

Issue: Qualification – Management Actions (Assignment of Duties, Recruitment & Selection, Non-Disciplinary Transfer); Ruling Date: September 6, 2012; Ruling No. 2013-3404; Agency: Department of Alcoholic Beverage Control; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of Department of Alcoholic Beverage Control
Ruling Number 2013-3404
September 7, 2012

The grievant has requested a ruling on whether his July 16, 2012 grievance with the Virginia Department of Alcoholic Beverage Control (the “agency”) qualifies for a hearing. The grievant alleges that the agency misapplied its transfer request policy which ultimately caused him to be unfairly denied an opportunity to compete for the Senior Agent in Charge position in the S region and resulted in his demotion to his former Assistant Special Agent in Charge position. For the following reasons, this grievance does not qualify for hearing.

FACTS

In November 2011, the grievant was temporarily elevated from his Assistant Special Agent in Charge (ASAC) position to the Acting Special Agent in Charge (SAC) position in the agency’s S region. At that time, the grievant alleges the Enforcement Division Director informed the grievant that the S region SAC position “would be posted in the near future and that he would have an opportunity to apply for the position on a permanent basis.”

On December 10, 2011, the agency asserts that it implemented its Bureau of Law Enforcement Division reorganizational efforts. As a part of its reorganization, the agency asserts that SAC positions in the S, L, RO, F, and R regions were reassigned among permanent SAC employees. Specifically, the agency’s Enforcement Division Director asserts that as part of his reorganizational efforts, he involuntarily reassigned SAC T from the L region to the SAC position in the S region pursuant to his authority to transfer or reassign any and all personnel under the agency’s General Order 14.

On July 11, 2012, the Enforcement Division Director informed the grievant that SAC T would be reassigned to the SAC position in the S region, effective August 1, 2012, and that the grievant would resume his former position as ASAC. The grievant alleges the only explanation he received from the Enforcement Division Director was that it was for the “better of the Bureau.” He challenges how the reassignment promoted the operational effectiveness of the agency when “it is common knowledge that [SAC T] has been an ineffective supervisor and that his region has had numerous problems since he assumed that role.” Moreover, the grievant alleges that the agency was required under its transfer request policy to post the S region SAC

position for recruitment because it was purportedly vacant, and because the grievant alleges that SAC T told the grievant he voluntarily requested the transfer to the S region. However, the agency did not recruit for that position. The grievant alleges that his demotion to his former ASAC position was a result of the agency's misapplication of its transfer request policy. The grievant now asks EDR to qualify his July 16th 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 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 misapplied its transfer request policy, and therefore, he was denied an opportunity to apply for the "vacant" SAC position in the S region and unfairly demoted to his former ASAC position.

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. 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."³ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁴ Here, the grievant has alleged an "adverse employment action" in that he was demoted, had his salary reduced, and lost an opportunity for a permanent position.

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. In this case, there is not sufficient 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 during agency reorganizational efforts. When the agency's Enforcement Division Director was questioned by EDR whether SAC T's transfer from the L region to the S region was voluntary, he stated that SAC's transfer was an "involuntary reassignment pursuant to the agency's General Order 14(III)(G)" and a result of the agency's reorganizational efforts. The General Order 14 provision states:

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

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

³ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

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

The Bureau Director reserves the right to transfer or reassign any and all personnel.⁵

The agency further asserts that pursuant to DHRM Hiring Policy 2.10, it is not required to post positions to be filled by “reassignments within the Pay Band.”⁶ As such, the agency contends that it was appropriate to reassign permanent SAC employees among the five regional SAC positions and the Richmond headquarters as part of its Enforcement Division reorganization.⁷ Based upon a review of these policy provisions, it appears the agency could properly reassign these employees without posting a vacancy for recruitment.

The grievance procedure accords much deference to management’s exercise of judgment, including management’s assessment of personnel transfers and reassignments. Thus, when there is a violation of a mandatory policy provision, a grievance that challenges agency actions like those alleged in this case do not qualify for a hearing unless there is sufficient evidence that the resulting actions were plainly inconsistent with other similar decisions by the agency or that the alleged actions were otherwise arbitrary or capricious.⁸ The Enforcement Division Director indicated that Section IV of the agency’s General Order 14 did not apply in this case because SAC T did not voluntarily request a transfer to the S region. On the other hand, the grievant alleges that SAC T told the grievant “and others that he was asked if he would like to be transferred to the [S region] in order to get ‘a fresh start.’” The grievant argues that if SAC T voluntarily requested a transfer to the S region, then pursuant to the agency’s General Order 14(IV)(A), SAC T would have had to “submit a State Application for the posted position.”

Although the grievant has interpreted SAC T’s statement to indicate that the transfer was voluntary, the statement is not necessarily inconsistent with the agency’s description of the events. Moreover, the agency has provided sufficient evidence to EDR that similar involuntary reassignments occurred during the agency’s reorganization. Consequently, the grievant has not presented sufficient evidence to raise a question as to whether SAC T’s transfer to the S region was voluntary. Therefore, the grievant’s arguments about the transfer request policy requiring the SAC position to be posted is not supported by the facts of the case.

Based on the foregoing, the grievant’s allegations fail 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 reassignment of SAC T to the S region was plainly inconsistent with other similar decisions by the agency. The moves occurred as part of an overall reorganization effort and were in conjunction with other SAC positions. Because the grievant did not raise a sufficient

⁵ See Virginia Department of Alcoholic Beverage Control Bureau of Law Enforcement General Order 14(III)(G), Transfer Requests, effective July 1, 2009, at 2.

⁶ See Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.

⁷ For example, the agency asserts that it similarly involuntarily reassigned the SAC from the R region to the L region, promoted the SAC from the S region to Richmond, and promoted the SAC from the RO region to Richmond as part of its reorganizational efforts as well.

⁸ 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.”

question that policy was misapplied or unfairly applied, the grievant's claim does not qualify for hearing.

EDR's qualification rulings are final and nonappealable.⁹



Christopher M. Grab
Senior Consultant
Office of Employment Dispute Resolution

⁹ Va. Code § 2.2-1202.1(5).