Issue: Qualification/reassignment is claimed retaliatory/management harassment; Ruling Date: February 2, 2005; Ruling #2004-927; Agency: University of Virginia; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of University of Virginia
Ruling Number 2004-927
February 2, 2005

The grievant has requested a ruling on whether her September 16, 2004 grievance with the University of Virginia (UVA or the agency) qualifies for a hearing. The grievant claims that her reassignment to a different building is retaliatory and that she was harassed by management regarding the reassignment. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as an Administrative and Program Specialist III. On or about August 23, 2004, the grievant was advised that she was being transferred from the M Center to the V Building. The agency explained that the grievant's services were being underutilized in the M Center and could be put to better use in the V Building.[1] Prior to the grievant's reassignment, she performed services for three physicians: Dr. X, who had retired in May 2003 but still performed some consulting services; Dr. Y., who had recently significantly reduced his work at the M Center, and Dr. Z, who was located in the V Building.[2]

The grievant initially advised management that she would not accept the transfer. Shortly thereafter, she went out on medical leave. When the grievant returned from leave in November 2004, she was transferred to the V Building. The grievant's work duties at the V Building continue to be the same as before her transfer, although she no longer handles the mail for Drs. X and Y and has not performed transcription services for Dr. Z since the initiation of this grievance.[3]

The grievant alleges that the decision to transfer her was in retaliation for a discussion she had with Dr. Z in which she complained about management's decision to

[1] The grievant disagrees with the agency's assessment of her workload prior to her reassignment.
[2] The grievant is assigned to Dr. X as his secretary or administrator. At the time of the reassignment, she performed more limited services for Drs. Y and Z. Specifically, the grievant provided transcription services for both doctors and, in addition, she handled Dr. Y's mail.
[3] The grievant appears to be in agreement with the decision regarding Dr. Z's transcription, stating that she was not sure it would be a "good idea" because of their conflict regarding outsourcing.

outsource the transcription of medical records after a patient record was sent to an incorrect address. She also claims that Dr. Z transferred her in what she calls a "power move" to obtain her office space in the M Center.

In addition, the grievant alleges that a supervisor harassed her by making comments to her and others about her possible reassignment for several years prior to the reassignment announced in 2004.[4] She also asserts that this same supervisor harassed her by e-mailing her with respect to her August 2004 reassignment as well as an attempted reassignment in March 2004, when she was advised that she would be assigned to a new physician. This reassignment ultimately did not occur because the physician declined the agency's offer.

DISCUSSION

Reassignment

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[5] Thus, all claims relating to issues such as the methods, means, and personnel by which work activities are to be carried out, or to the transfer or reassignment of employees within the agency generally do not qualify for 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 state policy may have been misapplied or applied unfairly.[6] The grievant asserts that she was reassigned to a different building in retaliation for her questioning management's decision to outsource the transcription of medical records and because Dr. Z sought to obtain her office for himself.

The General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."[7] An adverse employment action is defined as a "tangible employment act constituting 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."[8] The threshold question then becomes whether or not the grievant has suffered an adverse employment action.

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[4] This individual, the Executive Director, became the grievant's supervisor in 2003, after the alleged harassment had begun.
[5] Va. Code § 2.2-3004(B).
[6] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b) and (c).
[7] Va. Code § 2.2-3004(A).
[8] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

A reassignment may constitute an adverse employment action if, but only if, the reassignment results in an adverse effect *on the terms, conditions, or benefits* of one's employment.[9] This would encompass any tangible employment action by management that has some significant detrimental effect on factors such as an employee's hiring, firing, compensation, job title, level of responsibility, or opportunity for promotion.[10]

In this case, the grievant has not shown that she suffered an adverse employment action as a result of the reassignment. The grievant has admitted that with the exception of her mail duties for Drs. X and Y and transcription for Dr. Z, her job duties and responsibilities did not change as a result of the transfer of her office location.[11] To the contrary, the grievant concedes that she is doing the same job, just in a different place. Moreover, there has been no change in the grievant's compensation or benefits. [12]

