Issues: Qualification – Discipline (counseling memo), Retaliation (other protected right), and Discrimination (other): Ruling Date: November 6, 2017; Ruling No. 2018-4637; Agency: Virginia Department of Transportation; 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 Transportation
Ruling Number 2018-4637
November 6, 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 her August 14, 2017 grievance with the Virginia Department of Transportation (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about July 19, 2017, the grievant received a Written Counseling to address alleged issues relating to unsatisfactory work performance and communication. The grievant initiated a grievance on August 14, 2017, alleging that the Written Counseling was the result of a "[b]iased investigation" and was issued "in retaliation for a hostile work environment issue."[1] After proceeding through the management resolution 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 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]

---

[1] According to the agency, the grievant also filed a complaint of discrimination and retaliation with its Civil Rights Division on August 11, 2017. The agency appears to have determined that the grievant's complaint was unfounded.
[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).

Written Counseling

In this case, the grievant disputes the agency's issuance of the Written Counseling on the basis that her work performance was acceptable, and that her supervisor issued the Written Counseling in an "attempt to discredit [her] due to [her] hostile work environment complaints."[5] While grievances challenging these issues may qualify for a hearing, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."[6] 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8]

The management action challenged here—a Written Counseling—is not equivalent to a Written Notice of formal discipline. EEDR has long held that a 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.[9] The issuance of the Written Counseling was not an adverse employment action and, therefore, the grievant's claims relating to her receipt of the Written Counseling do not qualify for a hearing.[10]

While the Written Counseling 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 Written Counseling 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

---

[5] The grievant also asserts that the agency has not "provided information . . . that may have supported [her] position" in response to a request for documents she submitted during the management steps. To the extent the agency has not produced relevant documents to the grievant, EEDR finds that any such noncompliance with the grievance procedure is moot at this time because the Written Counseling does not constitute an adverse employment action as discussed below. However, the agency is reminded that Section 8.2 of the *Grievance Procedure Manual* provides that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved, shall be made available upon request from a party to the grievance, by the opposing party."

[6] *See Grievance Procedure Manual* § 4.1(b).

[7] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[8] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

[9] *See, e.g.*, EDR Ruling No. 2017-4443, EDR Ruling No. 2017-4434, EDR Ruling No. 2017-4419; *see also* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

[10] Although this grievance 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.*

attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.

Hostile Work Environment

In addition, the grievant argues that her supervisor has engaged in discrimination and/or retaliation that has 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.[11] 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.[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]

In this case, the grievant has not identified any protected status on which her supervisor's allegedly harassing conduct is based.[14] Instead, the grievant claims her supervisor's actions are part of a "campaign to retaliate against [her] by defaming [her] reputation" because she previously expressed concerns about her supervisor to agency management. Such conduct could arguably amount to protected conduct to support a claim of retaliation.[15] However, in this case, the facts alleged by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.[16] Though the grievant may reasonably disagree with the issuance of the Written Counseling and other aspects of her supervisor's conduct, prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[17] 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.[18]

---

[11] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[12] *See id.*
[13] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[14] *See* Executive Order 1 (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.
[15] *See* Va. Code § 2.2-3000(A).
[16] *See Grievance Procedure Manual* § 4.1.
[17] 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).
[18] The grievant further claims that, "[d]ue to the continued retaliation" since she initiated her grievance, she has been advised to file an additional complaint with the agency's Civil Rights Division. Although the grievant has not identified a protected status on which she believes her supervisor's allegedly discriminatory conduct is based, should additional actions occur that the grievant believes are discriminatory and/or retaliatory, this ruling does not limit the grievant's right pursue her concerns through available agency processes or initiate subsequent grievances challenging those actions.

CONCLUSION

For the reasons set forth above, this grievance does not qualify for a hearing. EEDR's qualification rulings are final and nonappealable.[19]

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

[19] *See* Va. Code § 2.2-1202.1(5).