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QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2019-4928
May 17, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR")[1] at the Virginia Department of Human Resource Management ("DHRM") on whether her March 5, 2019 grievance with the Department of Transportation (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

On or about February 6, 2019, the grievant's supervisor issued a Counseling Memorandum documenting alleged violations of DHRM Policy 1.60. The Memorandum described several specific comments by the grievant that were disrespectful to her supervisor and "eroded the morale of the work unit." The Memorandum also addressed the grievant's recent inappropriate access of an agency computer system to view a coworker's leave balance. In response to these alleged violations, the agency also issued to the grievant a Notice of Improvement Needed/Substandard Performance on February 11, 2019. The grievant asserts that the Memorandum and Notice are unfounded because her supervisor misrepresented her comments and because no one advised her that accessing others' leave balances is prohibited. She alleges that her supervisor's misrepresentations are retaliation for "concerns" the grievant raised to her supervisor's own supervisor, which has created a hostile work environment. The grievant seeks rescission of all "disciplinary action" against her and an end to "untruthful comments" and "retaliation." After the grievance proceeded through the management steps, the agency head declined to qualify the grievance for hearing. The grievant now appeals that determination to EDR.

[1] 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.

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 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.[4]

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."[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

Counseling Memorandum and Notice of Improvement Needed/Substandard Performance

Here, the grievant asks the agency to rescind the Counseling Memorandum on grounds that its account of her statements is false. While intentional misrepresentations by a supervisor are a legitimate concern, the Counseling Memorandum and Notice of Improvement Needed/Substandard Performance challenged here are both instances of written counseling, a type of informal supervisory action. They are not equivalent to a Written Notice of formal discipline, which the grievant's supervisor expressly declined to issue. 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] Therefore, the grievant's claims relating to the Memorandum and Notice do not qualify for a hearing.[9]

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[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).
[8] *See* 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 § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

Although the Memorandum and Notice have not adversely affected the grievant's employment, they could be used to support a future adverse employment action against the grievant. Should the informal supervisory actions grieved in this instance later serve to support an adverse employment action, such as a formal Written Notice or a "Below Contributor" 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 and/or Hostile Work Environment

The grievant contends more generally that her supervisor's alleged misrepresentation of her comments is a form of retaliation against her that creates a hostile work environment. In support of this claim, the grievant references "previous discussions" she had with her supervisor's own supervisor regarding "issues that have occurred involving" the grievant's supervisor, including a concern that her supervisor was already retaliating against her. For a claim of workplace harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question whether the conduct at issue was (1) unwelcome; (2) based on a protected status or protected activity;[10] (3) sufficiently severe or pervasive so as 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.[11] The "adverse employment action" requirement is satisfied if the facts raise a sufficient question whether the conduct at issue was so severe or pervasive as to alter the conditions of employment and to create an abusive or hostile work environment.[12] "[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."[13]

Having thoroughly reviewed the grievance record and the information provided by the parties, EDR cannot find that the facts as alleged raise a sufficient question whether the conduct at issue was so severe or pervasive as to alter the conditions of the grievant's employment. Even assuming that the grievant reasonably disagrees with her supervisor's recollection or interpretation of the comments at issue, prohibitions against retaliation and harassment do not establish a "general civility code" or prevent all objectionable conduct in the workplace.[14] Further, while the grievant's concerns about retaliation for her grievance activity may warrant further attention by the agency, no conduct occurring after the Counseling Memorandum – which preceded the filing of the grievance by 27 days – is apparent from the record.

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[10] *See* Va. Code § 2.2-3004(A). Only 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).

[11] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

[12] *See generally id.* at 142-43.

[13] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

[14] 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).

Accordingly, the facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.[15] Because the grievant has not raised a sufficient question as to the existence of severe or pervasive harassment reaching the level of an abusive or hostile work environment, the grievance does not qualify for a hearing on this basis.

Mediation

In the Counseling Memorandum, the grievant's supervisor expressed her intention to "work towards building a good working relationship with" the grievant, who herself seeks "confidence that the agency will not allow the [supervisor's] untruthful comments to continue." While EDR will not mandate additional steps to improve the employment relationship, mediation may be a viable option for the parties to pursue. 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.[16]

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[15] *See Grievance Procedure Manual* § 4.1. This ruling determines only that the grievant's claims do not qualify for an administrative hearing under the grievance procedure. It does not address whether there may be some other legal or equitable remedy available to the grievant in relation to this claim, or whether the supervisor's allegedly retaliatory conduct could justify the issuance of corrective and/or disciplinary action by the agency.
[16] *See* Va. Code § 2.2-1202.1(5).