

Issues: Qualification – Retaliation (grievance activity), Discrimination (race, age, gender), Work Conditions (employee/supervisor conflict); Ruling Date: June 26, 2018; Ruling No. 2018-4746; Agency: Department of Behavioral Health and Developmental Services; 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 Behavioral Health and Developmental Services  
Ruling Number 2018-4746  
June 26, 2018

This ruling addresses the partial qualification of the grievant's October 10, 2017 grievance with the Department of Behavioral Health and Developmental Services (the "agency"). The grievant asserts, in part, that she was improperly issued a Group II Written Notice. The agency head qualified the grievant's challenge to the Group II Written Notice for a hearing, but declined to qualify additional issues presented in the grievance. The grievant has appealed the agency head's partial qualification of her grievance to the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management. For the reasons discussed below, the additional issues presented in the grievance do not qualify for a hearing.

FACTS

On October 10, 2017, the grievant initiated a grievance challenging the issuance of a Group II Written Notice and alleging that an agency manager (the "Manager") had engaged in "continuous harassment and retaliation in the workplace . . . ." After the grievance advanced through the management resolution steps, the grievant requested qualification by the agency head. The agency head qualified the grievant's challenge to the Written Notice, but declined to qualify the issues of workplace harassment and retaliation raised in the grievance. The grievant now appeals the agency head's partial qualification decision 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.<sup>1</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>2</sup> 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.<sup>3</sup>

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<sup>1</sup> See *Grievance Procedure Manual* § 4.1.

<sup>2</sup> Va. Code § 2.2-3004(B).

<sup>3</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b), (c).

Outside of her challenge to the agency's issuance of the Group II Written Notice, the grievant essentially contends that the Manager has engaged in retaliation and/or harassment that have created a hostile work environment. The grievant appears to argue that the Manager's allegedly improper conduct was prompted by the grievant's inquiries about the status of a requested salary increase and/or her past grievance activity, and was also based on her "race, gender, and age." In support of her position, the grievant contends that she received an unfounded counseling memorandum from the Manager in 2016, that the Manager declined to approve the grievant's requested salary increase retroactively, and that there was no basis for the Manager to issue the Written Notice.<sup>4</sup> The grievant further claims that "[t]here is an obvious double standard" in the Manager's treatment of employees in her work unit, as demonstrated by the above-described behavior.

Even if EEDR assumes, without deciding, that the grievant's allegations regarding the Manager's behavior are true and rose to a sufficiently severe or pervasive level to create a hostile work environment in this case, a hearing officer would be unable to address this claim effectively were this issue qualified for a hearing. There are some cases where qualification of an issue that might qualify for a hearing, such as workplace harassment, is inappropriate. 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 with regard to the grievant's allegations of retaliation and/or workplace harassment. Events that happened after the grievant initiated her grievance have rendered her claims regarding the alleged hostile work environment moot. The Manager who allegedly engaged in the retaliatory and/or harassing behavior complained of by the grievant no longer works for the agency. At a hearing to determine whether the Manager had created a hostile work environment, 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."<sup>5</sup> Even if the grievant were able to establish that workplace harassment had occurred, the relief available through the grievance process would be meaningless, as the Manager is no longer employed by the agency. Moreover, EEDR has not reviewed information in the grievance record to show that the grievant has complained of continued retaliation or harassment since the Manager's departure. 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 that conduct apparently ceased when the Manager's employment with the agency ended. Accordingly, this issue is not qualified for a hearing and will not proceed further.

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<sup>4</sup> The grievant has previously filed two grievances challenging the counseling memorandum and the agency's actions surrounding her request for a salary increase, respectively. Neither of those grievances was qualified for a hearing by either the agency or EEDR. See EEDR Ruling No. 2018-4667; EDR Ruling No. 2017-4419.


<sup>5</sup> *Rules for Conducting Grievance Hearings* § VI(C)(3).

CONCLUSION

The grievant's challenge to the issuance of the Group II Written Notice that was qualified by the agency head will proceed to a hearing. For the reasons discussed above, the remaining issues of retaliation and workplace harassment presented in the grievance are not qualified and may not proceed further.<sup>6</sup> While these additional management actions and/or omissions do not qualify for a hearing, some of the facts presented in relation to these claims may be relevant to the grievant's arguments regarding the Written Notice. Evidence related to the other issues cited in the grievance may be presented by the grievant as background information at the hearing as to why the Written Notice was improperly issued, if determined to be relevant by the hearing officer. The hearing officer will not, however, have the authority to order relief for any of the specific management actions challenged in the grievance other than the Written Notice.<sup>7</sup>

If it has not already done so, the agency is directed to submit a completed Form B for the qualified portions of the grievance to EEDR within five workdays of this ruling. A hearing officer will be appointed for the grievant's qualified challenge to the Group II Written Notice in a forthcoming letter.

EEDR's qualification rulings are final and nonappealable.<sup>8</sup>

  
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Director  
Office of Equal Employment and Dispute Resolution

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<sup>6</sup> To the extent this ruling does not address any specific issue raised in the grievance, EEDR has thoroughly reviewed the grievance record and has determined that the grievance does not raise a sufficient question as to whether the grievant experienced an adverse employment action, whether discrimination, retaliation, or discipline may have improperly influenced any management decision cited in the grievance, or whether the agency may have misapplied and/or unfairly applied state policy that would warrant qualification of any additional issue(s) other than the Written Notice.

<sup>7</sup> See *Rules for Conducting Grievance Hearings* § V(C) ("Challenges to management actions or omissions that have not been qualified in the grievance assigned to the hearing officer are not before that hearing officer, and may not be resolved or remedied.").

<sup>8</sup> See Va. Code § 2.2-1202.1(5).