Issues: Qualification – Discipline (counseling memo), and Work Conditions (supervisor/ employee conflict); Ruling Date: December 21, 2018; Ruling No. 2019-4819; Agency: Department of Social 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 Virginia Department of Social Services
Ruling Number 2019-4819
December 21, 2018

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 8, 2018 grievance with the Virginia Department of Social Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about July 11, 2018, the grievant was issued a Memorandum (the "Counseling Memo") to address an incident regarding her work performance. The grievant initiated a grievance on August 8, 2018, claiming that her supervisor had engaged in "Bullying, Harassment, and Intimidating [behavior]" and citing the Counseling Memo as an instance of the supervisor's allegedly improper behavior. After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head's designee. 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]

Counseling Memo

In this case, the grievant appears to dispute the issuance of the Counseling Memo. While grievances that allege workplace harassment may qualify for a hearing, the grievance procedure

[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).

generally limits grievances that qualify 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]

The management action challenged here—a Counseling Memo—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.[7] The issuance of the Counseling Memorandum was not an adverse employment action and, therefore, the grievant's claims relating to her receipt of the Counseling Memo do not qualify for a hearing.[8]

While the Counseling Memo 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 Counseling Memo 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.

Hostile Work Environment

Fairly read, the grievant also alleges that her supervisor has engaged in harassment and/or bullying 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

[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, 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).
[8] 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 he 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.*

the agency.[9] 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.[10] "[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."[11]

In support of her assertion that her supervisor engaged in harassing and/or intimidating behavior, the grievant claims that her supervisor approached her at her desk and reprimanded her publicly, and displayed aggression on multiple instances. Having reviewed 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. Though the grievant may reasonably disagree with the issuance of the Counseling Memo and/or her supervisor's behavior, prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[12] In this case, the facts alleged by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.[13] 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.[14]

EEDR's qualification rulings are final and nonappealable.[15]

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[9] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[10] *See id.*
[11] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[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] *See Grievance Procedure Manual* § 4.1.
[14] Should additional actions occur that the grievant believes are harassing in nature, this ruling does not limit the grievant's right to initiate subsequent grievances challenging those actions.
[15] Va. Code § 2.2-1202.1(5).