Issues: Qualification – Management Actions (misapplication of policy), and Work Conditions (other condition); Ruling Date: March 31, 2017; Ruling No. 2017-4489; Agency: Department of Motor Vehicles; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of the Department of Motor Vehicles
Ruling Number 2017-4489
March 31, 2017

The grievant has requested a ruling from the Office of Employment Dispute Resolution[1] ("EDR") at the Department of Human Resource Management ("DHRM") on whether his September 30, 2016 grievance with the Department of Motor Vehicles ("agency") qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant is employed with the agency as a Driver's License Quality Assurance Specialist. On or about September 30, 2016, he initiated a grievance challenging a change in agency practices regarding centralization of the Commercial Driver's License Center. Whereas the grievant had previously been assigned a state van for his use in commuting to various testing sites, vans are now shared between employees and required to be parked at a centralized location. As such, the grievant has to travel to the centralized location in order to pick up a van to travel to the various testing sites. The grievant argues that the change in practice leads to added hardship placed on him in performing his daily duties, and requests as relief either the return of the van to him for his personal use, or compensation for mileage in traveling to the various test sites. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing and the grievant now appeals that determination.

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.[2] The grievant has not alleged discrimination, retaliation, or discipline. Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as "EDR" in this ruling to alleviate any confusion. EDR's role with regard to the grievance procedure remains the same post-merger.
[2] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

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."[3] 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."[4] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[5]

Under the facts presented to EDR, it does not appear that the grievant has experienced an adverse employment action. A transfer or reassignment, or denial thereof, may constitute an adverse employment action if a grievant can show that the transfer/reassignment had some significant detrimental effect on the terms, conditions, or benefits of his/her employment.[6] A reassignment or transfer with significantly different responsibilities, or one providing reduced opportunities for promotion can constitute an adverse employment action, depending on all the facts and circumstances.[7] However, in general, a lateral transfer will not rise to the level of an adverse employment action.[8] Further, subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.[9]

Based on the information presented in this grievance, the grievant is now required to share the use of a state van with other employees, rather than being assigned a state van for his own use. He potentially incurs extra travel time and expenses in picking up a van should he wish to use it for travel to various testing locations rather than his personal vehicle. He maintains his same salary, job title and responsibilities. While EDR is not unsympathetic to the grievant, nevertheless, he has presented insufficient evidence that these changes have had a significant detrimental effect on his employment. An employee's unmet preference regarding job location is not enough to result in an adverse employment action. Accordingly, this grievance does not qualify for a hearing on this basis.

To the extent that the grievant raises a question regarding the agency's misapplication of policy pertaining to the start of his workday, even if EDR assumes that the grievant has alleged an adverse employment action, we are unable to conclude that any policy violation has occurred under the facts presented with respect to the grievant's compensation for hours worked each day.

---

[3] *See Grievance Procedure Manual* § 4.1(b).
[4] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[5] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[6] *See id.*
[7] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 375-77 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253, 255-256 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 Fed. Appx. 726, 729 (4th Cir. 2004).
[8] *See* Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996).
[9] *See, e.g.*, Jones v. D.C. Dep't of Corr., 429 F.3d 276, 284 (D.C. Cir. 2005); *James*, 368 F.3d at 377; Fitzgerald v. Ennis Bus. Forms, Inc., No. 7:05CV00782, 2007 U.S. Dist. LEXIS 875, at *14-15 (W.D. Va. Jan. 8, 2007); Stout v. Kimberly Clark Corp., 201 F. Supp. 2d 593, 602-03 (M.D.N.C. 2002).

In his grievance, the grievant requests as relief "[c]lear written instructions . . . [d]oes my day start when I arrive at my base station to pick up the State Vehicle?" To this, the agency has indicated that the workday begins either when the employee reaches the van to pick it up for driving to the assigned test location, or, if the employee uses his personal vehicle to drive to the assigned test location, the workday begins when he reaches that location. While we understand the grievant's concerns in this case, EDR has found no mandatory policy provision that the agency has violated. The agency references the Code of Federal Regulations, which states that

> "[a]n employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime."[10]

EDR is not able to conclude that the agency's alignment of their practices with this regulation violates any state policy provision. Further, EDR has reviewed nothing that would suggest that the grievant was treated inconsistently from other agency employees in similar situations. As such, because EDR cannot find that the agency has misapplied or unfairly applied policy, the grievance does not qualify for hearing.[11]

EDR's qualification rulings are final and nonappealable.[12]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[10] 29 C.F.R. 785.35.
[11] This ruling only determines that under the grievance statutes this grievance does not qualify for a hearing. This ruling does not address whether the grievant may have some other legal or equitable remedy.
[12] Va. Code § 2.2-1202.1(5).