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QUALIFICATION RULING

In the matter of George Mason University
Ruling Number 2022-5356
February 8, 2022

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether his grievance filed with George Mason University (the "university" or "agency") on October 25, 2021 qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The university employs the grievant as a police officer. On October 19, 2021, the university's police chief issued a counseling letter to the grievant regarding allegations that the grievant failed to respond when another officer radioed for help during a physical altercation with a criminal suspect. Although an internal investigation did not sustain most of the allegations against the grievant, the counseling letter stated in strong terms that the chief was dissatisfied with the grievant's job performance during the incident. In particular, the chief expressed consternation that the grievant did not use an earpiece to hear radio calls and was not certain of the university's jurisdiction.

On October 25, 2021, the grievant initiated a grievance seeking to have the counseling letter rescinded. At the second management resolution step, the chief proposed to resolve the grievance by withdrawing the counseling letter in favor of verbal counseling on the two performance issues.[1] However, the grievant rejected the proposed resolution on grounds that the internal investigation had revealed that the altercation in question was minor, and the officer involved had never called for assistance from officers not already on the scene, like the grievant. The grievant alleged that the chief knew these details and yet still reprimanded him as if he had actually ignored an officer's request for assistance. Accusing the chief of defamation, the grievant demanded a "full retraction of all records of the unfounded investigation against him, as well as a retraction of all records of 'wrongdoing' and 'confusion' and 'lack of responsiveness'" related to

[1] The record indicates that the chief had already withdrawn the initial counseling letter and issued a revised letter on November 5, 2021, removing certain commentary but maintaining the substantive concerns expressed in the initial letter.

the grievant.[2] The agency head declined to grant additional relief or to qualify the grievance for a hearing, and the grievant now appeals the latter determination to EDR.

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 maintains that the agency's counseling, whether written or verbal with a written record, constitutes formal discipline. However, per section 4.1 of the *Grievance Procedure Manual*, written counseling and oral reprimands are examples of informal supervisory actions that "do not qualify for a hearing."[9] They are not equivalent to a written notice of formal discipline.[10] 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.[11]

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[2] The grievant also requested that the chief's "wrongdoing" be documented in both the grievant's and the chief's employment records, that the chief and the university issue a written apology for the accusations against him, and "an official statement" from the university "describing the actions that will be taken to protect [the grievant] from retaliation of this nature in the future."
[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] *Grievance Procedure Manual* § 4.1(c)(8) (giving "Formal (Written) Counseling" as an example of an informal supervisory action).
[10] *See* DHRM Policy 1.60, *Standards of Conduct*, at 6-7 (distinguishing between "Formal (Written) Counseling" and "Written Notices").
[11] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999). The grievant argues that EDR has previously treated a written counseling as an adverse employment action. *See* EDR Ruling No. 2020-5023; *see also* Hearing Decision, Case No. 11496, Oct. 9, 2020. In that unusual case, the counseling memo at issue resulted in a reassignment of the grievant to "markedly different duties" with a change in schedule and withdrawal of access to certain agency property.

Nevertheless, the grievant contends that the grievance should qualify for a hearing because "the agency did not consider all of the facts" and because disciplinary motives prompted the chief's assignment for the grievant to conduct training on the university's jurisdiction. Neither argument, even if true, indicates that the grievant has experienced an adverse employment action. The substance of the university's management step responses in this case does not in itself create a tangible employment action or an adverse effect on the terms, conditions, or benefits of the grievant's employment. This threshold standard is also a hearing qualification requirement for management actions "that are not accompanied by formal discipline (a Written Notice) but which are taken primarily for disciplinary reasons."[12] Here, even if the chief's standing instructions to the grievant were motivated by dissatisfaction with the grievant's job performance, we perceive nothing punitive about wearing an earpiece or assisting with training, such that these directives would rise to the level of an adverse employment action.

Finally, the grievant argues that the internal affairs investigation and its findings constitute an adverse employment action under Virginia Code section 15.2-1705. Under this statute, when a law-enforcement agency intends to hire a police offer formerly employed by a different agency, the hiring agency "shall request from all prior law-enforcement agencies or jails any information . . . obtained during the course of any internal investigation related to a former police officer's . . . official misconduct in violation of the state professional standards of conduct adopted by the Criminal Justice Services Board . . . ."[13] The grievant appears to contend that, because this statute may require the university to report the allegations sustained by its internal investigation to the grievant's potential future employers, the grievant has experienced an adverse employment action.

EDR cannot agree that the results of the internal investigation, as apparent from the grievance record, raise a sufficient question whether the grievant has experienced a tangible adverse effect on the terms, benefits, or conditions of his employment with the university. It appears that the investigation sustained allegations that the grievant did not properly respond to a motor vehicle accident due to misunderstanding of the university's law-enforcement jurisdiction. As a result, the grievant received written counseling, an informal supervisory action. The grievant has not been separated, suspended, demoted, or otherwise formally disciplined. The record does not indicate a reduction in pay, loss of benefits, or a reassignment with significantly different responsibilities. The possibility that the grievant may seek employment with another law-enforcement agency in the future, and that the university may disclose the results of its internal investigation to such a prospective employer, does not in itself create an adverse employment action that qualifies for a hearing at this time.[14]

Here, by contrast, we perceive nothing to indicate that a reassignment or other significant change in the grievant's employment situation has occurred.

[12] *Grievance Procedure Manual* § 4.1(b)(5).

[13] Va. Code § 15.2-1705(B).

[14] Because this ruling addresses only the question of whether the grievance qualifies for a hearing, EDR takes no position on the merits of either the revised counseling letter or the grievant's defamation claim against the chief. We note that defamation, as a legal cause of action, would not be within the scope of the hearing officer's authority to grant relief to the extent the grievant sought monetary damages. *See Grievance Procedure Manual* § 5.9(b); *Rules for Conducting Grievance Hearings* §§ VI(C), (D). However, 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 he wishes to challenge, correct, or explain information contained in his 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

Although the counseling letter 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 against the grievant. Should the counseling letter grieved in this instance later serve to support an adverse employment action against the grievant, 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.[15]

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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.*

[15] *See* Va. Code § 2.2-1202.1(5).