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## QUALIFICATION RULING

In the matter of the Virginia Department of Juvenile Justice  
Ruling Number 2019-4900  
June 6, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”)<sup>1</sup> at the Virginia Department of Human Resource Management (“DHRM”) on whether his December 11, 2018 grievance with the Virginia Department of Juvenile Justice (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing. If the grievant wishes to pursue allegations of retaliation for his participation in the grievance process, he may do so by requesting an investigation by EDR or, in the alternative, by initiating a separate grievance with the agency.

### FACTS

On or about November 29, 2018, the grievant received a counseling memorandum alleging that he was not adequately monitoring students in his classroom. The memorandum recited the observations of an information technology (IT) employee, who had reviewed security footage of the grievant in his classroom<sup>2</sup> and concluded that the students were “unsupervised.” The memorandum directed the grievant to follow “all policies and procedures regarding appropriate supervision of youth.” In an initial written rebuttal and then by grievance dated December 11, 2018, the grievant strongly disputed the IT employee’s characterizations and use of security video to assess his instructional performance. Noting that elements of his classroom technology had apparently been confiscated or disabled, the grievant alleged that the IT employee was retaliating against him for challenging certain IT policies. The grievant asked the agency to restore his technology.

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<sup>1</sup> The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

<sup>2</sup> According to the IT employee, he reviewed four hours of video of the grievant’s classroom in order to investigate, at least in part, whether a student had brought in a personal USB drive for use on classroom computers.

As the grievance proceeded through the management resolution steps, the agency's IT department initially declined to restore the grievant's classroom computer functions.<sup>3</sup> When the agency received seven new computers for the grievant's classroom in January 2019, the IT department deferred installation indefinitely.<sup>4</sup> Although the agency's step respondents agreed to arrange a meeting between the grievant and the IT employee, no such meeting ever occurred. Nevertheless, the agency declined to grant further relief or to qualify the grievance for hearing. The grievant now appeals the latter determination to EDR, citing allegations that he experienced retaliation for using the grievance process.

### 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>5</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>6</sup> Thus, claims relating to issues such as the means, methods, 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.<sup>7</sup>

Further, 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."<sup>8</sup> Typically, then, 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."<sup>9</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>10</sup>

#### *Counseling Memorandum*

Here, the grievant challenged, among other things, the November 28 counseling memorandum on grounds that it was based on accusations by another employee who (1) lacked authority to evaluate the grievant's instructional performance, (2) based his observations only on security footage, and (3) had a motive to harass the grievant. While an agency's toleration of such conduct is concerning, the counseling memorandum challenged here is an instance of informal supervisory action. It is not equivalent to a Written Notice of formal discipline. Written counseling does not generally constitute an adverse employment action because such an action,

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<sup>3</sup> Although the record reflects that the agency made multiple requests to its IT staff to restore the CD drive on the grievant's classroom computer, the available facts do not show whether they ever complied. It also appears that a flash drive that was initially confiscated by IT staff was eventually returned.

<sup>4</sup> According to the grievant, the computers for his classroom still had not been installed as of early May 2019, months after another class had its computers installed.

<sup>5</sup> See *Grievance Procedure Manual* § 4.1.

<sup>6</sup> Va. Code § 2.2-3004(B).

<sup>7</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>8</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>9</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>10</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.<sup>11</sup> Therefore, the grievant's claims relating to the memorandum do not qualify for a hearing.<sup>12</sup>

Although it is not apparent that the memorandum itself has adversely affected the grievant's employment, it could be used to support an adverse employment action against him in the future. Should the informal supervisory action grieved in this instance later serve to support an adverse employment action, such as a formal Written Notice or a "Below Contributor" overall annual performance rating, this ruling does not prevent the grievant from contesting the merits of these allegations through a subsequent grievance challenging a related adverse employment action.

### *Retaliation for Participating in the Grievance Process*

The grievant also contends that he is entitled to a hearing in this instance because he has experienced retaliation for invoking the grievance process. State law prohibits retaliation against employees for using or participating in the grievance process.<sup>13</sup> Where retaliation takes the form of harassment, it rises to the level of an adverse employment action if evidence tends to show that the conduct is (1) unwelcome; (2) based on a protected status or protected activity;<sup>14</sup> (3) sufficiently severe or pervasive 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.<sup>15</sup> "[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."<sup>16</sup>

However, after a grievance is initiated, the grievance procedure does not permit a grievant to challenge additional management conduct via that same initial grievance.<sup>17</sup> To address conduct occurring after a grievance is filed (such as conduct the employee believes may be retaliatory), the employee may file a new grievance. In the alternative, the employee may ask EDR to investigate allegations of retaliation that results from the use of or participation in the

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<sup>11</sup> See *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999).

<sup>12</sup> 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 he wishes to challenge, correct, or explain information contained in his 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 his 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.*

<sup>13</sup> Va. Code § 2.2-3000(B); *Grievance Procedure Manual* § 1.4.

<sup>14</sup> See Va. Code § 2.2-3004(A). The following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).

<sup>15</sup> See *Gilliam v. S.C. Dep't of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

<sup>16</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

<sup>17</sup> *Grievance Procedure Manual* § 2.4.

grievance procedure.<sup>18</sup> Where EDR has investigated a complaint, its statutory authority is limited to advising the agency head of its findings.<sup>19</sup>

In this case, the grievant has alleged that actions or omissions by the agency and/or its IT department were in retaliation for his initiating and pursuing this grievance. Specifically, the grievant has cited as retaliatory the IT department's – and, by extension, the agency's – refusal to restore his classroom computer's CD drive; refusal to install his new classroom computers; and misrepresentation of the grievant's actions to supervisors. This alleged conduct occurred *after* the initial grievance (consistent with the claim that the conduct was in retaliation for that grievance). Therefore, the allegedly retaliatory conduct must be addressed either by separate grievance or, in the alternative, via a request to EDR to investigate whether the grievant suffered retaliation as a result of his participation in this grievance process.

### *Mediation*

In third resolution step communications related to this grievance, the primary relief the grievant still sought from the agency was a meeting between himself, the IT employee, and management. At each resolution step, the agency expressed its intention to facilitate such a discussion, though such a discussion has never occurred. While EDR will not mandate additional steps to improve the employment relationship, mediation may be a viable option for the parties to pursue if all participants are amenable to that approach. EDR's Workplace Mediation Program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and possible solutions. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. The parties may contact EDR at 888-232-3842 for more information about the Workplace Mediation Program.

EDR's qualification rulings are final and nonappealable.<sup>20</sup>



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<sup>18</sup> *Grievance Procedure Manual* § 1.5. An employee may not pursue both a retaliation investigation and a grievance on the same management action or omission alleged to be retaliatory.

<sup>19</sup> *Id.*

<sup>20</sup> See Va. Code § 2.2-1202.1(5).