Although the grievant asserts that her current work location is more inconvenient because she must now travel periodically to the M Center or to Dr. X's home to access Dr. X's files, to pick up tapes for transcription, and to drop off documents, this travel appears to be largely of her own choice. While the grievant claims that Dr. X's files cannot be moved from the M Center because of the size of the cabinets in the V Building, there is no evidence that the agency has refused to provide space in the V Building. To the contrary, the grievant states that she "refuses" to move Dr. X's files from the M Center to the V Building, at least in part because Dr. X continues to maintain an office in the M Center.[13] The grievant also admits that Dr. X has offered to bring tapes and documents to her, but she rejects these offers because she does not want Dr. X to have to deliver items to her. In contrast, the grievant does not travel to the M Center to pick up transcription tapes for Dr. Y: if she is at the M Center she will pick up any tapes he has, but as a general practice, the grievant receives his tapes through an interagency courier system. Even if the agency were to *require* the grievant to travel regularly between these two campus buildings, however, an

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[9] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

[10] *See* Boone v. Goldin, 178 F.3d. 253 (4th Cir. 1999).

[11] It appears that the agency initially planned for the grievant to perform additional work after her transfer to V Building, but that the grievant has not in fact been assigned additional duties since her return from medical leave. While a significant reduction in work responsibilities could constitute an adverse employment action where the reduction also results in significantly diminished opportunities for desired advancement, that is not the case here. We note that in a August 24, 2004 e-mail explaining to management the reasons she did not wish to move to V Building, the grievant stated, "I have NO desire to go to work for a new Dr. in [the department]. There is absolutely NO sense in it with my time left being 11 months and 1 week. I am at the age I NO longer want high profile, much less HIGH stress."

[12] During the course of our investigation, the grievant initially alleged that following the reassignment, her job title had been changed from "Executive Secretary Senior" to "Executive Secretary." Upon further review of the grievant's 2003 performance evaluation, it appeared this change had taken place no later than October 23, 2003, approximately a year before the reassignment.

[13] In an October 29, 2004 e-mail to her supervisor, the grievant indicated her decision not to move the files was also "due to the ongoing grievance process."

inconvenience of this limited nature would not constitute a materially adverse employment action.

While we do not question the grievant's extreme distress over the agency's decision to transfer her, the grievant's own subjective belief that the transfer was an adverse employment action is not determinative. The existence of an adverse employment action is measured from an objective, not a subjective, perspective,[14] and in this case, there is no evidence that the transfer constituted an objectively and materially adverse change in the grievant's terms, conditions, or benefits of employment. Accordingly, because the grievant has failed even to make the threshold showing of an adverse employment action, she is not entitled to a hearing with respect to her reassignment.

Harassment

The grievant also alleges that a supervisor harassed her by making comments to her and others about her possible reassignment for several years prior to the reassignment announced in 2004, and by e-mailing her with respect to her August 2004 reassignment as well as an attempted reassignment in March 2004. For a claim of harassment to be qualified for hearing, the grievant must present evidence raising a sufficient question as to whether the conduct in question was (1) unwelcome; (2) based on a protected status or on prior protected activity; (3) sufficiently severe or pervasive so as to alter her conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[15]

In this case, the grievant has failed to show that the alleged harassment was based on any protected status or on prior protected activity. To the contrary, the grievant admits that she does not know why the supervisor engaged in the allegedly harassing conduct. Moreover, while the grievant may have been annoyed or disturbed by the supervisor's conduct, she has not shown that the claimed harassment was so sufficiently severe or pervasive so as to alter her conditions of employment and create an abusive or hostile work

[14] Pegram v. Honeywell, Inc., 361 F.3d 272, 283 (5th Cir. 2004); *see also* Williams v. R.H. Donnelley Corp., 368 F.3d 123, 128 (2d Cir. 2004); Munday, 126 F.3d at 244.
[15] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004);Von Gunten v. State of Maryland, 243 F.3d 858, 865, 869-70 (4th Cir. 2001); Morris v. Oldham County Fiscal Court, 201 F.3d 784, 791-92 (6th Cir. 2000); Ray v. Henderson, 217 F.3d 1234, 1245-46 (9th Cir. 2000); Gunnell v. Utah Valley State College, 152 F.3d, 1253, 1264 (10th Cir. 1998).

environment. For these reasons, the grievant's claim of harassment is not qualified 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. 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

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Gretchen M. White
EDR Consultant