

Issue: Qualification – Management Actions (misapplication of policy); Ruling Date: April 16, 2018; Ruling No. 2018-4698; Agency: Virginia Information Technologies Agency; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the Virginia Information Technologies Agency
Ruling Number 2018-4698
April 16, 2018

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) on whether her December 27, 2017 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

The grievant is employed by the agency as a Project Management Specialist. On or about August 15, 2017, the agency notified the grievant that it had identified multiple potential instances of fraud, waste, or abuse related to the grievant’s work activities. The agency reported these issues to the Office of the State Inspector General (“OSIG”) for further investigation,¹ provided the grievant with a notice of its intent to issue disciplinary action pending the outcome of the investigation, and placed the grievant on paid pre-disciplinary leave pursuant to DHRM Policy 1.60, *Standards of Conduct*, while the OSIG investigation took place. The grievant retained legal counsel and provided the agency with a response to the due process notice. On or about October 10, 2017, the grievant returned to work from pre-disciplinary leave. The grievant received a letter from the agency on December 7, 2017, stating that the investigation had resulted in no findings of fraud, waste, or abuse, and that no discipline would be issued.

On or about December 27, 2017, the grievant filed a grievance with the agency, challenging the “targeted, mismanaged investigation” on the basis that it was not conducted with a proper understanding of state and/or agency policy, the grievant’s job duties, relevant documents, and information from management. As relief, the grievant requested reimbursement for attorneys’ fees and changes to agency policy to prevent the issue from occurring again in the future. 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 EEDR.

¹ OSIG is charged with receiving and investigating complaints of fraud, waste, abuse, or corruption by state officers or employees. Va. Code § 2.2-309.

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.² Additionally, 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 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 or agency policy may have been misapplied or unfairly applied.⁴ The grievant has not alleged discrimination, retaliation, or discipline. Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁵ 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."⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁷

Agency and OSIG Investigation

The grievant "challeng[es] the agency's practices" after it discovered the alleged instances of potential misconduct. The grievant argues that "the agency had a total disregard for the validation, confirmation, and verification of the compiled accusations," and that the agency's decision to investigate the issue more fully "led to financial and emotional hardship" for her. The agency asserts that it initially discovered that the grievant may have engaged in specific acts of misconduct that could be considered fraud, waste, or abuse. Due to the nature of the potential misconduct, the agency contends that it appropriately decided to refer the matter to OSIG for a more thorough investigation. OSIG investigated the issue and submitted a report to the agency dated November 9, 2017, stating that there was no evidence of fraud, waste, or abuse and that the grievant had not otherwise acted inappropriately.

Although the grievant's concerns about the investigatory process in this case are understandable, EEDR cannot conclude that the agency's decision to investigate possible misconduct by the grievant in the manner described here is, in itself, an adverse employment

² See *Grievance Procedure Manual* § 4.1.

³ Va. Code § 2.2-3004(B).

⁴ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁵ See *Grievance Procedure Manual* § 4.1(b).

⁶ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁷ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

action. Even accepting as true the grievant's claims – which appear to have been validated by the agency's ultimate decision not to issue disciplinary action – there is nothing to indicate that any of the agency's actions had an adverse impact on the terms, conditions, or benefits of the grievant's employment. For example, the agency has not taken any corrective action to address the issue, such as formal discipline, demotion, or transfer. In addition, the grievant continued to receive her salary while on paid pre-disciplinary leave and returned to work on or about October 10, 2017. Furthermore, there is nothing to indicate that any information related to the investigation or any potential corrective action has been placed in the grievant's personnel file.

In summary, while the grievant may disagree with the agency's decision to investigate the alleged misconduct identified in the August 15, 2017 notice of due process, as well as the manner in which the investigation was conducted, none of her claims raise a question as to whether she has experienced an adverse employment action. As a result, the grievance does not qualify for a hearing on this basis.

Attorneys' Fees

In addition, the grievant requests as relief in her grievance that she receive "reimbursement of attorney fees generated as a result of [the] investigation." 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. Accordingly, there is no basis for EEDR to conclude that reimbursement of the grievant's attorneys' fees is appropriate under the grievance procedure in this case.

Based on the foregoing, the grievance does not qualify for hearing. EEDR's qualification rulings are final and nonappealable.⁹



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⁸ *Grievance Procedure Manual* § 7.2(e); *Rules for Conducting Grievance Hearings* § VI(E). "Substantially prevail" means that "the hearing officer's decision must contain an order that the agency reinstate the employee to his/her former (or an equivalent) position." *Id.*

⁹ Va. Code § 2.2-1202.1(5).