Issues: Qualification: Retaliation (Grievance Activity), Management Actions (Records Disclosure/Confidentiality, Benefits/Leave (Sick Leave), and Compliance: Grievance Procedure (Other Issue); Ruling Date: June 8, 2017; Ruling No. 2017-4550, 2017-4551; 2017-4552; Agency: Department of Corrections; Outcome: Not Qualified and Agency in Compliance.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution[1]

COMPLIANCE & QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Numbers 2017-4550, 2017-4551, 2017-4552
June 8, 2017

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether his two March 22, 2017 grievances with the Department of Corrections (the "agency") qualify for a hearing. The grievant also appeals the agency's administrative closure of his April 17, 2017 grievance due to initiation noncompliance.

FACTS

The grievant is employed by the agency as a Cognitive Counselor at one of the agency's facilities. On January 24, 2017, the grievant met with the facility's Human Resource Officer ("HRO") and warden to discuss his perceived issues with a selection process in which he competed unsuccessfully. Based on statements allegedly made by the grievant during the meeting that raised concerns about his own safety as well as the safety of other employees and offenders, the agency placed the grievant on Civil and Work-Related Leave pending his completion of a fitness for duty evaluation.

The evaluation was conducted by an independent doctor on February 11, 2017. In his report discussing the results of the evaluation, the doctor stated that the grievant was not able to safely perform the essential functions of his position. The doctor further recommended that the grievant take time off from work and complete at least three counseling session, to include cognitive behavioral therapy and anger management, before returning to work. After he completed three counseling sessions, the grievant's mental health care provider released him to return to work, noting that there was "no evidence that he [was] dangerous to himself or others" or that he was unable to perform the duties of his job.

After he returned to work, the grievant filed two grievances with the agency on March 22, 2017. In the first grievance (hereinafter "Grievance 1"), the grievant disputes his loss of sick leave while he was out of work receiving treatment and alleges that the agency ordered him to complete the fitness for duty evaluation as a form of retaliation because he filed a grievance on

[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.

January 24, 2017 to dispute the selection process with which he disagreed. In the second grievance (hereinafter "Grievance 2"), the grievant alleges that the agency released confidential information about the fitness for duty evaluation and related matters to other employees and offenders. After both grievances proceeded through the management resolution steps, the agency head declined to qualify either of them for a hearing. The grievant now appeals those determinations to EDR.

On April 17, 2017, the grievant initiated a third grievance with the agency (hereinafter "Grievance 3"), repeating his concerns about the agency's decision to order the evaluation and claiming that the third step response to Grievance 1 contains inaccurate information about his conduct during the incident that prompted the fitness for duty evaluation. The agency administratively closed Grievance 3 on May 4, 2017, on the basis that it did not satisfy the initiation requirements of the grievance procedure. The grievant has appealed that determination to EDR and seeks to reopen the grievance.

DISCUSSION

Compliance – Grievance 3

In Grievance 3, the grievant challenges the veracity of information contained in the third step response to Grievance 1. More specifically, he asserts that there is "no documentation/evidence of any inappropriate conduct on [his] behalf" in his personnel file, and that the third step-respondent stated otherwise in concluding that the agency's decision to order a fitness for duty evaluation was warranted. The grievant also reasserts his arguments about the appropriateness of the fitness for duty evaluation and subsequent agency actions, which have already been raised in Grievances 1 and 2.

The grievance procedure provides that, in general, "*any* management actions or omissions may be grieved," but that an employee may not file a grievance "seeking relief from alleged agency noncompliance with the grievance procedure."[2] Issues of this type should be raised using the noncompliance process established in Section 6 of the *Grievance Procedure Manual*.[3] Thus, grievances filed for the purpose of obtaining relief from agency noncompliance, including a dispute regarding the content of a management step response, may be administratively closed.[4] As such, to the extent Grievance 3 attempts to raise issues related to the accuracy of the third step response, it does not comply with the initiation requirements of the grievance procedure.

