

Issue: Qualification – Management Actions (assignment of duties); Ruling Date: January 27, 2011; Ruling No. 2011-2804; Agency: Department of Mines, Minerals and Energy; Outcome: Not Qualified.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of the Department of Mines, Minerals and Energy  
Ruling No. 2011-2804  
January 27, 2011

The grievant has requested qualification of her August 23, 2010 grievance with the Department of Mines, Minerals and Energy (the agency) regarding her reassignment from the emergency operations center to the certification department. For the reasons set forth below, the grievance does not qualify for hearing.

FACTS

Prior to her reassignment, the grievant was employed in the emergency operations center. On July 27, 2010, management informed the grievant that effective July 28, 2010, she, as well as another employee in her role, was being transferred to the certification department. While her duties have changed somewhat, the grievant's pay band and salary remain the same in her new position. On August 23, 2010, the grievant initiated a grievance challenging the reassignment as unfair. More specifically, the grievant argues that she was reassigned as a result of another employee's failure to adequately perform her job functions in the certification department and that this other employee was treated more favorably because she was placed in the grievant's position upon her return from disability leave.<sup>1</sup>

The grievance proceeded through the management steps of the grievance process without resolution and the agency head denied the grievant's request for qualification for hearing. The grievant now seeks a qualification determination from this Department.

DISCUSSION

Although state employees with access to the grievance procedure may grieve anything related to their employment, only certain grievances qualify for a hearing.<sup>2</sup> 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 position classifications, hiring, promotion, transfer, assignment, and retention of employees within the

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<sup>1</sup> According to the agency, when this employee returned to work she was placed in a position that performed many functions, including those previously performed by the grievant in the emergency operations center.

<sup>2</sup> See *Grievance Procedure Manual* § 4.1.

agency “shall not proceed to hearing” unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.<sup>3</sup>

In this case, the grievant essentially claims that her transfer from the emergency operations center to the certification department was a misapplication or unfair application of policy. For this claim to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy provision or whether the challenged action, in its totality, is so unfair as to amount to a disregard of the intent of the applicable policy. Significantly, the grievance procedure accords much deference to management’s exercise of judgment, including management’s assessment of the degree of change, if any, in an employee’s job duties. Agency discretion is not without limitation, however. Rather, this Department has repeatedly held that even where an agency has significant discretion to make decisions (for example, an agency’s reassignment of an employee), qualification is warranted where evidence presented by the grievant raises a sufficient question as to whether the agency’s determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.<sup>4</sup>

The grievance procedure also generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”<sup>5</sup> Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.<sup>6</sup> 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.”<sup>7</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>8</sup>

Assuming for purposes of this ruling only that the grievant’s reassignment constituted an adverse employment action, it does not appear that the agency’s action violated a mandatory policy provision or was without a reasoned basis. Policy specifically allows an agency to reassign an employee to a different position within the same pay band if the reassignment is required to fulfill agency business (staffing or operational) needs.<sup>9</sup> Here, it appears that the grievant’s reassignment was effectuated in response to agency business needs. More specifically, the grievant’s reassignment was apparently predicated on the agency’s inability to meet certification program needs due to the disability leave of an

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<sup>3</sup> Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

<sup>4</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.

<sup>5</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>6</sup> 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.

<sup>7</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>8</sup> See, e.g., *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4<sup>th</sup> Cir. 2007).

<sup>9</sup> DHRM Policy 3.05, *Compensation*.

employee assigned to that department and the increased workload of the certification section.<sup>10</sup> As such, while the grievant is perhaps understandably upset with the changes in her job, it cannot be said that the agency violated a mandatory policy provision or lacked a reasoned basis for the reassignment. Nor has there been any evidence presented that the grievant was treated differently than others at the agency under similar circumstances.

Accordingly, though the grievant may disagree with the agency's decision and the effect it has had, the evidence presented does not raise a sufficient question of whether the agency misapplied or unfairly applied policy. As such, this 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 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>10</sup> It appears that the grievant does not dispute that help was needed in the certification department. However, she argues that the person assigned to the certification department should have been returned to that position upon her return from disability leave and that the agency's failure in this regard constitutes a misapplication of the Virginia Sickness and Disability Policy (VSDP). Whether the agency has misapplied the VSDP in its placement of the grievant's co-worker upon her return from disability leave is not an issue that can be grieved by the grievant because this issue, by itself, does not pertain directly and personally to the grievant's own employment. See *Grievance Procedure Manual*, § 2.4. The grievant's resulting reassignment, however, does pertain personally and directly to the grievant and has been addressed in detail above.