Issues: Qualification – Discipline (counseling memo), and Retaliation (prior grievance activity); Ruling Date: January 19, 2017; Ruling No. 2017-4474; Agency: Department of Corrections; 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 Corrections
Ruling Number 2017-4474
January 19, 2017

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether her July 22, 2016 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about June 24, 2016, the grievant was issued a Written Counseling Memorandum to address concerns about an interview process that occurred at a facility managed by the grievant. Although the grievant was not directly involved in the interview process, the Memorandum was issued because the agency deemed her, as unit head, to be "ultimately responsible" for the irregularities that occurred. On or about July 22, 2016, the grievant initiated a grievance challenging the Counseling Memorandum as an unfair or misapplication of policy, arbitrary and capricious, and retaliation for her previous grievance activity and subsequent judicial actions. After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.

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]

Written Counseling Memorandum

[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).

In this case, the grievant alleges that the Counseling Memorandum was as an unfair application or misapplication of policy, arbitrary and capricious, and retaliation for her previous grievance activity and subsequent judicial actions. While grievances that allege unfair application and/or misapplication of policy and retaliation may qualify for a hearing, the grievance procedure generally limits grievances that qualify 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]

In this case, the grievant's frustration with the conduct of her subordinates is understandable. Ultimately, however, the management action challenged here--written counseling--is not equivalent to a Written Notice of formal discipline. EDR has long held that a written counseling does not generally constitute an adverse employment action because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[7] The issuance of the Counseling Memorandum was not an adverse employment action and, therefore, the grievant's claims relating to her receipt of the Counseling Memorandum do not qualify for a hearing.[8] In the end, the Counseling Memorandum is simply a reminder to the grievant that as a supervisor, she is ultimately responsible for ensuring that those under her comply with policy.

While the Counseling Memorandum has not had an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against the grievant. Should the Counseling Memorandum 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.

Hostile Work Environment

Read broadly, the grievance also alleges that agency management has engaged in retaliation and/or harassment that have created a hostile work environment. For a claim of workplace harassment to qualify for a hearing, the grievant must present evidence raising a

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[4] *See Grievance Procedure Manual* § 4.1(b).
[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] *See, e.g.*, EDR Ruling No. 2017-4443, EDR Ruling No. 2017-4434, EDR Ruling No. 2017-4419; *see also* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[8] Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the "Act"). Under the Act, if the grievant gives notice that she wishes to challenge, correct, or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

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) imputable on some factual basis to the agency.[9] 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 an abusive or hostile work environment.[10] "[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."[11]

The grievant argues that the agency has retaliated against her because of her past grievance activity and related judicial actions. Having reviewed the facts as presented by the grievant, however, EDR cannot find that the grieved management actions either rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment or were based on a retaliatory motive. Rather, the Counseling Memorandum appears to be based on the agency's concerns about the manner in which a hiring process was conducted in a facility managed by the grievant. Though the grievant may reasonably disagree with the issuance of the Counseling Memorandum, prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[12] For these reasons, the grievance does not qualify for a hearing on this basis. However, should additional actions occur which the grievant believes are retaliatory, this ruling does not limit the grievant's right to initiate subsequent grievances challenging those actions.

CONCLUSION

For the reasons set forth above, this grievance does not qualify for a hearing. EDR's qualification rulings are final and nonappealable.[13]

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Office of Employment Dispute Resolution

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[9] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[10] *See id.*
[11] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[12] Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("[C]onduct must be extreme to amount to a change in the terms and conditions of employment . . . ."); *see* Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).
[13] *See* Va. Code § 2.2-1202.1(5).