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QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2022-5315
November 5, 2021

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether her grievance filed with the Virginia Department of Transportation (the "agency") on June 25, 2021 qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant is employed as a Business Administrator for one of the agency's residencies. On May 26, 2021, she received a counseling memorandum related to her oversight of employee leave approval within the residency. An earlier investigation had concluded that some residency employees who normally worked 10-hour days had been improperly supplementing 8-hour state holidays with sick leave to satisfy their work-hours requirements. The memorandum alleged that the grievant "failed to review [leave] submissions and to use available resources before approving inappropriate leave and timesheet data." On or about June 25, 2021, the grievant filed a grievance challenging the counseling memorandum as an inappropriate means of setting new job expectations, and seeking to "learn why someone else is labeling [her] review and verification of time entries as incorrect." During the management steps, the grievant argued that her leave processing responsibilities are administrative, not supervisory, and thus she lacks authority to verify individual employees' reasons for using sick leave.[1] Her managers disagreed, however, maintaining that the grievant, as a manager herself, should have been concerned by "repetitive sick leave depicting a glaring pattern" and taken initiative to ensure the agency's compliance with state leave policies.[2] The agency declined to qualify the grievance for a hearing, and the grievant now appeals that determination to EDR.

[1] The grievant noted that employees may properly schedule medical appointments on state holidays, and she has not been given authority to inquire about such circumstances or to request documentation from individual employees claiming sick leave. As a result, she explained, she feels it most appropriate to assume that the type of leave noted on an employee's timesheet is the result of their conversations with their respective managers, and not to assume that the leave designation is improper.

[2] The third-step response also indicated that the agency was developing new training to address leave oversight.

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.[3] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[4] 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, whether state policy may have been misapplied or unfairly applied, or whether a performance evaluation was arbitrary and/or capricious.[5]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] 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."[7] Adverse employment actions include agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8]

The grievant has disputed whether her performance merited the counseling memorandum she received. Such written counseling is an example of informal supervisory action. It is not equivalent to a written notice of formal discipline.[9] 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.[10] Because the record does not raise a sufficient question as to whether the grievant has experienced an adverse employment action, this grievance does not qualify for a hearing.[11]

Although the counseling memorandum has not had a tangible adverse effect on the grievant's employment at this time, it could be used to support a future adverse employment action

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[3] *See Grievance Procedure Manual* § 4.1.
[4] Va. Code § 2.2-3004(B).
[5] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[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* DHRM Policy 1.60, *Standards of Conduct*.
[10] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[11] Because the issue before EDR is whether this grievance qualifies for a hearing, our ruling does not address the merits of the counseling memorandum or the scope of the grievant's job responsibilities with respect to leave oversight. In addition, while the 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.*

against the grievant.[12] It appears that the counseling memorandum and subsequent discussions with management have left the grievant with outstanding questions about her authority to question the basis of leave entries for employees not under her supervision. We encourage the parties to continue dialogue on this issue as necessary to maximize clarity regarding the grievant's job expectations. Should the counseling memorandum grieved in this instance later serve to support an adverse employment action, such as a formal Written Notice or an annual performance rating of "Below Contributor," this ruling does not prevent the grievant from contesting the merits of these issues through a subsequent grievance challenging such a future related adverse employment action.

EDR's qualification rulings are final and nonappealable.[13]

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[12] The memorandum advises the grievant that, "should your performance or other issues arise in the future, you may be subject to formal disciplinary action for each occurrence, which could lead to suspension or termination of your employment."
[13] *See* Va. Code § 2.2-1202.1(5).