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QUALIFICATION RULING

In the matter of the Virginia Department of Agriculture and Consumer Services
Ruling Number 2024-5634
November 22, 2023

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether her August 25, 2023 grievance with the Virginia Department of Agriculture and Consumer Services (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On or about July 12, 2023, the grievant received a Due Process Letter stating that the agency was investigating a reported conflict of interest offense related to the grievant’s employment and activities conducted on her personal time. The grievant issued a response to the Due Process Letter on July 13. On August 8, the agency notified the grievant that no further disciplinary action would be taken, while recommending that the grievant “refrain[] from participating in similar actions in the future that may create a conflict with [her] official position or the perception of a conflict.” The grievant initiated a grievance on August 25, 2023, alleging that she was wrongfully charged with a conflict of interest offense, that the charge resulted in a written counseling memo, and that the agency’s actions constituted a misapplication of policy. As relief, the grievant has requested (1) clear documentation stating that there was no conflict of interest violation; (2) the Due Process Letter expunged from her personnel file; (3) the August 8 Email expunged from her supervisor/manager records; and (4) full reimbursement of attorneys’ fees. After proceeding through the management resolution steps, all requested relief was apparently granted except the reimbursement of attorneys’ fees. In addition to continuing to request the reimbursement of attorneys’ fees, the grievant also continues to question the legitimacy of the original conflict of interest charge and argues that the August 8 Email should be viewed as a form of unjust corrective action. The grievance was not qualified for a hearing by the agency head because, as stated in the agency head’s response, “the agency has no obligation to reimburse legal fees” in this case. The grievant now appeals that determination to EDR.

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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 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.³

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁴ 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."⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁶

Due Process Letter and Written Counseling

In her grievance, the grievant primarily challenges the content of a Due Process Letter she received on July 12, 2023. The grievant alleges that the Letter erroneously alleged that she had engaged in a conflict of interest offense, with the result that the Letter failed to comply with agency policy and violated her legal rights. While the grievant has acknowledged in the management steps that her requested relief regarding the Due Process Letter and the August 8 Email has been granted, EDR feels it would nonetheless be beneficial to identify and distinguish the types of agency communications that can qualify for a hearing in this context.

Although the grievant may properly raise her concerns about the origins of the July 12 Due Process Letter under the grievance procedure, EDR cannot conclude that the document is, in itself, an adverse employment action. A due process notification does not generally constitute an adverse employment action because such an action, by itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment. Indeed, only in instances when a due process notification leads to a form of formal disciplinary action, such as a Written Notice, would such a notification lead to a qualification for a hearing. Here, after the grievant met with the agency and issued a response to the Letter, the agency notified her that no further disciplinary action would be taken. Therefore, this grievance does not qualify for a hearing on the basis of the Due Process Letter.

¹ See *Grievance Procedure Manual* §§ 4.1 (a), (b).

² See 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").

The August 8 Email also does not constitute an adverse employment action. The Email states that no further disciplinary action is being taken. The supervisor offered to set up a meeting between the grievant and human resources, who had apparently handled the matter, but the grievant states that she declined the offer. Notwithstanding this analysis, even if the Email was to be perceived as a form of written counseling, a written counseling does not generally constitute an adverse employment action because such an action, in and of itself, also does not have a significant detrimental effect on the terms, conditions, or benefits of employment.⁷ Therefore, the grievant's claims relating to her receipt of the Due Process Letter and the August 8 Email do not qualify for a hearing. Nonetheless, while neither agency communications have had an adverse impact on the grievant's employment, should the agency communications grieved in this instance later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.

Attorneys' Fees

The grievant requests as relief in her grievance that she receive "[r]eimbursement of all of [her] legal expenses incurred to defend [herself] from 7/11/23 to the final date of conclusion of this matter." The *Grievance Procedure Manual* states that "[a]ttorneys' fees are not available under the grievance procedure, with one exception: an employee who is represented by an attorney licensed by the Virginia State Bar, and who substantially prevails on the merits of a grievance challenging his/her discharge is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust."⁸ The circumstances under which attorneys' fees would be recoverable by a grievant are not present here. The grievant has not been discharged from employment with the agency and is not challenging such an action, nor does the grievance qualify for a hearing, as discussed above. Hiring an attorney is within the personal choice and discretion of the employee, and DHRM does not have the authority to compel an agency to compensate the employee for making this choice.⁹ Accordingly, there is no basis for EDR to conclude that reimbursement of the grievant's attorneys' fees is appropriate under the grievance procedure in this case. Further, this allegation does not present a basis to qualify the grievance for a hearing.

CONCLUSION

For the reasons discussed above, EDR finds that the facts presented in the grievance record do not constitute a claim that qualifies for a hearing under the grievance procedure.¹⁰ EDR's qualification rulings are final and nonappealable.¹¹

Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁷ See *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999).

⁸ *Grievance Procedure Manual* § 7.2(e)

⁹ See also *Grievance Procedure Manual* § 5.9(a).

¹⁰ *Grievance Procedure Manual* § 4.1.

¹¹ See Va. Code § 2.2-1202.1(5).