Issues: Qualification: Work Conditions (supervisory conflict), and Separation from State (retirement); Ruling Date: June 11, 2018; Ruling No. 2018-4722; Agency: Virginia Commonwealth University; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of Virginia Commonwealth University
Ruling Number 2018-4722
June 11, 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 March 27, 2018 grievance with Virginia Commonwealth University (the "University") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant was employed by the University as a Program Assistant. The grievant received a due process memorandum on or about March 9, 2018, notifying her of the University's intention to issue a Group III Written Notice with termination for sleeping during work hours. On March 14, 2018, the grievant informed the University of her intention to retire as of June 1, 2018. In light of her decision to retire, the University elected not to issue the proposed disciplinary action to the grievant. The grievant filed a grievance on March 27, 2018, challenging an alleged "reduction of workload" and "realignment of duties to [a] co-worker, supervisory bullying and intimidation," and "non-responsiveness from University management." The grievant further disputes the allegedly "unsubstantiated termination charge" and her "retirement." As relief, the grievant seeks "[n]ot to be coerced into retirement," that the "[t]ermination be dropped for consideration," and to "[r]esume [her] work duties or be reassigned to a lateral position . . . ." 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).

Due Process Notice and Retirement

In this case, the grievant argues that the University's notice of intent to issue disciplinary action for sleeping at work was "completely unsubstantiated," and that management told her "the only alternative [to termination] was to retire." Although the grievant asserts that she was "coerced in going forward with [her] intent to retire to stop" the disciplinary action from being issued, this allegations is not sufficient to support a claim that the grievant's decision to resign/retire was forced by duress or coercion in this case.[4] Indeed, that the choice facing an employee is resignation or discipline does not in itself demonstrate duress or coercion, unless the agency "actually lacked good cause to believe that grounds for termination existed."[5] Having reviewed the information provided by the parties, this does not appear to be a case where the University *knew* that its ultimate threatened disciplinary action could not be substantiated. In the due process notice, the University alleged that the grievant had been observed sleeping during work hours. Under DHRM Policy 1.60, *Standards of Conduct*, sleeping during work hours is categorized as a Group III offense, which may result in termination.[6] While we understand the grievant's disagreement with the University's decision to notify her of its intent issue disciplinary action, as well as her perception of the choice between two unpleasant alternatives (retirement and termination), EEDR has not reviewed information that raises a sufficient question as to whether the grievant's decision to retire was involuntary in this case. Accordingly, the grievance does not qualify for a hearing on this basis.

Remaining Issues

In the remainder of her grievance, the grievant essentially contends that University management engaged in "[h]arassment, bullying and intimidation" that created a hostile work environment. The grievant also asserts that the University modified the time she was to devote to specific work with the result that she was not able to complete certain assigned tasks, monitored her work performance after "inform[ing her] that her work product was subpar and that [her] performance was low," and was not responsive to her concerns about the issuance of the due process notice. In response, the University asserts that it adjusted the grievant's workload after she declared her intent to retire as a transition plan based on the grievant's input, provided feedback about errors and other deficiencies in order to improve her work performance, and complied with policy in notifying her of its intent to issue disciplinary action.

Assuming without deciding that the grievant's allegations are true and the grieved management actions rose to a sufficiently severe or pervasive level to create a hostile work environment,[7] a hearing officer would be unable to address this claim effectively were the

[4] A resignation can be viewed as forced by the employer's duress or coercion if it appears that the employer's conduct effectively deprived the employee of free choice in the matter. Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 174 (4th Cir. 1988). "Factors to be considered are: (1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice he was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether he was permitted to select the effective date of resignation." *Id.*

[5] *Stone*, 855 F.2d at 174.

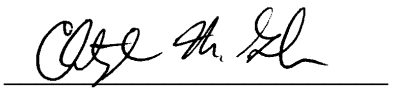
[6] DHRM Policy 1.60, *Standards of Conduct*, Attachment A. No disciplinary action was ultimately issued to the grievant because she chose to retire.

[7] In cases involving claims of workplace harassment, 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

grievance qualified for a hearing. There are some cases where qualification of a grievance is inappropriate even if a grievance challenges a management action that might qualify for a hearing, such as workplace harassment. 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.

This case presents a situation where a hearing officer would be unable to award any meaningful relief under the grievance procedure. Events that happened after the grievant initiated her grievance have rendered her claims regarding the alleged hostile work environment moot. The grievant retired from employment with the University as of June 1, 2018. At a hearing to determine whether University management had engaged in workplace harassment, a hearing officer would have the authority to "order the agency to create an environment free from" the allegedly harassing behavior or "take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence."[8] Even if the grievant were able to establish that workplace harassment had occurred in this case, the relief available through the grievance process would be meaningless because the grievant is no longer employed by the University. EEDR does not generally grant qualification for a grievance hearing to determine whether agency employees created a hostile work environment where, as here, a direction from a hearing officer to cease the offending conduct would have no effect because the grievant no longer works in the allegedly harassing environment. Accordingly, the grievance does not qualify for a hearing on this basis and will not proceed further.

EEDR's qualification rulings are final and nonappealable.[9]



Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

environment; and (4) imputable on some factual basis to the agency. *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007). "[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." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

[8] *Rules for Conducting Grievance Hearings* § VI(C)(3).

[9] Va. Code § 2.2-1202.1(5).