Issue: Qualification – Verbal Counseling and Transfer; Ruling Date: January 26, 2010; Ruling #2010-2507; 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 2010-2507
January 26, 2010

The grievant has requested a ruling on whether his October 29, 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

On or about October 20, 2009, the grievant was informed that he was being transferred to a different work location. He would hold the same position at the new work location without any other changes to his employment. The grievant inquired about the agency's reasons for the transfer, which also transferred other employees from the same work location to other stores. According to the grievant, he was given differing explanations. A manager first reportedly informed him that the transfers had nothing to do with anything he had done wrong. However, the grievant's supervisor informed him that the transfer was a result of the grievant's failure to address certain employee relations issues at his former work location. In addition, his supervisor noted certain problems found in a recent audit. The grievant states that his supervisor told him that she was "breaking up that little clan" at the former work location. The grievant disputes the allegations in part because he had recently received a favorable performance evaluation. The grievant initiated this grievance to challenge the transfer and management's statements about his allegedly poor performance.

DISCUSSION

Adverse Employment Action

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[1] 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 for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination,

[1] *See* Va. Code § 2.2-3004(B).

retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[2]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[4] 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6]

The allegations of poor performance made against the grievant could amount to the equivalent of written or verbal counseling. A counseling does not generally constitute an adverse employment action, because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[7] For this reason, the grievant's claims relating to the allegations of his allegedly poor performance do not qualify for a hearing.[8]

A transfer or reassignment 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.[9] 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.[10] Based on the information presented in this grievance, the grievant was transferred into the exact same job at another store. Thus, it does not appear that the agency's action had a significant detrimental effect on the grievant or deprived him of a significant change in employment status such as a

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[2] Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).
[3] *See Grievance Procedure Manual* § 4.1(b).
[4] 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.
[5] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[7] *See* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).
[8] Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that he wishes to challenge, correct or explain information contained in his personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth his position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).
[9] *See Holland*, 487 F.3d at 219.
[10] *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).

promotion, higher level responsibilities, or an increase in salary or benefits and was therefore not an adverse employment action.[11] Accordingly, the grievant's claims cannot qualify for a hearing.[12]

Retaliation

The grievant has also alleged a claim of retaliation at the qualification stage of this process. 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;[13] (2) the employee suffered a materially adverse action;[14] 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.[15] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[16]

The grievant states the protected activities on which his retaliation claims are based are his inquiries as to the agency's reasons for the transfers and this grievance itself. Given that the transfer decision occurred before both of these protected activities, the grievant's claim of a retaliatory transfer is without merit. These protected activities could not have caused the transfer. Further, the allegations of poor performance, which, as stated above, are the equivalent of verbal or written counseling, do not constitute a "materially adverse action," which is required

[11] Further, the allegation that the transfer requires the grievant to travel an additional ten miles in 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). However, it should be noted that, given that the grievant is claiming discrimination and/or harassment, this ruling in no way prevents the grievant from raising these matters again at a later time if the alleged discriminatory conduct continues or worsens.

[12] We note, however, that while the transfer and allegations regarding the grievant's allegedly poor performance have not had an adverse impact on the grievant's employment, they could be used later to support an adverse employment action against the grievant. Therefore, should the allegations grieved in this case later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.

[13] *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." *Id.*; *see also* Va. Code § 2.2-3000(A) ("employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management").

[14] 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.

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

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

to establish a retaliation claim.[17] As such, the grievant's retaliation claim does not qualify for hearing.[18]

It appears that the grievant may also be asserting that other subsequent retaliatory acts have occurred as a result of his filing this grievance. Consequently, any such actions would have occurred after the initiation of this grievance and cannot be added at this stage.[19] If the grievant wishes to raise such issues, a new grievance would need to be initiated.

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 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

[17] *See, e.g.*, EDR Ruling No. 2009-2090, at n.6.
[18] Again, this ruling does not mean that EDR deems the alleged behavior of the grievant's supervisor to be appropriate, only that the grievance does not raise a sufficient question of retaliation so as to qualify for a hearing. This ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.
[19] *Grievance Procedure Manual* § 2.4.