In addition, a grievance may not "challeng[e] the same management action or omission challenged by another grievance."[5] To the extent Grievance 3 attempts to raise issues relating to the fitness for duty evaluation that have already been presented in Grievances 1 and 2, it is duplicative and does not comply with the initiation requirements of grievance procedure.[6]

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[2] *Id.* § 2.4 (emphasis in original).
[3] *Id.* §§ 2.4, 6.3.
[4] *Id.* § 2.4.
[5] *Id.*
[6] Any issues properly raised in Grievances 1 and 2 will nevertheless be discussed in this ruling in relation to the grievant's appeal of the agency head's qualification decision.

Accordingly, for the preceding reasons, it is EDR's determination that Grievance 3 will remain administratively closed.

Qualification

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[7] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[8] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out 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 state policy may have been misapplied or unfairly applied.[9]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[10] Thus, typically, the 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."[11] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[12]

Grievance 1

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[13] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[14] Ultimately, to support a finding of retaliation, EDR must find that the protected activity was a but-for cause of the alleged adverse action by the employer.[15]

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[7] *See Grievance Procedure Manual* § 4.1.
[8] Va. Code § 2.2-3004(B).
[9] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[10] *See Grievance Procedure Manual* § 4.1(b).
[11] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[12] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[13] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).
[14] *See, e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 139-40 (4th Cir. 2014).
[15] *See id.* (citing Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013)).

The grievant engaged in protected activity by filing a grievance to dispute the outcome of a selection process in which he competed unsuccessfully. Assuming without deciding that the grieved actions (e.g., the fitness for duty evaluation itself, and the grievant's need to use sick leave while completing the recommended counseling) are considered adverse employment actions, the grievant has not presented evidence that raises a sufficient question as to whether the agency's actions were the result of a retaliatory motive, rather than a legitimate concern about the grievant's ability to perform his job duties. The grievant disputes the details of the incident that prompted the agency to direct him to complete the fitness for duty evaluation, as well as the contents of the evaluation report. While the grievant's concerns are understandable, the evaluating doctor concluded that the grievant was unable to work because he could not perform the essential functions of his position. EDR has reviewed nothing to indicate that the report is inaccurate or not based on an actual assessment of the grievant's condition at the time the evaluation was conducted.[16] Furthermore, there does not appear to be evidence raising a sufficient question that, to the extent there was any retaliatory motive, such a motive was the but-for cause of the evaluation or any other related issues. Accordingly, Grievance 1 does not qualify for a hearing on this basis.

The grievant further disputes the agency's decision to place him on unpaid leave under the Family and Medical Leave Act ("FMLA") while he was completing the recommended counseling, and requests that sick leave used to cover that absence be reinstated. Under DHRM Policy 4.20, *Family and Medical Leave*, eligible employees are entitled to receive "up to 12 weeks of unpaid family and medical leave per leave year because of their own serious health condition . . . ."[17] The policy further provides that "[e]mployees have the option of using paid leave, as appropriate under each particular leave policy," for absences on FMLA leave.[18] Accordingly, it does not appear that the agency's decision to apply a portion of the grievant's sick leave balance to cover his absence on FMLA leave was inconsistent with state policy or otherwise improper. Therefore, Grievance 1 does not qualify for a hearing on this basis.

Grievance 2

In Grievance 2, the grievant alleges a "[b]reach of [c]onfidentiality," asserting that the agency did not keep information about the fitness for duty evaluation and related matters confidential. In support of his position, the grievant states that an employee at the facility and two offenders made comments to him about the incident that prompted the evaluation. The grievant appears to contend that the agency's alleged disclosure of confidential information constitutes a misapplication and/or unfair application of DHRM Policy No. 6.05, *Personnel*

[16] The grievant appears to assert that the evaluating doctor was biased because he "has worked for the department before . . . ." The information in the grievance record indicates that the doctor is not employed by the agency, and EDR has reviewed nothing to suggest that either the evaluation itself or the doctor's conclusions were biased in any way.

[17] DHRM Policy 4.20, *Family and Medical Leave*; *see* 29 U.S.C. § 2612(a)(1). To be eligible for family and medical leave, an employee must "have worked for at least 1,250 hours in the previous 12-month period . . . ." DHRM Policy 4.20, *Family and Medical Leave*; *see* 29 U.S.C. § 2611(2)(A). The FMLA Policy further requires the employee to have been "employed by the Commonwealth for a total of at least 12 months in the past seven years . . . ." DHRM Policy 4.20, *Family and Medical Leave*. There is no dispute in this case that the grievant satisfied these eligibility requirements.

