Issues: Qualification – Benefits/Leave (FMLA), Discipline (other), Work Conditions (employee/supervisor conflict), and Consolidation of Grievances for a Single Hearing; Ruling Date: August 4, 2016; Ruling No. 2017-4391; Agency: Department of Behavioral Health and Developmental Services; Outcome: Partially Qualified, Consolidation Granted.

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

QUALIFICATION AND CONSOLIDATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2017-4391
August 4, 2016

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 April 14, 2016 grievance with the Department of Behavioral Health and Developmental Services (the "agency") qualifies for a hearing. For the reasons set forth below, the April 14 grievance is qualified in part and consolidated with the grievant's July 20, 2016 dismissal grievance.

FACTS

The grievant was employed by the agency as the Chief Nurse Executive for one of its facilities ("Facility A"). She asserts that on March 21, 2016, she was scheduled to be on leave under the Family and Medical Leave Act ("FMLA")[1] to be with her mother, who was in the intensive care unit, but that she was instead called in for a meeting with her facility director.[2] Although the facility director apparently told her that the meeting was for the purpose of meeting with outside consultants, the meeting was actually to reassign the grievant to new duties at the agency's central office. This transfer removed the grievant from her supervisory duties at Facility A and instead gave her the responsibility "to develop and implement strategic initiatives related to integrated health care in hospital and community settings." The agency's stated reasons for the transfer were to fill a "business need" within Central Office while removing the grievant from Facility A during "an external review of nursing operations."

On or about April 14, 2016, the grievant initiated a grievance challenging her transfer, the agency's failure to allow her to take FMLA leave, and "abusive and demeaning treatment" by the facility director. Subsequent to the initiation of her April 14, 2016 grievance, the grievant was terminated from employment and she initiated a dismissal grievance. After proceeding through the management steps, the April 14 grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.

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[1] 29 U.S.C. 2601 *et seq.*; *see also* DHRM Policy 4.20, *Family and Medical Leave*.

[2] The agency states that it considered the grievant's FMLA paperwork to be incomplete, but that she was never advised of that fact and therefore believed her leave was protected. The grievant states that at the time of her scheduled leave, the agency had once returned the paperwork to her for completion, but that she had her mother's physician complete the paperwork and again returned it to the agency. After providing the completed paperwork to the agency, the grievant was not notified of any additional defects.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out and the reassignment or transfer of employees within the agency 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.[4]

Transfer

For state employees subject to the Virginia Personnel Act,[5] appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the policies and procedures promulgated by DHRM.[6] For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.[7] These safeguards are in place to ensure that disciplinary actions are appropriate and warranted.

Where an agency has taken informal disciplinary action against an employee, a hearing cannot be avoided for the sole reason that a Written Notice did not accompany the disciplinary action. Rather, even in the absence of a Written Notice, a hearing is required where the grieved management action resulted in an adverse employment action[8] against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance).[9] 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."[10] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[11] Depending on all the facts and circumstances, a reassignment or transfer with significantly different responsibilities can constitute an adverse employment action.[12] For purposes of this ruling, we will assume that the grievant's transfer constitutes an adverse employment action.[13]

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[3] *See* Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[5] Va. Code § 2.2-2900 *et seq.*
[6] *See id.* §§ 2.2-2900, 2.2-2901.
[7] *See* DHRM Policy 1.60, *Standards of Conduct*.
[8] The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions." *See Grievance Procedure Manual* § 4.1(b).
[9] *See, e.g.*, EDR Ruling Nos. 2007-1516, 2007-1517; EDR Ruling Nos. 2002-227, 2002-230; *see also* Va. Code § 2.2-3004(A) (stating that grievances involving "transfers and assignments . . . resulting from formal discipline or unsatisfactory job performance" may qualify for a hearing).
[10] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[11] *See, e.g.*, Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[12] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 376 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 Fed. Appx. 726, 729 (4th Cir. 2004).
[13] For instance, in the grievant's new assignment, she no longer has any supervisory authority or responsibility.

The grievant argues that her transfer was a "pretext for discipline." The agency has stated that during the period when it needed the grievant to be away from the facility for an external review, it identified a "business need . . . for someone with [the grievant's] experience and education to develop and implement strategic initiatives related to integrated health care in hospital and community settings." EDR has thoroughly reviewed all documentation provided and, while the grievant's perception that the transfer appears to be disciplinary in nature is understandable, we have not reviewed any documentation that shows the agency's stated purpose in reassigning her was untrue or pretextual.

