

Issues: Qualification – Discipline (counseling memo) and Work Conditions (employee/supervisor conflict); Ruling Date: May 24, 2018; Ruling No. 2018-4714; Agency: Department of Juvenile Justice; 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 Department of Juvenile Justice
Ruling Number 2018-4714
May 24, 2018

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management on whether her February 1, 2018 grievance with the Department of Juvenile Justice (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about January 30, 2018, the grievant received an Informal Counseling Memo listing items of discussion from a meeting between the grievant and agency management that took place on November 29, 2017. The Informal Counseling Memo is dated November 30, 2017; however, it appears the grievant was out of work between approximately November 30, 2017 and January 29, 2018 on short-term disability leave. Thus, the grievant seems to have received the Informal Counseling Memo when she returned to work. The grievant initiated a grievance on February 1, 2018, challenging the issuance of the Informal Counseling Memo and alleging that agency management had engaged in “ongoing harassment, hostility and antagonizing and retaliation” 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.

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

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).

Informal Counseling Memo

In this case, the grievant appears to argue that the Informal Counseling Memo is not supported by the facts and was issued as a form of harassment and/or retaliation. However, 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 Informal Counseling Memo in this case are somewhat unclear. For example, the Informal Counseling Memo describes how sick leave must be used and describes the agency’s policy requirements for solicitation and appropriate use of state email, and states that these policy requirements were discussed with the grievant on November 29, 2017. The document does not, however, identify the specific instances of the grievant’s conduct that prompted the meeting or the issuance of the Informal Counseling Memo. In her grievance, the grievant describes her “confusion and lack of understanding” about the agency’s decision to issue the Informal Counseling Memo. From a review of the document itself, the grievant’s confusion is understandable, as the Informal Counseling Memo does not appear to “convey[] that [the grievant’s] conduct or performance was improper and must be corrected,” as required by DHRM Policy 1.60, *Standards of Conduct*.⁷ Ensuring that instances of alleged misconduct are clearly described in a written counseling memorandum or other performance management document is a best practice for agencies to guarantee employees receive adequate notice of their allegedly improper behavior that must be improved or corrected.

Ultimately, however, the management action challenged here—an Informal Counseling Memo—is not equivalent to a Written Notice of formal discipline. EEDR 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.⁸ The issuance of the Informal Counseling Memo was not an adverse employment action and, therefore, the grievant’s claims relating to her receipt of the Informal Counseling Memo do not qualify for a hearing.⁹

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 DHRM Policy 1.60, *Standards of Conduct*, § B(1).

⁸ 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).

⁹ Although this issue 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-

While the Informal 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 Informal Counseling Memo grievant 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

In addition, the grievant appears to argue that agency management has engaged in harassment and/or retaliation that have created a hostile work environment. 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

In support of her position, the grievant states that she previously filed a complaint alleging that her supervisor had engaged in workplace harassment, and appears to contend that agency management has harassed and/or retaliated against her as a result of her complaint.¹² In particular, the grievant alleges that management "constantly contacted [her]" about leave and/or job-related matters while she out of work on short-term disability leave, and that management shared her personal email address with other employees.¹³ The grievant's conduct of submitting a complaint of workplace harassment would amount to protected conduct to support a claim of retaliation.¹⁴ However, in this case, the facts alleged by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.¹⁵ The allegedly hostile work environment challenged by the grievant essentially involves allegedly unprofessional conduct by agency management and disagreements regarding her work duties and performance, which do not generally rise to the level of adverse employment actions or severe or pervasive conduct.¹⁶

3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

¹⁰ *See id.*

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

¹² The agency has informed EEDR that it investigated the matters raised in the grievant's complaint and has taken action to address and improve any issues with the supervisor's conduct.

¹³ The grievant also appears to contend that management did not approve her request for leave to care for a family member pursuant to the Family and Medical Leave Act. However, the date(s) related to this matter appear to have fallen when the grievant was out of work on short-term disability leave, and the agency states that the grievant did not request family and medical leave to care for a family member.

¹⁴ *See, e.g.*, Va. Code § 2.2-3000(A).

¹⁵ *See Grievance Procedure Manual* § 4.1.

¹⁶ *See* EDR Ruling No. 2011-2891 (and authorities cited therein). Although this issue does not qualify for a hearing under the grievance procedure at this time, the grievant's assertions about excessive contact from agency management while was on short-term disability are potentially concerning. Under DHRM Policy 4.57, *Virginia*

Though the grievant may reasonably disagree with the issuance of the Informal Counseling Memo and other actions taken by agency management, prohibitions against harassment do not provide a “general civility code” or prevent all offensive or insensitive conduct in the workplace.¹⁷ Because the grievant has not raised a sufficient question as to the existence of a severe or pervasive 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. EEDR’s qualification rulings are final and nonappealable.¹⁸



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Sickness and Disability Program, agencies should “[c]oordinate disability claim and benefits with the . . . employee” and “[c]ommunicate with [the] employee during [her] absence if [the] employee is physically able.” DHRM Policy 4.57, *Virginia Sickness and Disability Program*. Agencies should not, however, require or permit an employee to perform work-related functions while she is on short-term disability leave. *See id.* Based on EEDR’s review of the information presented by the parties, it appears the contact cited by the grievant consisted of phone calls and email messages about the grievant’s leave, as well as work-related information that was emailed to the grievant in anticipation of her return. It does not appear the grievant was expected to perform any job functions while she was out of work.

¹⁷ *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).

¹⁸ *See Va. Code* § 2.2-1202.1(5).