F.3d at 256-57).

⁹ 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).

¹⁰ *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.

¹¹ See, e.g., *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005).

¹² See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

¹³ Va. Code § 2.2-3000(A) ("It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management.").

¹⁴ *Burlington N.*, 548 U.S. at 68.

the denial of that particular position materially and adversely impacted her compensation or benefits. The grievant primarily argues that if she had been selected to transfer to Store D, her commute would have been reduced by approximately 17 miles one-way, and some of the store hours might have been different. However, while we do not deny that the grievant has experienced unwanted changes in her life due to her assignment to Store G,¹⁵ we cannot conclude that her transfer and continued work in Store G, as opposed to Store D, rises to the level of a materially adverse action on the part of management.¹⁶ Accordingly, this grievance cannot be qualified for hearing on the basis of retaliation.

The parties should note that this ruling does not mean that EDR deems the alleged actions by the agency, if true, to be appropriate. It means only that the lateral transfer actions involved in this case did not rise to the level of an “adverse employment action” or a “materially adverse action” such as to warrant a hearing. Also, this ruling in no way prevents the grievant from raising her concerns again at a later time if the alleged conduct continues or worsens.

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.

Claudia T. Farr
Director

¹⁵ This Department considered the entirety of the grievant’s submission regarding the alleged impacts on her life and job that her continued employment at Store G has had, including her allegations of a hostile work environment and change in a day off.

¹⁶ This finding does not necessarily mean that a longer commute alone could never amount to a materially adverse action. However, the limited change in distance in this case would not appear significant enough to meet that standard.