EDR must also examine the question of whether the grievant's reassignment constitutes a misapplication or unfair application of state policy. 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. The primary policy implicated in this grievance is DHRM Policy 3.05, *Compensation*, which defines a "Reassignment Within The Pay Band" as an "[a]ction of agency management to move an employee from one position to a different position in the same Role or Pay Band." The policy further provides that, due to operational business needs, agencies may require the movement of staff to different positions within the same salary range, in either the same or a different role.[14] Though we are sympathetic to the grievant's situation, EDR has found no mandatory policy provision that the agency has violated by reassigning the grievant in this instance. It is undisputed that the grievant's salary and pay band remained the same following her transfer. Further, although the grievant alleges that her transfer was also in retaliation for her challenge to her 2015 performance evaluation and a Notice of Improvement Needed, EDR cannot conclude that sufficient evidence exists to raise a question as to this theory. As such, because EDR cannot find that the agency has misapplied or unfairly applied policy, this portion of the April 14 grievance does not qualify for hearing.[15]

Harassment/Hostile Work Environment

The grievant has also asserted that her supervisor has harassed her and created a hostile work environment. For a claim of a hostile work environment or 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 conduct; (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.[16] 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

[14] DHRM Policy 3.05, *Compensation.*

[15] This ruling only determines that under the grievance statutes this grievance does not qualify for a hearing. This ruling does not address whether the grievant may have some other legal or equitable remedy. Further, if the grievant's dismissal grievance is successful and she is reinstated to the position in Central Office, she may file a grievance to challenge the permanency of the transfer (if it is made permanent) from Facility A, if she wishes to contest it.

[16] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).

environment.[17] "[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."[18] However, the grievant must raise more than a mere allegation of harassment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination or retaliation.

In this case, the grievant has not shown that the alleged conduct by her supervisor was based on a protected status or conduct. Although she has suggested that the transfer discussed previously was in retaliation for her complaints about her evaluation and a Notice of Improvement Needed, the grievant appears to allege that her difficulties with her supervisor began long before this protected activity occurred. To the contrary, during the course of EDR's investigation, the grievant indicated her supervisor "targeted" her from the beginning of his employment at Facility A, because, the grievant suspects, he has a close friend who also worked at Facility A and did not like the grievant. While conduct of this nature would, if true, be troubling, it is not prohibited workplace harassment, because it is not based on a protected status or conduct.[19] For these reasons, the grievant's claim of a hostile work environment does not qualify for a hearing.[20]

FMLA Leave

The grievance also asserts a claim that the agency has misapplied and/or unfairly applied the statutory and/or policy provisions of the FMLA and DHRM Policy 4.20, *Family and Medical Leave*. In particular, the grievant asserts that the agency wrongfully refused her the opportunity to take FMLA leave for her mother's illness.

An employee alleging interference with FMLA leave must show that she was eligible for FMLA leave, gave notice of her intention to take leave, and was denied leave she was entitled to take.[21] In this case, the evidence suggests that the grievant was eligible for FMLA leave, that the agency was aware of her need and intent to take leave, that her supervisor instead required her to attend a meeting, and that as a result, she was not able to provide care to her mother. Further, although the agency asserts that the grievant never completed the appropriate paperwork—a contention the grievant disputes—it agrees that it never advised the grievant that it needed additional information.

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[17] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142-43 (4th Cir. 2007).
[18] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[19] *See* DHRM Policy 2.05, *Equal Employment Opportunity*; DHRM Policy 2.30, *Workplace Harassment*; *see also* Executive Order No. 1 (2014).
[20] To the extent the grievant's claims regarding hostile work environment may be background information related to her termination, the grievant may offer evidence regarding these issues at the hearing on her dismissal grievance, if determined to be relevant by the hearing officer.
[21] *See, e.g.*, Duong v. Bank of Am, N.A., No. 1:15-cv-784, 2016 U.S. Dist. LEXIS 26921, at *12 (E.D. Va. Mar. 2, 2016); Downs v. Winchester Med. Ctr., 21 F. Supp. 3d 615, 617 (W.D. Va. 2014).

In light of this evidence, there appears to be a sufficient question that the agency improperly interfered with the grievant's rights under the FMLA for the April 14 grievance to qualify for hearing on this basis. At the hearing, the grievant will have the burden of proving that she was eligible for FMLA leave, the agency was aware of her intent to take leave, and that she was denied the right to take leave. If the hearing officer finds that this is the case, he may order the agency to cease any future interference.[22] This ruling in no way determines that the agency's actions with respect to the grievant were improper, but merely reflects that further exploration of the facts by a hearing officer is warranted.

Consolidation with Dismissal Grievance

On or about July 20, 2016, the grievant initiated a dismissal grievance challenging her June 22, 2016 termination. Approval by EDR in the form of a compliance ruling is required before two or more grievances may be consolidated in a single hearing. Moreover, EDR may consolidate grievances for hearing without a request from either party.[23] EDR strongly favors consolidation and will consolidate grievances when they involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.[24]

EDR finds that consolidation of the qualified issue of the April 14 grievance and the July 20 dismissal grievance is appropriate. These grievances involve the same grievant and could share common themes, claims, and witnesses. Further, the grievances relate, at least in part, to actions and occurrences that appear to have arisen from the same series of events. Lastly, we find that consolidation is not impracticable in this instance. Therefore, the qualified portion of the April 14 grievance is consolidated with the July 20 dismissal grievance for a single hearing.

CONCLUSION

The grievant's April 14 grievance is qualified in part for hearing to the extent described above, and consolidated with her July 20 dismissal grievance for a single hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer for the claim qualified in the April 14 grievance, using the Grievance Form B.

EDR's qualification and compliance rulings are final and nonappealable.[25]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[22] *Rules for Conducting Grievance Hearings* § VI(C)(3).
[23] *Grievance Procedure Manual* § 8.5.
[24] *See id.*
[25] *See* Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).