Issues: Qualificaton – Management Actions (records disclosure/confidentiality) and Work Conditions (supervisory conflict); Ruling Date: August 31, 2018; Ruling No. 2019-4766; Agency: Department of Veterans 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 Veterans Services
Ruling Number 2019-4766
August 31, 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 his June 17, 2018 grievance with the Department of Veterans Services (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 June 17, 2018, alleging that his supervisor had (1) improperly issued him a Notice of Improvement Needed/Substandard Performance ("NOI") to address an issue with a dropped client claim[1]; (2) violated state policy relating to the confidentiality of personnel records; and (3) engaged in workplace harassment and/or retaliation. 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.[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 methods, means and personnel by which work activities are to be carried out generally do not

[1] The grievant received the NOI on July 11, 2018, several weeks after he initiated his grievance. Section 2.4 of the *Grievance Procedure Manual* provides that "challenges to additional management actions or omissions cannot be added" after a grievance has been initiated. However, the agency addressed the grievant's allegations regarding the NOI during the management steps and did not raise any claim of noncompliance regarding to this issue. *See Grievance Procedure Manual* § 2.4 ("The agency may raise [initiation] noncompliance at any point through the agency head's qualification decision."). Accordingly, EEDR deems the agency to have waived any such argument regarding the addition of the NOI to the grievance after it was initiated.

[2] *See Grievance Procedure Manual* § 4.1.

[3] Va. Code § 2.2-3004(B).

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, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

Notice of Improvement Needed/Substandard Performance

The grievant disputes the issuance of the NOI, arguing that he was treated differently than two similarly situated employees who also dropped claims. The agency has provided EEDR with information to show that the comparator employees were not similarly situated to the grievant. Neither employee, however, had a history of performance management; the grievant, on the other hand, has been counseled multiple times, both verbally and in writing, to address issues with his work performance. Under these circumstances, EEDR finds that there was a reasonable basis for the agency to decide an NOI was warranted for the grievant, while the comparator employees' dropped claims should be treated differently.

In addition, the grievant asserts that his supervisor failed to comply with DHRM Policy 6.05, *Personnel Records Disclosure*, and/or DHRM Policy 6.10, *Personnel Records Management*, by not giving him an opportunity to review evidence before receiving the NOI or to submit a rebuttal to management. According to the information in the grievance record, the grievant requested a delay in the issuance of the NOI to allow him an opportunity to review the evidence and respond. The grievant's supervisor declined this request. EEDR is unaware of any requirement in policy that an agency must allow time for an employee to review evidence or submit a rebuttal prior to the issuance of an NOI or other informal counseling document. Moreover, the agency has indicated that it provided the grievant with detailed information about the performance issues underlying the NOI during the management steps, and that the grievant has not requested anything further. Accordingly, EEDR finds no basis to conclude that the any misapplication and/or unfair application of policy occurred with regard to this issue.

Finally, EEDR further notes that the NOI is a form of written counseling. It is not equivalent to a Written Notice of formal discipline. A written counseling does not generally constitute an adverse employment action because such an action, in and of itself, does not have a

[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).

significant detrimental effect on the terms, conditions, or benefits of employment.[8] For these reasons, the grievant's claims relating to his receipt of the NOI do not qualify for a hearing. While the NOI has not had an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against the grievant. Should the NOI grieved in this instance later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.

Personnel Records Disclosure

The grievant contends that his supervisor violated DHRM Policy 6.05, *Personnel Records Disclosure*, by permitting another agency employee to attend a meeting between the grievant and his supervisor at which the grievant's work performance was discussed, and that the supervisor copied a co-worker on an email to the grievant that referred to the grievant's receipt of the NOI. The grievant further asserts that his supervisor violated DHRM Policy 1.75, *Use of Electronic Communications and Social Media*, by sending "sensitive data or records," apparently in the form of personnel information about the grievant, via email. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

DHRM Policy 6.05 generally prohibits disclosure of an employee's personal information—such as disciplinary and investigative records or records regarding grievances or complaints—without the written consent of the subject employee.[9] Here, EEDR has reviewed the information presented by the grievant and finds that it is unclear whether any "personal information," as defined by DHRM Policy 6.05, was actually disclosed to a third party. For example, it appears that another employee was present while the grievant's work performance was discussed at a meeting, but there is nothing to indicate that the employee reviewed records containing the grievant's personal information. Likewise, the email on which a co-worker was copied, and which refers to the issuance of the NOI, does not include a copy of the NOI itself, but instead states that the NOI will be issued to the grievant. EEDR has also not identified any specific provision of DHRM Policy 1.75 that the grievant's supervisor may have violated by using email to communicate with him about performance management issues, and the grievant has cited to none.

[8] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

[9] DHRM Policy 6.05 also provides that certain "individuals/agencies may have access to employee records without the consent of the subject employee," including "[t]he employee's supervisor," "higher level managers in the employee's supervisory chain," "[t]he employee's agency head or designee[,] and agency human resource employees . . . ." Notably, the list of such exceptions in the policy is "not all inclusive." Significantly, the employee who attended the meeting with the grievant and his supervisor is employed as a Deputy Regional Director. While she does not directly supervise the grievant, it would not be unreasonable for her to attend meetings about employee performance management.

More importantly, EEDR finds that the alleged conduct challenged by the grievant does not rise to the level of an adverse employment action such that qualification for hearing is warranted. The information provided by the parties does not indicate that any disclosure of the grievant's personal information and/or improper use of email, if they in fact occurred, resulted in a significant adverse effect on the terms, conditions, or benefits of his employment. While there can be little doubt that the grievant was reasonably concerned by what he believes to be an improper handling of his personal information, the alleged breach of confidentiality, if any occurred here at all, cannot be considered an adverse employment action for which qualification is warranted because there is nothing to demonstrate that it had a materially detrimental effect on the grievant's employment status. Accordingly, the grievance does not qualify for a hearing on this basis.

Workplace Harassment/Retaliation

Lastly, the grievant alleges that his supervisor has engaged in harassment and/or retaliation 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 or prior protected activity; (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.[10] 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 an abusive or hostile work environment.[11] "[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."[12]

In addition to the issuance of the NOI and his allegations relating to personnel records disclosure discussed above, the grievant argues that his supervisor has "threatened [him] with disciplinary actions" on two occasions for issues that did not warrant corrective action; uses a management style that "does not foster the option of open communication"; asked other agency employees about their perception of the grievant's work performance; decided that the grievant should not participate in an agency outreach activity; and directed the grievant to undergo a skills assessment. 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 retaliatory hostile work environment. Though the grievant may reasonably disagree with the issuance of the NOI and other supervisory actions, prohibitions against harassment do not provide a "general civility

[10] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[11] *See generally id* at 142-43.
[12] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

code" or prevent all offensive or insensitive conduct in the workplace.[13] In this case, the facts alleged by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.[14] 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.[15]

EEDR's qualification rulings are final and nonappealable.[16]

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[13] 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).

[14] *See Grievance Procedure Manual* § 4.1. This ruling only determines 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 unprofessional behavior could justify the issuance of corrective and/or disciplinary action by the agency.

[15] 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 for a hearing.

[16] *See* Va. Code §§ 2.2-1202.1(5).