[18] DHRM Policy 4.20, *Family and Medical Leave*.

Records Disclosure, which prohibits the disclosure of an employee's "mental and medical records" without the written consent of the subject employee.[19]

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. As stated above, however, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[20] 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."[21]

In this case, the alleged conduct challenged by the grievant does not rise to the level of an adverse employment action. The information provided by the parties does not indicate, and the grievant does not argue, that the rumors regarding the nature of his absence resulted in a significant adverse effect on the terms, conditions, or benefits of his employment. Moreover, while the grievant clearly believes that members of agency management improperly disclosed confidential information to other employees and offenders, EDR has reviewed nothing to identify the source of the information justifying a conclusion that the agency misapplied and/or unfairly applied DHRM Policy 6.05. While there can be little doubt that the grievant was reasonably concerned by what he heard from other employees and offenders, the alleged breach of confidentiality cannot be considered an adverse employment action for which qualification is warranted because there has been no materially detrimental effect on the grievant's employment status.[22] As a result, Grievance 2 does not qualify for a hearing on this basis.

Hostile Work Environment

Taken as a whole, the arguments presented by the grievant in Grievances 1 and 2 amount to a claim that the agency has engaged in retaliation and/or harassment that has created an alleged hostile work environment. Indeed, the grievant specifically asserts that the alleged breach of confidentiality challenged in Grievance 2 "create[d] an environment that a reasonable individual would find to be offensive," and alleges that he has experienced workplace harassment in several attachments to the grievances. For a claim of hostile work environment or workplace harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or prior protected activity; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4)

[19] DHRM Policy 6.05, *Personnel Records Disclosure*. The grievant also asserts that the alleged breach of confidentiality violated the Health Insurance Portability and Accountability Act ("HIPAA"). Generally speaking, a state grievance is not the most appropriate means by which to raise an alleged violation of HIPAA. Specific enforcement authority for HIPAA is provided in the Act itself. Nevertheless, the grievant's HIPAA claims would not qualify for a hearing because there has been no information presented that indicates any alleged disclosure of potentially protected health information was done by any covered entity to which HIPAA applies. *E.g.*, 45 C.F.R. §§ 160.102, 160.103.

[20] *See Grievance Procedure Manual* § 4.1(b).

[21] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[22] The alleged breach of confidentiality and related matters will be addressed below as to whether the conduct amounts to harassment and/or a hostile work environment that can be qualified for a hearing.

imputable on some factual basis to the agency.[23] In the analysis of such a claim, the "adverse employment action" requirement is satisfied if the facts raise a sufficient question as to whether the conduct at issue was sufficiently severe or pervasive so as to alter the conditions of employment and to create and abusive or hostile work environment.[24] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[25]

In this case, the grievant asserts that previous grievance activity was the basis for the agency's decision to order the fitness for duty evaluation, the alleged disclosure of confidential information, and other related issues. While the grievant's concerns and general disagreement with the agency's actions are understandable, EDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment. Further, the alleged breach of confidentiality, while concerning, has not been directly attributed to agency management and, importantly, did not have a material impact on the grievant's employment. In addition, prohibitions against harassment do not provide a "general civility code"[26] or remedy all offensive or insensitive conduct in the workplace.[27] For workplace conduct to constitute an actionable hostile environment, the conduct must rise to a "sufficiently severe or pervasive" level such that an unlawfully abusive or hostile work environment was created.[28] In this case, the challenged conduct cannot be found to rise to this level.[29] In the absence of such evidence, Grievances 1 and 2, whether considered separately or collectively, do not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.[30]

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[23] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[24] *See generally id.* at 142-43.
[25] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[26] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (citation omitted).
[27] *See, e.g.*, Beall v. Abbott Labs, 130 F.3d 614, 620-21 (4th Cir. 1997); Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).
[28] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[29] *See generally* Gunten v. Maryland, 243 F.3d 858, 869 (4th Cir. 2001).
[30] *See* Va. Code § 2.2-1202.1(5).