

Issue: Qualification – Management Actions (Non-Disciplinary Transfer); Ruling
Date: December 21, 2011; Ruling No. 2012-3181; Agency: Virginia
Department of Transportation; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling No. 2012-3181
December 21, 2011

The grievant has requested a ruling on whether his July 19, 2011 grievance with the Department of Transportation (the “agency”) qualifies for a hearing. The grievant claims that the agency inconsistently applied its work location reassignment procedure which he alleges caused him to be unfairly denied a lateral transfer. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant has been employed as a Maintenance Area Program Manager at the agency’s C Residency since April 25, 2010. The agency’s C Residency is 47 miles from the grievant’s residence. Because the agency’s W Residency is 24 miles from the grievant’s residence, the grievant informed agency management that he was interested in a lateral transfer to the agency’s W Residency. When a vacant position opened at the agency’s W Residency in November 2010, the grievant applied and interviewed for the position. Several days after his interview, the grievant became aware that a lateral transfer was permitted for this position, and he subsequently called the agency’s C Residency Assistant District Administrator to advise him of the same. The agency’s C Residency’s Assistant District Administrator denied the grievant’s request for a lateral transfer. Likewise, the agency’s C Residency’s District Administrator evaluated and denied the grievant’s request for a lateral transfer. As such, on July 19, 2011, the grievant filed a grievance challenging the agency’s denial. The July 19th grievance proceeded through the management resolution steps without resolution and on October 21, 2011, the agency head denied the grievant’s request for qualification. The grievant now asks this Department to qualify his July 19th grievance for a hearing.

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 a hearing” unless there is sufficient evidence of

discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.¹ In this case, the grievant alleges that the agency inconsistently applied the agency's work location reassignment procedure which he alleges caused him to be unfairly denied a lateral 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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."² Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.³ 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."⁴ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁵

In this case, the grievant has not shown that the agency's decision to deny the requested lateral reassignment resulted in an adverse employment action. While the grievant's disappointment over the denial of a lateral transfer is understandable, there is no evidence that he has experienced any significant and materially adverse change in employment status as a result of the agency's conduct.

Furthermore, assuming for the purposes of this ruling only that the denial of a lateral transfer rose to the level of an adverse employment action, there is no evidence that the agency misapplied or unfairly applied policy. The grievance procedure accords much deference to management's exercise of judgment, including management's assessment of its business need in balancing and reassigning personnel resources when a work location reassignment is requested by an employee. Thus, a grievance that challenges an agency's action such as the request for a work location reassignment in this case does not qualify for a hearing unless there is sufficient evidence that the resulting

¹ Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

² *See Grievance Procedure Manual* § 4.1(b).

³ 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.

⁴ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998); *see also* *Burnette v. Northside Hospital*, 342 F. Supp. 2d 1128, 1137 (N.D. Ga. 2004) (holding that, absent unusual circumstances, a lateral reassignment which results in an increased commute for the employee does not constitute an adverse employment action).

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

determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.⁶

In this case, the agency's C Residency District Administrator evaluated and denied the grievant's request for reassignment. The grievant's evidence fails to raise a sufficient question as to whether the agency's assessment of its business needs was arbitrary or capricious, or whether the agency's denial of the work location reassignment was plainly inconsistent with other similar decisions by the agency. Because there is no indication that policy was misapplied or unfairly applied when the agency denied the grievant's request for reassignment, the grievant's claim 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 this determination to the circuit court, he should notify the human resources office, in writing, within five workdays of receipt of this ruling. 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 notifies the agency that he does not wish to proceed.

Claudia Farr
Director

⁶ See *Grievance Procedure Manual* § 9. Arbitrary or capricious is defined as a decision made "[i]n disregard of the facts or without a reasoned basis."