

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling  
Date: March 29, 2012; Ruling No. 2012-3243; 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 Virginia Department of Transportation  
Ruling Number 2012-3243  
March 29, 2012

The grievant has requested a ruling on whether his May 25, 2011 grievance with the Virginia Department of Transportation (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In October 2010, the grievant was transferred to a new position. At the time of the transfer, the grievant was told that upon the completion of his service in the new position, he would be returned to a position within the same directorate, but that he could not be guaranteed return to his former position and that it would not be held open for his return. The grievant timely grieved those actions in an October 22, 2010 grievance. That grievance was concluded January 28, 2011. The agency has sought to fill the grievant's former position by beginning a recruitment process. In his May 25, 2011 grievance, the grievant challenges the agency's decision to attempt to fill his former position by recruitment, forcing him to reapply if he wants his former position back.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>1</sup> Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out and the hiring, reassignment, or transfer of employees within the agency generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether policy may have been misapplied or unfairly applied.<sup>2</sup>

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<sup>1</sup> See Va. Code § 2.2-3004(B).

<sup>2</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”<sup>3</sup> Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.<sup>4</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>5</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>6</sup>

Generally speaking, an agency’s decision to begin a recruitment process is not an adverse employment action that qualifies for hearing. In this case, the only way to construe the agency’s decision to post the grievant’s former position for recruitment as an adverse employment action against the grievant, is if it represents a deprivation of the grievant’s former position. However, that decision was effectively accomplished at the time of the grievant’s transfer in October 2010. The grievant knew or should have known at that time that his position would not be held and he would not return to his former position. Consequently, the effective removal of the grievant from his former position was a matter for the grievant’s prior grievance.<sup>7</sup>

The grievant’s May 25, 2011 grievance in essence challenges the natural conclusion to the agency’s earlier decision to transfer the grievant without holding his former position open. However, the adverse action of removing the grievant from that position had already occurred and was grieved previously. As such, that issue is not part of this grievance and cannot be considered to determine whether there has been an adverse employment action challenged by the May 25, 2011 grievance.<sup>8</sup> This grievance challenges the agency’s posting of the grievant’s former position for recruitment alone, a position the grievant had effectively vacated months previously. The agency’s posting of this recruitment was not an adverse employment action. Therefore, this grievance does not qualify for a hearing.

#### APPEAL RIGHTS AND OTHER INFORMATION

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

<sup>4</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>5</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>6</sup> *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4<sup>th</sup> Cir. 2007).

<sup>7</sup> See EDR Ruling No. 2011-3012 (finding that agency actions prior to October 22, 2010 are not part of the grievant’s May 25, 2011 grievance).

<sup>8</sup> See *id.*

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