

Issue: Qualification – Management Actions (Non-disciplinary Transfer); Ruling
Date: September 26, 2011; Ruling No. 2012-3060; Agency: Department of
Corrections: Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2012-3060
September 26, 2011

The grievant has requested qualification of his May 4, 2011 grievance with the Department of Corrections (the agency) regarding his transfer to another facility. For the reasons set forth below, the grievance does not qualify for hearing.

FACTS

The Warden of the grievant's former facility learned from a Regional Director in another region that the grievant had previously asked him to transfer to a facility in his region. This Regional Director also indicated that he was willing to accept the grievant's transfer to an open position at that time. On or about April 11, 2011, after discovering the grievant's previous requests submitted to the Regional Director, the Warden effectuated the grievant's transfer. The grievant submitted his May 4, 2011 grievance to challenge the transfer.¹

DISCUSSION

Although state employees with access to the grievance procedure may grieve anything related to their employment, only certain grievances qualify for a hearing.² 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 agency "shall not proceed to hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.³ In this

¹ The grievant has also asserted certain issues of procedural noncompliance that allegedly occurred during the management resolution steps. However, these issues, to the extent there was any noncompliance, have been waived because they were not raised prior to the grievance proceeding to this stage (qualification). See *Grievance Procedure Manual* § 6.3 (All claims of noncompliance should be raised immediately; by proceeding with the grievance after becoming aware of a procedural violation, one may forfeit the right to challenge the noncompliance at a later time). Therefore, the allegations of party noncompliance will not be addressed in this ruling.

² See *Grievance Procedure Manual* § 4.1.

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

case, the grievant has not alleged discrimination⁴ or retaliation. As such, the grievance will be analyzed to determine whether it raises a sufficient question of a misapplication and/or unfair application of policy.⁵

For a claim of misapplication and/or unfair application of policy 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. Moreover, the grievance procedure accords much deference to management's exercise of judgment, including decisions as to the assignment of employees, which are generally within the agency's discretion. Nevertheless, agency discretion is not without limitation. Rather, this Department has repeatedly held that even where an agency has significant discretion to make decisions, 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.⁶

This Department has not found any provision of policy that the agency violated by transferring the grievant to a different facility, and the grievant has cited to none.⁷ Nor is there any indication that the transfer was without a reasoned basis. Rather, it appears that the Warden discovered that on multiple occasions in the past the grievant had asked a Regional Director in another region to be transferred to his region. Consequently, although it appears the Warden may have already been seeking to transfer the grievant, the Warden's decision to effectuate the transfer did not occur until the discovery of the grievant's prior requests made to the Regional Director. While the grievant may dispute the transfer now, it cannot be said that the agency lacked a reasoned basis for or the authority to transfer him to a different facility.⁸ Nor has there been any evidence presented that the grievant was treated differently than others at the agency. In sum, the grievance fails to raise a sufficient question of whether the agency misapplied or unfairly applied policy.

⁴ Although the grievant claimed on the Grievance Form A that the situation has created a "hostile work environment," nothing on the Form A or the grievance paperwork through the management steps indicates that any kind of discrimination claim based on a protected status has been raised.

⁵ Some of the grievant's statements in his grievance could also arguably raise claims of defamation and/or slander. Claims such as false accusations, defamation, and slander are not among the issues identified by the General Assembly as qualifying for a grievance hearing. Va. Code § 2.2-3004 (A); *Grievance Procedure Manual* § 4.1. Accordingly, these claims cannot be qualified for a hearing.

⁶ 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.

⁷ The grievant cites to "P.R.I.D.E.," which appears to be the agency's Code of Ethics. However, in reviewing the agency's Code of Ethics, this Department finds no mandatory provision that was violated in transferring the grievant to a different facility.

⁸ One of the grievant's arguments is that he was transferred to one facility, but had submitted a request to be transferred to another facility, which was ignored. However, the Warden was not aware of this request, apparently made on December 17, 2010 by e-mail. That request was made directly to a Regional Director and does not appear to have been copied to the Warden.

In addition, this grievance would not qualify under a theory of informal discipline. Where an agency has taken informal disciplinary action against an employee, a hearing cannot be avoided for the sole reason that a Written Notice did not accompany the disciplinary action. Rather, even in the absence of a Written Notice, a hearing is required where the grieved management action resulted in an adverse employment action against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance).⁹ The information reviewed by this Department does not indicate that the primary purpose for the grievant's transfer was disciplinary. 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.

Claudia T. Farr
Director

⁹ *E.g.*, EDR Ruling No. 2012-3072.