Issues: Qualification – Grievance Procedure (other issue), and Retaliation (whistleblowing); Ruling Date: November 27, 2018; Ruling No. 2019-4799; Agency: Virginia Correctional Enterprises; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of Virginia Correctional Enterprises
Ruling Number 2019-4799
November 27, 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 July 5, 2018 grievance with Virginia Correctional Enterprises (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

On or about June 8, 2018, the grievant was issued a Group I Written Notice for sleeping during work hours. On July 5, 2018, the grievant initiated a grievance challenging the disciplinary action and alleged retaliation by the agency. During the management resolution steps, the agency rescinded the Written Notice at the second step, concluding that because he was a passenger in a vehicle and playing no "active role" at the time he was sleeping, removing the disciplinary action was appropriate. The grievant advanced his grievance to the third step, stating that he had only been granted partial relief, because his grievance requested that disciplinary action be given to his supervisor, and the agency had not addressed the "retaliation that caused the write-up."

The third step respondent declined to grant further relief, asserting that the discipline of another employee cannot be addressed with the grievant. The third step respondent also indicated that he would forward the grievant's complaint of retaliation to the agency's human resource department. Following receipt of this response, the grievant requested qualification of his grievance for hearing. The agency head denied the grievant's request, and the grievant now appeals that determination to EEDR.

DISCUSSION

Written Notice

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] Furthermore, EEDR has recognized that even if a grievant's allegations are true there are still some cases when qualification is inappropriate, even if law and/or policy has been violated or misapplied. For example, during the resolution steps, an issue may have become moot, either

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

because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In this case, the agency has rescinded the Group I Written Notice challenged by the July 5, 2018 grievance. At hearing, the agency would be required to show that the grieved disciplinary action was warranted and appropriate under the circumstances;[2] and in the event the agency failed to carry its burden, the potential remedy would be for the hearing officer to order that the discipline be rescinded.[3] However, this relief has already been granted by the agency. Because a grievance hearing on this matter would be unable to provide the grievant any other relief beyond that which has already been granted,[4] there is no reason for this issue to proceed to a hearing. The grievance is therefore not qualified and will not proceed further.

Retaliatory Harassment

Fairly read, the grievance also appears to allege a claim of retaliatory harassment.[5] For a claim of hostile work environment or workplace harassment to qualify for a hearing, the grievant must present evidence that raises 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.[6] "[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."[7]

The grievant alleges that as a result of reporting his supervisor's improper conduct to agency management, his supervisor has engaged in "inappropriate statements and actions" against him, as well as issuing disciplinary action to the grievant.[8] However, after reviewing the facts as presented by the grievant, EEDR cannot find that any alleged management actions rose to a sufficiently severe or pervasive level such that an unlawfully abusive or hostile work environment was created at this time, as there is no indication that the terms, conditions, or benefits of the grievant's employment were detrimentally impacted.[9] As courts have repeatedly noted, prohibitions against harassment do not provide a "general civility code" or remedy all

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[2] *See Rules for Conducting Grievance Hearings* § VI(B)(1).
[3] *Id.*
[4] While the grievant requests disciplinary action be taken against his supervisor, the hearing officer has no authority to order the agency to issue disciplinary actions to an employee.
[5] The grievant also claims that he has reported new incidents of allegedly retaliatory harassment by his supervisor. To challenge a new management action or omission occurring after the initiation of a grievance, an employee would need to file a new grievance, since once the grievance is initiated, challenges to additional management actions or omissions cannot be added. *See Grievance Procedure Manual* § 2.4.
[6] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[7] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[8] The grievant further asserts that the Written Notice was part of this pattern of retaliatory harassment. As we have addressed the rescinded Written Notice previously in this ruling, it will not be considered again here.
[9] *See generally* EDR Ruling No. 2012-3125 (and authorities cited therein).

offensive or insensitive conduct in the workplace.[10] For these reasons, the grievant's retaliatory harassment claim does not qualify for a hearing.[11]

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

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[10] 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).

[11] However, this ruling does not preclude the grievant from presenting the issues raised here as background evidence, if relevant, in any future grievance about subsequent agency actions should the alleged conduct continue or worsen.

[12] *See* Va. Code §§ 2.2-1202.1(5).