Issue: Qualification – Work Conditions (co-worker conflict); Ruling Date: August 8, 2018; Ruling No. 2018-4755; Agency: Virginia Department of Health; 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 Virginia Department of Health
Ruling Number 2019-4755
August 8, 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 16, 2018 grievance with the Virginia Department of Health (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant initiated a grievance with the agency on March 16, 2018, challenging a "concern about [her] work environment" relating to a coworker's behavior. It appears that the grievant and the coworker were assigned to complete a project together and disagreed about the method of carrying out the task. The grievant subsequently received an email from the coworker stating that he wanted to communicate with the grievant only via email in the future. The grievant requested a meeting with management and the coworker to discuss her concerns about the coworker's conduct. She alleges that the coworker used "harsh, demeaning and defamatory words about [the grievant] and [her] work ethics" during the meeting. After proceeding through the management 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]

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[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).

Further, the grievance procedure generally limits grievances that qualify for a hearing 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]

Here, the grievant appears to allege that the coworker has engaged in discrimination and/or harassment that have created a hostile work environment. For a claim of workplace harassment to qualify for a hearing, 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; (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.[7] 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 and abusive or hostile work environment.[8] "[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."[9]

In support of her position, the grievant appears to contend that the coworker's conduct is based on her sex and/or race. As examples of the allegedly harassing and discriminatory behavior she has experienced, the grievant contends that the coworker has "us[ed] profanity and ma[de] derogatory and demeaning references to female colleagues and managers." She further asserts that, at the meeting she requested with management, the coworker "yelled and screamed" at her.[10] The grievant also argues that the coworker engaged in confrontational and inappropriate behavior with a speaker at a conference they both attended.

The grievant may be raising legitimate concerns about her employment and the co-worker's conduct. Having thoroughly reviewed the grievance record and the information provided by the parties, however, EEDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level to create an abusive or discriminatory hostile work environment. The alleged workplace harassment challenged by the grievant essentially involves alleged unprofessional conduct by the coworker, which does not generally rise to the level of an

[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] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[8] *See generally id* at 142-43.
[9] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[10] The grievant appears to additionally assert that her supervisor has used language she believes is offensive. However, EEDR has not reviewed information to show that the supervisor's conduct was related to the grievant's concerns about the coworker or was otherwise severe or pervasive.

adverse employment action or severe or pervasive conduct.[11] Prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[12] 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.

In addition, EEDR notes that the grievance record indicates the agency has looked into the grievant's concerns and has begun implementing a plan for improving conditions in her work unit. For example, the coworker's office was relocated to a different area to minimize in-person contact between the grievant and the coworker, and a training class has been held for employees in the grievant's work unit to foster more effective communication skills. In her response to the grievance, the second step-respondent also determined that the grievant's work unit would benefit from management intervention, including coaching and performance management, to improve the work environment. According to the agency, the actions recommended by the second step-respondent are currently in progress. Although the grievance does not raise a sufficient question as to whether the coworker has engaged in workplace harassment such that a hearing is warranted, EEDR finds that the agency has adequately addressed the grievant's concerns by limiting contact between the grievant and the coworker and taking other steps to prevent further alleged harassment from occurring in the future.[13]

Mediation

Finally, although this grievance does not qualify for a hearing, mediation may be a viable option for the parties to pursue. EEDR'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 work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. The parties may contact EEDR at 888-232-3842 for more information about EEDR's Workplace Mediation Program. To request mediation, an employee can contact the agency's workplace mediation coordinator.

EEDR's qualification rulings are final and nonappealable.[14]

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[11] *See generally* EDR Ruling No. 2012-3125 (and authorities cited therein).
[12] 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).
[13] This ruling does not mean that EEDR deems the alleged behavior of the grievant's coworker, if true, to be appropriate, only that the grievant's claim of workplace harassment does not qualify for a hearing. Moreover, this ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.
[14] *See* Va. Code §§ 2.2-1202.1(5).