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## QUALIFICATION RULING

In the matter of the Department of Corrections  
Ruling Number 2022-5302  
October 4, 2021

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) on whether her May 20, 2021 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

### FACTS

In March 2021, the grievant completed her probationary period with the agency. At that time, she understood she was eligible for a salary increase for successfully completing her initial training. When the grievant did not receive the salary increase as expected, she contacted management and human resources at the facility where she worked to ask about her pay. On or about April 27, 2021, management at the facility addressed with the grievant concerns about alleged attendance issues between April 18 and 23. The grievant states that she was unable to work on April 18 and 19 due to a medical issue, and that she was providing care for her sick child on April 22 and 23.

The grievant filed a grievance with the agency on May 20, 2021, in which she appears to challenge management’s decision to address attendance concerns with her on April 27 because she had not previously been counseled or disciplined for attendance issues. As relief, the grievant requested that management “be more professional and be truthful when writing any report” and for the agency to retroactively approve the salary increase she should have received after completing her probationary period.<sup>1</sup> Following the management resolution steps, the agency head subsequently determined that the grievance record did not contain evidence demonstrating that the grievant had experienced an adverse employment action and declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

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<sup>1</sup> In her grievance, the grievant apparently acknowledges that she received the salary increase beginning in May 2021, but sought back pay beginning when her probationary period ended in March 2021. As described below, the grievant has apparently received the pay she sought and is no longer challenging the issue of the salary increase.

After filing the grievance, the grievant received notice on June 22, 2021 that she was assigned to the night shift beginning on June 26. The grievant reported to work on June 26 but left early due to a medical issue. She subsequently filed a claim for short-term disability and has not returned to work since June 26. A portion of the grievant's absence appears to have been approved for short-term disability; however, at some point she was placed on leave without pay and her disability claim was ultimately denied. After the grievant requested this qualification ruling from EDR, the agency issued to her a Group III Written Notice with termination on September 15.<sup>2</sup>

### 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.<sup>3</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>4</sup> Thus, claims relating to issues such as the means, methods, 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.<sup>5</sup>

Further, while grievances that allege retaliation or other misapplication of policy may qualify for a hearing, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."<sup>6</sup> Typically, then, 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."<sup>7</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>8</sup>

In this case, the grievant alleges that, after she raised questions about a salary increase in March 2021, management retaliated against her by addressing concerns about her attendance from April 18 through 23. During the management steps, the agency confirmed that the grievant was permitted to use leave for her absences in April and that she had received all back pay due to her in connection with the salary increase. The grievant does not appear to dispute that these matters have been resolved. Nonetheless, she continues to argue that management has retaliated against

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<sup>2</sup> The grievant has been advised of the steps she can take to file a dismissal grievance to challenge her disciplinary termination if she so chooses. As of the date of this ruling, EDR has not yet received a dismissal grievance. If the grievant wishes to do so, the grievance must be submitted within 30 calendar days of receiving the termination documentation.

<sup>3</sup> See *Grievance Procedure Manual* § 4.1.

<sup>4</sup> Va. Code § 2.2-3004(B).

<sup>5</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>6</sup> Va. Code § 2.2-3004(A); see *Grievance Procedure Manual* § 4.1(b).

<sup>7</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>8</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

her, not only with regard to the original attendance matter but also by assigning her to the night shift<sup>9</sup> in June and later issuing the Group III Written Notice with termination in September.<sup>10</sup>

Initially, and to the extent the grievant is attempting to challenge either her assignment to the night shift or her receipt of the Group III Written Notice directly, additional management actions or omissions cannot be added to a grievance after it is filed.<sup>11</sup> The grievant may file another grievance, if timely, to challenge additional management actions or omissions, including her termination. Any such grievance must comply with the initiation requirements of the grievance procedure, as set forth in section 2.4 of the *Grievance Procedure Manual*.

Turning to the issue challenged in the grievance – management addressing attendance concerns with the grievant on April 27, 2021 – the information in the grievance record suggests that this management action essentially amounted to counseling, which is a type of informal corrective action.<sup>12</sup> Counseling is not equivalent to a Written Notice of formal discipline and 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.<sup>13</sup> Significantly, the parties appear to agree that the grievant used leave for her absences in April and thus experienced no loss in pay. The grievant also agrees that she has received all back pay to which she is entitled, and there is no evidence before EDR to suggest that management’s actions in April 2021 had any other effect on the terms, conditions, or benefits of her employment. As such, though the grievant understandably disagrees with management’s decision, EDR must conclude that she has not experienced an adverse employment action within the scope of this grievance.

Regarding the grievant’s allegation that management retaliated against her, a claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) they engaged in a protected activity; (2) they suffered an adverse employment action;

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<sup>9</sup> Although the grievant’s assignment to night shift is not a subject of this grievance as it occurred after the grievance was filed, the grievant’s assertions to challenge this assignment as retaliation could be the subject of a retaliation investigation request. EDR has authority to investigate allegations of retaliation for use of or participation in the grievance procedure. *See Grievance Procedure Manual* § 1.5. If the grievant were to return to work for the agency and her night shift assignment remains, the grievant may decide to seek such an investigation from EDR at that time. EDR would assess the circumstances as to whether the matter is appropriate for investigation at that time.

<sup>10</sup> The grievant also appears to argue that the agency failed to comply with the grievance procedure during the management steps, noting she did not receive all of the management responses within five workdays. The *Grievance Procedure Manual* states that “[a]ll claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time.” *Grievance Procedure Manual* § 6.3. From the evidence before EDR, it is unclear whether the grievant notified the agency about the alleged noncompliance; to the extent she did, those issues were apparently corrected because she ultimately received each management response. Moreover, the grievant did not request a ruling from EDR or otherwise halt the grievance process to correct any matters of alleged noncompliance at the time they occurred. *See id.* Based on these facts, EDR finds that the alleged issues of noncompliance described in the grievant’s request for qualification were either corrected during the management steps or have been waived at this point, based on her continuation of the grievance beyond the agency head’s qualification decision.

<sup>11</sup> *Grievance Procedure Manual* § 2.4.

<sup>12</sup> *See* DHRM Policy 1.60, *Standards of Conduct*, at 6.

<sup>13</sup> *See* *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999).

and (3) a causal link exists between the protected activity and the adverse action.<sup>14</sup> Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.<sup>15</sup> Even assuming that the grievant engaged in protected activity by attempting to address concerns about her salary,<sup>16</sup> the grievance record does not reflect that she has suffered an adverse employment action as described above. Further, the grievant has not identified acts or omissions that could reasonably be viewed as exceeding managerial discretion or would not have occurred but for a retaliatory motive.

### CONCLUSION

For the reasons expressed above, the facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.<sup>17</sup> EDR's qualification rulings are final and nonappealable.<sup>18</sup>

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<sup>14</sup> See *Netter v. Barnes*, 908 F.3d 932, 938 (4th Cir. 2018) (citing *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013)); *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 900-901 (4th Cir. 2017).

<sup>15</sup> *Id.*

<sup>16</sup> See Va. Code § 2.2-3000(A).

<sup>17</sup> See *Grievance Procedure Manual* § 4.1.

<sup>18</sup> See Va. Code § 2.2-1202.1(5).