Issues: Qualification – Discipline (Counseling Memo) and Retaliation (Other Protected Right); Ruling Date: September 26, 2016; Ruling No. 2017-4419; Agency: Department of Behavioral Health and Developmental Services; 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 Behavioral Health and Developmental Services
Ruling Number 2017-4419
September 26, 2016

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 6, 2016 grievance with the Department of Behavioral Health and Developmental Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about July 1, 2016, the grievant was issued a Counseling Memo to address perceived issues with her work performance. The grievant initiated a grievance on July 6, 2016 disputing the Counseling Memo and alleging that her supervisor has engaged in "[r]etaliatory actions" because the grievant participated in an internal investigation of another agency employee. 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]

Counseling Memo

In this case, the grievant alleges that the Counseling Memo is "unwarranted, unjustified, and without merit," and was issued as an act of retaliation because of her participation in "an

[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).

investigation of another coworker . . . ." While grievances that allege 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]

The circumstances surrounding the agency's issuance of the Counseling Memo in this case are somewhat confusing. For example, the complaint that prompted the Counseling Memo was anonymously submitted to the agency head purportedly by a customer and alleges that the grievant engaged in unprofessional behavior. Nothing in the grievance record indicates whether the agency investigated the truthfulness of the allegations contained in the complaint prior to issuing the Counseling Memo or if they could be investigated. Indeed, the Counseling Memo itself contains no information about whether the grievant's supervisor believes the incident described by the purported customer actually occurred; instead, it notes that the grievant had previously been informally counseled about "communication skills," notes the receipt of the anonymous complaint, and directs the grievant to "maintain professionalism" in the workplace.

While the grievance responses rely on the fact that the grievant had been previously verbally counseled for certain past interactions, such past interactions would not justify the issuance of the Counseling Memo. The past interactions had already been addressed by the grievant's supervisor through verbal counseling. New written counseling would not appear to have been warranted unless additional poor performance or misconduct had occurred. Thus, it is a logical conclusion that the Counseling Memo would not have been issued if the anonymous complaint was not received. Yet, there is nothing in the grievance record to indicate whether the agency has any information to support that the allegations of the anonymous compliant actually occurred. It is confusing that an employee's supervisor would take an action against an employee for behavior that was not or cannot be substantiated. Ensuring that an employee's alleged poor work performance or unprofessional behavior is supported by the facts is a best practice for effective performance management, particularly when an anonymous complaint is the agency's initial source of the alleged improper behavior.

Ultimately, however, the management action challenged here, a Counseling Memo, is a form of written counseling. It is not equivalent to a Written Notice of formal discipline. 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 Memo was not an adverse employment action and, therefore, the grievant's claims relating to her receipt of the Counseling Memo do not

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

qualify for a hearing.[8] In the end, the Counseling Memo is simply a reminder to the grievant to be professional and respectful at work, which are certainly important responsibilities for any employee.

While the Counseling Memo 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 Memo 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

Fairly read, 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 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 she participated in an investigation of another employee whom her supervisor "favors and supports," and that her supervisor has engaged in allegedly retaliatory and/or harassing behavior since her participation in the investigation. Having reviewed the facts as presented by the grievant, however, EDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment. The grievant's claim of workplace harassment appears to be based largely on disagreements with

[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.*

[9] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

[10] *See generally* Gillam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

[11] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

her supervisor regarding her work duties and performance. For example, the grievant states that her supervisor has engaged in "passive aggressive behavior" and "over monitoring," did not allow the grievant to attend a professional development training, did not approve a salary alignment action, and sent her a request to gather information to provide a response to a Virginia Freedom of Information Act request. In this case, the facts alleged by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.[12] Though the grievant may reasonably disagree with the issuance of the Counseling Memo and other supervisory actions, prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[13] Because the grievant has not raised a sufficient question as to the existence of severe or pervasive harassment reaching the level of an abusive or hostile work environment, the grievance does not qualify for a hearing on this basis.

CONCLUSION

For the reasons set forth above, this grievance does not qualify for a hearing. EDR's qualification rulings are final and nonappealable.[14]

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Director
Office of Employment Dispute Resolution

[12] *See Grievance Procedure Manual* § 4.1.
[13] 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).
[14] *See* Va. Code § 2.2-1202.1(5).