JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2023-5472
January 31, 2023

The grievant seeks a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) as to which issues in her grievances filed with the Department of Corrections (the "agency") respectively on May 6 and June 6, 2022, qualify for a hearing. For the reasons set forth below, EDR concludes that the May grievance is not qualified for a hearing, but the June grievance is qualified.

FACTS

On or about May 6, 2022, the grievant filed a grievance ("May Grievance") taking issue with the agency's policies and practices as applied to her, following her apparent exposure to COVID-19 at work. The grievant alleged she was required to report to work despite posing an infection risk, and to wear a protective mask that did not fit and/or to reuse a single mask over multiple days. The grievant also claimed that she should have been granted Public Health Emergency Leave under the circumstances.

On the same date, the agency issued to the grievant a Group II Written Notice related to an earlier incident in which the grievant allegedly made an inappropriate statement to inmates. The Written Notice also noted demotion to a new position at a lower pay band. However, on May 11, 2022, the agency revised and reissued the Written Notice without demotion, as the original had erroneously cited a prior active Written Notice as an aggravating circumstance. On June 6, 2022, the grievant filed a second grievance ("June Grievance"), which challenged the Group II Written Notice on grounds that the discipline was too harsh and was issued in retaliation for raising her concerns about masking practices. After the grievances proceeded through the management resolution steps, the agency head determined that the May Grievance was not qualified for a hearing, and the June Grievance was qualified only to the extent it challenged formal disciplinary action. The grievant has appealed the agency head's determination as to both grievances.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[1] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the means, methods, 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.[3] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must 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 applicable policy's intent.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Typically, then, 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6] Workplace harassment or similar conduct rises to this level if it is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[7]

In this case, the agency head determined that the grievant's challenge to the Group II Written Notice she received (via the June grievance) qualifies for a hearing. However, he concluded that no other issues in the May or June grievances are qualified. As there is no question that the grievant's challenge to the formal discipline she received qualifies for a hearing, it appears that the grievant is generally appealing the latter determination.

EDR agrees with the agency head's finding that the Written Notice is the only issue presented by the June Grievance that independently represents an adverse employment action, a threshold qualification requirement. However, consistent with EDR's usual practice, we view qualification of a disciplinary issue to include any relevant defenses against the discipline that the grievant may wish to raise at the hearing. For example, the grievant will be entitled to present claims and evidence to the effect that the agency's disciplinary action was issued for improper

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[1] *See Grievance Procedure Manual* § 4.1.
[2] Va. Code § 2.2-3004(B).
[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[4] *See Grievance Procedure Manual* § 4.1(b).
[5] Ray v. Int'l Paper Co., 909 F.3d 661, 667 (4th Cir. 2018) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).
[6] Laird v. Fairfax County, 978 F.3d 887, 893 (4th Cir. 2020) (citing Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007)) (an adverse employment action requires more than a change that the employee finds "less appealing").
[7] Strothers v. City of Laurel, 895 F.3d 317, 331 (4th Cir. 2018) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)).

reasons, such as retaliation. Evidence about how and when the grievant raised her concerns about masking requirements could be relevant to any such defense; the same could be said for the grievant's allegations that she was denied documents to which she was entitled. Although we emphasize that such claims are not qualified to be heard independent from the Written Notice, we do not identify any claim presented by the June 6 grievance that appears to be unrelated to a potential defense. Accordingly, we characterize the June Grievance as qualified in full, as defined herein, reserving to the hearing officer the discretion to make determinations of relevancy as necessary.

By contrast, the May Grievance does not present a sufficient question that could qualify any issue therein for a hearing. The May Grievance alleged that the agency's requirements following her exposure to COVID-19 were unfair and lacked transparency. The grievant objected to the type of mask(s) she was required to wear, and she claims she should have been granted leave from work under DHRM Policy 4.52, *Public Health Emergency Leave*, during her exposure period. However, the grievance record does not suggest why the grievant should have been entitled to such leave under the circumstances,[8] and we are unable to identify any other claims in the May Grievance that might constitute a "tangible employment action."[9] Therefore, we must conclude that the May Grievance does not qualify for a hearing. This conclusion addresses only whether the grievance qualifies for a hearing; EDR takes no position regarding the merits of the agency's masking requirements or any other issue presented by the May Grievance. In addition, our conclusion does not prevent the grievant from referencing these issues in any defense(s) to the qualified Group II Written Notice.

CONCLUSION

For the reasons stated above, the grievance filed May 6, 2022, is not qualified for a hearing. The grievance filed June 6, 2022, is qualified in full as described herein. At the hearing, the agency will have the burden to prove that its disciplinary action issued May 11, 2022 was warranted and appropriate; the grievant will have the burden to prove any defenses. Pursuant to the Form B that the agency already submitted in connection with the June Grievance, EDR will appoint a hearing officer via separate correspondence.

EDR's qualification rulings are final and nonappealable.[10]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[8] As of January 10, 2022, DHRM guidance as to the use of Public Health Emergency Leave under DHRM Policy 4.52 did not recognize exposure alone as a basis for eligibility.
[9] *Ray*, 909 F.3d at 667.
[10] *See* Va. Code § 2.2-1202.1(5).