Issue: Qualification – Work Conditions (employee/supervisor conflict, and other issue); Ruling Date: October 31, 2017; Ruling No. 2018-4635; 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 2018-4635
October 31, 2017

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management on whether his July 24, 2017 grievance with the Department of Behavioral Health and Developmental Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Dental Manager at one of the agency's facilities. On or about July 24, 2017, the grievant initiated a grievance disputing the contents of an email sent by a manager to his facility director. In the grievance, the grievant alleges that the email is professionally offensive and inaccurate. He further claims the email is "the start of a formal process to develop formal personnel actions against [him]" and is discriminatory and/or retaliatory in nature because he has been treated differently than another employee in his work unit. As relief, the grievant seeks an apology from the manager, to be "respected as [a] professional," and to "have a continued positive and recognized role" in the agency's mission. 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, as well as the contents of statutes, ordinances, personnel policies, procedures, rules, and regulations, 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]

[1] *See Grievance Procedure Manual* § 4.1.
[2] *See* Va. Code § 2.2-3004(B).
[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

Adverse Employment Action

Further, while grievances that allege discrimination and/or retaliation may qualify for a hearing, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Thus, typically, a 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]

Based on the facts presented to EEDR, it does not appear that the allegedly improper email challenged in this case constitutes an adverse employment action. In the email, the manager discussed issues that she believed were occurring at the grievant's facility and proposed a means for addressing some of those issues. While the grievant may disagree with the manager's understanding of events or her method of communicating her concerns, the email appears to have been reasonably intended to address work-related matters relating to the services provided by the grievant and his work unit. Having thoroughly reviewed the information in the grievance record, EEDR finds that the grievant has not presented evidence that raises a sufficient question as to whether he has experienced an adverse employment action, as there is nothing to show that the email had a significant detrimental effect on the terms, conditions, or benefits of his employment. Accordingly, the grievance does not qualify for a hearing on this basis.[7]

Hostile Work Environment

In addition, the grievant's challenge to the email and related issues, taken as a whole, could amount to a claim of workplace harassment or hostile work environment. 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]

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[4] *See Grievance Procedure Manual* § 4.1(b).
[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] *See, e.g.*, Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] Although the grievant has not alleged an adverse employment action at this time based on EEDR's review of the facts presented in the grievance, this ruling does not prevent the grievant from filing a subsequent grievance should further or related issues occur in the future.
[8] *See generally* Gillam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[9] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

After reviewing the facts as presented by the grievant, EEDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment. The allegedly hostile work environment challenged by the grievant essentially involves work-related conflict and difficulties relating to the completion of a project and conduct by the manager the grievant alleges is unprofessional, which do not generally rise to the level of adverse employment actions or severe or pervasive conduct.[10] Prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[11] Because the grievant has not raised a sufficient question as to the existence of an abusive or hostile work environment, the grievance does not qualify for a hearing on this basis.

Mediation

In his request for a qualification ruling, the grievant further asks EEDR to "arrange an informal meeting" with management if the grievance does not proceed to a hearing. While this Office will not mandate such a meeting, to the extent we have authority to do so, 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 the Workplace Mediation Program.

EEDR's qualification rulings are final and nonappealable.[12]

Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

[10] *See* EDR Ruling No. 2011-2891 (and authorities cited therein).
[11] 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. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).
[12] Va. Code § 2.2-1202.1(5).