

Issue: Qualification – Management Actions (Non-Disciplinary Transfer); Ruling Date: April 14, 2011; Ruling No. 2011-2895; Agency: Department of Forestry; Outcome: Not Qualified.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of the Department of Forestry  
Ruling Number 2011-2895  
April 14, 2011

The grievant has requested a ruling on whether his October 21, 2010 grievance with the Department of Forestry (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In his October 21, 2010 grievance, the grievant has challenged the agency's removal of his field duties and his transfer to a desk job. He has been removed as a county forester and placed in a staff forester position in a regional office. According to the agency, the grievant's salary and role code have remained the same, though his duties and working title have been changed. The grievant asserts that the transfer occurred, at least in part, due to the results of a medical examination the grievant was required to take.

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.<sup>1</sup> In this case, the grievant alleges misapplication and/or unfair application of policy and discrimination based on disability.

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."<sup>2</sup> Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.<sup>3</sup> An adverse employment action is

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

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

<sup>3</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.

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>4</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>5</sup>

Under the facts presented to this Department, it does not appear that the grievant’s transfer to the regional office amounted to an adverse employment action. 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/her employment.<sup>6</sup> 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.<sup>7</sup> However, subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.<sup>8</sup>

Based on the information presented in this grievance, the grievant was transferred from working on forestry issues in the field to working on forestry issues in the regional office. The grievant is or will be assigned special projects as well. While the grievant’s duties have changed, the grievant has presented insufficient evidence that these changes have had a significant detrimental effect on his employment. The grievant has indicated that he greatly enjoyed his field work, and the removal of such duties from a forester is not lost on this Department. However, that an employee’s preference is unmet is not enough to result in an adverse employment action.

The grievant has also expressed concern that his transfer puts him in a unique position, which makes him susceptible to layoff in any future budget cuts. While the grievant’s concern is understood, assertion of a possible future adverse action is too speculative to support the contention that the grievant’s transfer itself was an adverse employment action.<sup>9</sup> In sum, it does not appear that the agency’s actions had a significant detrimental effect on the grievant’s employment or deprived him of opportunities for promotion, higher level responsibilities, or an increase in salary or benefits such as to constitute an adverse employment action. Accordingly, the grievant’s claims regarding the transfer do not qualify for a hearing.

This ruling does not mean that EDR deems the alleged actions by the agency, if true, to be appropriate (or inappropriate); only that the grievance does not raise a sufficient question of an adverse employment action so as to qualify for a hearing. This ruling in no way prevents the

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<sup>4</sup> Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

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

<sup>6</sup> See *id.*

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

<sup>8</sup> See, e.g., James, 368 F.3d at 377; Jones v. D.C. Dep’t of Corrections, 429 F.3d 276, 281 (D.C. Cir. 2005); Fitzgerald v. Ennis Business Forms, Inc., No. 7:05CV00782, 2007 U.S. Dist. LEXIS 875, at \*14-15 (W.D. Va. Jan. 8, 2007); Stout v. Kimberly Clark Corp., 201 F. Supp. 2d 593, 602 (M.D.N.C. 2002).

<sup>9</sup> See James, 368 F.3d at 377.

grievant from raising these matters 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.

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Claudia T. Farr  
Director