

Issue: Qualification – Discipline (counseling memo); Ruling Date: March 9, 2017;  
Ruling No. 2017-4509; Agency: Virginia Information Technologies Agency; Outcome:  
Not Qualified.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Employment Dispute Resolution**

**QUALIFICATION RULING**

In the matter of the Virginia Information Technologies Agency  
Ruling Number 2017-4509  
March 9, 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 December 13, 2016 grievance with the Virginia Information Technologies Agency (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about December 6, 2016, the grievant was issued a Written Counseling Memorandum (the “Counseling Memo”). The grievant initiated a grievance on December 13, 2016, alleging that the Counseling Memo contains “misleading” statements that are “misrepresentative of facts” and is part of a “continued pattern of behavior” from her supervisor that is harassing, discriminatory, and/or retaliatory. In particular, the grievant argues that a reference in the Counseling Memo to previous “similar behavior” for which she was counseled in May 2016 is inaccurate, and claims that her supervisor made false statements in connection with a previous grievance challenging the May 2016 informal counseling. In the third step response, the third step-respondent rescinded the Counseling Memo. The grievant advanced the grievance to the qualification phase, and 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.<sup>1</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>2</sup> 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.<sup>3</sup>

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<sup>1</sup> See *Grievance Procedure Manual* § 4.1.

<sup>2</sup> Va. Code § 2.2-3004(B).

<sup>3</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

Further, the grievance procedure generally limits grievances that qualify for hearing to those that involve “adverse employment actions.”<sup>4</sup> 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.”<sup>5</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>6</sup>

### *Counseling Memo*

EDR has further recognized that, even if a grievance challenges a management action that might qualify for a hearing, there are some cases where qualification is inappropriate. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available. In this case, the agency rescinded the Counseling Memo at the third step. As a result, a hearing officer would be unable to provide the grievant with any additional relief beyond that which has already been granted to her by the agency. Accordingly, there is no reason for this issue to proceed to a hearing. It would be pointless to hold a grievance hearing to determine whether the Counseling Memo was justified when, as here, it has been rescinded by the agency. This issue is, therefore, not qualified and will not proceed further.

### *Hostile Work Environment*

Fairly read, the grievance appears to also allege that the Counseling Memo is part of a pattern of discriminatory and/or retaliatory behavior that has created a hostile work environment. The alleged workplace harassment, as recited in the grievance, appears to consist of several instances of informal counseling and other related actions taken by agency management. However, the grievant explicitly states on the Grievance Form A that “[t]he issues of workplace harassment, hostile work environment, and other associated behaviors . . . will be addressed under [a] separate grievance.” EDR further notes that the management actions at issue in this ruling are alleged to be part of a larger series of ongoing workplace disputes between the parties, many of which involve allegations of discrimination, retaliation, and harassment to varying degrees. Finally, it is EDR’s understanding that the grievant has, in fact, initiated a separate grievance on or about February 23, 2017, alleging that the agency has engaged in discrimination, retaliation, and/or workplace harassment.

Given the unique circumstances presented by this case and the surrounding issues, EDR will defer consideration of the grievant’s claims of discrimination, retaliation, and/or workplace harassment, to the extent they are raised in the December 13, 2016 grievance. Should the

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<sup>4</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>5</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>6</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

grievant's February 23, 2017 grievance be reviewed by EDR in a future qualification ruling, it will then be possible to more fully assess the grievant's allegations that the agency has engaged in discrimination, retaliation, and/or workplace harassment, in the manner in which those issues are raised and articulated in that grievance.

*Previous Counseling*

In her request for a qualification ruling from EDR, the grievant raises issues relating to a May 2016 informal counseling, including her belief that her supervisor made false statements during the second step meeting in a prior grievance challenging the informal counseling. The grievance procedure provides that a grievance cannot be filed to "challeng[e] the same management action or omission challenged by another grievance."<sup>7</sup> The grievant filed a grievance disputing the May 2016 informal counseling and surrounding issues, which she concluded after receiving the third step response. Accordingly, EDR will not address the grievant's claims relating to the May 2016 informal counseling in this ruling.

To the extent the grievant believes her supervisor lied to management about the existence of documentation that may not exist, the question of whether management has addressed such a situation, if it occurred, could be a separate and distinct issue from the May 2016 informal counseling. However, this December 13, 2016 grievance would appear to be untimely to challenge that particular question as a specific issue.<sup>8</sup> Nevertheless, the grievant's claim also appears to be part of her complaints of a discriminatory and/or retaliatory hostile work environment. As such, EDR will not address this issue further in this ruling for the same reasons discussed above.

CONCLUSION

For the reasons set forth above, this grievance does not qualify for a hearing. EDR's qualification rulings are final and nonappealable.<sup>9</sup>



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Director  
Office of Employment Dispute Resolution

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<sup>7</sup> See *Grievance Procedure Manual* § 2.4.

<sup>8</sup> See *id.* § 2.2.

<sup>9</sup> See Va. Code § 2.2-1202.1(5).