

Issue: Qualification – Management Actions (Transfer, non-disciplinary); Ruling Date: June 7, 2011; Ruling No. 2011-2986; Agency: Virginia Department of Transportation; Outcome: Not Qualified.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of the Department of Transportation  
Ruling Number 2011-2986  
June 7, 2011

The grievant has requested a ruling on whether his January 6, 2011 grievance with the Department of Transportation (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In his January 6, 2011 grievance, the grievant challenges the agency's "[i]nconsistent, application of personnel policy/guidelines" and violation of the agency's Equal Employment Opportunity (EEO) Policy.<sup>1</sup> However, it is unclear what specific management actions (or inactions) the grievant is challenging or how the agency has allegedly misapplied policy. From the grievant's stated requests for relief, it appears that he is challenging the fact that the agency filled certain positions through transfer instead of opening those positions to competition. As such, he argues that he was denied the opportunity to compete for those positions. The grievant also includes an unclear statement about the placement of "Employees Exempt from Licensure." It appears that these are the employees who were placed in positions for which the grievant alleges he lost the opportunity to compete. To the extent the grievant now seeks to challenge his own transfer, neither the Grievance Form A nor any attachment thereto initially submitted clearly challenged that action. Such a claim could not be added after the grievance was initiated and, moreover, would have been untimely as the grievant's transfer occurred in June 2010.<sup>2</sup>

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>3</sup> By statute and under the grievance procedure, management reserves the exclusive right to

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<sup>1</sup> The grievant's claims regarding the agency's alleged violation of its EEO Policy appears to be coextensive with his other policy claims discussed below. The grievant does not appear to be alleging discrimination based on any factor included in the EEO Policy, but rather he is asserting general inconsistent treatment. As such, this issue will be addressed as part of the policy claims.

<sup>2</sup> See *Grievance Procedure Manual* § 2.4.

<sup>3</sup> See *Grievance Procedure Manual* § 4.1.

manage the affairs and operations of state government.<sup>4</sup> Further, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as layoff, position classifications, 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>5</sup> In this case, the grievant essentially alleges misapplication and/or unfair application of policy.

#### *Positions Filled by Transfer*

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. The Department of Human Resource Management (DHRM) Policy 2.10 provides exceptions to any requirement that open positions be advertised for competition. One such exception is for “positions to be filled by agency-initiated demotions, employee-requested demotions, reassignments within the Pay Band, non-competitive voluntary transfers or temporary assignments.”<sup>6</sup> The positions to which the “Exempt Employees” were transferred and for which the grievant alleges he was denied the opportunity to compete appear to fall squarely within this exception. Consequently, the grievant’s argument that the agency has somehow misapplied policy by not opening the positions to competition is misplaced. There is no basis to qualify this grievance for a hearing.

#### *Other Claims*

The grievant has also sought as relief an audit of the agency’s hiring, promotion, work assignment and pay practices. While the agency may certainly conduct such an audit in its discretion, there is no reason to qualify this grievance for a hearing based on the agency’s denial of the request. Further, the grievant seeks layoff so that he may receive benefits under the Workforce Transition Act. The grievant has stated no basis for the position that such an action should take place under policy. As such, the grievance does not qualify for a 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

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<sup>4</sup> Va. Code § 2.2-3004(B).

<sup>5</sup> Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

<sup>6</sup> DHRM Policy 2.10, *Hiring*.

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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