Issue: Qualification – Work Conditions (co-worker conflict); Ruling Date: August 21, 2017; Ruling No. 2018-4586; Agency: Department of Game and Inland Fisheries; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution[1]

QUALIFICATION RULING

In the matter of the Department of Game and Inland Fisheries
Ruling Number 2018-4586
August 21, 2017

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 his February 2, 2017 grievance with the Department of Game and Inland Fisheries (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

On or about February 2, 2017, the grievant initiated a grievance alleging that several agency employees had created a "demeaning [and] humiliating" video recording of which he was the subject, and showed the video to other employees. In the grievance, the grievant asserts that the employees who made the video engaged in "[u]nacceptable behavior and misconduct" that created a hostile work environment. After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. 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.[2] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] 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.[4]

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[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. The *Grievance Procedure Manual* has now been updated to reflect this Office's name post-merger as the Office of Equal Employment and Dispute Resolution.
[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

Here, the grievant essentially alleges that several agency employees engaged in inappropriate and harassing behavior that created a hostile work environment. For a claim of hostile work environment or 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 the agency.[8] 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 and abusive or hostile work environment.[9] "[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."[10]

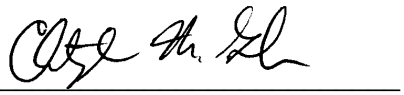
In this case, the grievant has not alleged that the offending conduct was based on a protected status or prior protected activity and, while the grievant's concerns are understandable, prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[11] However, even assuming without deciding that the grievant's allegations are true and the grieved management actions rose to a sufficiently severe or pervasive level to create a hostile work environment, a hearing officer would be unable to address this claim effectively were the grievance qualified for a hearing. While EEDR certainly does not condone the employees' behavior, there are some cases where qualification of a grievance is inappropriate even if a grievance challenges a management action that might qualify for a hearing, such as workplace harassment. For example, during the resolution steps, an issue may have become moot, either 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

[5] *See Grievance Procedure Manual* § 4.1(b).
[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[8] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[9] *See generally id.* at 142-43.
[10] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[11] 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).

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.

This case presents a situation where a hearing officer would be unable to award any meaningful relief under the grievance procedure. Events that happened after the grievant initiated his grievance have rendered his claims regarding the alleged harassment moot. While this ruling was pending with EEDR, the grievant resigned from employment with the agency. At a hearing to determine whether agency employees had engaged in workplace harassment, a hearing officer would have the authority to "order the agency to create an environment free from" the allegedly harassing behavior or "take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence."[12] Even if the grievant were able to establish that workplace harassment had occurred in this case, the relief available through the grievance process would be meaningless because the grievant is no longer employed by the agency.[13] For example, a hearing officer does not have the authority to take disciplinary action against another agency employee, such as those who are alleged to have created the hostile work environment here.[14] EEDR does not generally grant qualification for a grievance hearing to determine whether agency employees created a hostile work environment where, as here, a direction from a hearing officer to cease the offending conduct would have no effect because the grievant no longer works in the allegedly harassing environment. Accordingly, the grievance is not qualified and will not proceed further.

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



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[12] *Rules for Conducting Grievance Hearings* § VI(C)(3).
[13] In addition, it is unclear whether additional relief beyond the actions taken by the agency during the management resolution steps would be available through the grievance process, even were the grievant still employed by the agency. After the grievance was filed, the agency investigated the grievant's allegations and issued corrective action to several employees for their roles in the incident described in the grievance. Prior to his resignation, the grievant was offered, and accepted, a transfer to a different office location. Furthermore, the agency advised the grievant that all copies the video that had been distributed were deleted, that any remaining copies were retained solely as part of the investigative file, and that the investigative file will be destroyed when appropriate under state records retention policies. The grievant has further requested as relief that there be no retaliation against him or other employees who provided information during the grievance process, additional promotional opportunities and a salary increase, and confirmation of who viewed the video recording. While a hearing officer may direct an agency to "create an environment free from discrimination and/or retaliation" if they have occurred or to reapply policy properly if it has been misapplied and/or unfairly applied, *Rules for Conducting Grievance Hearings* § VI(C), a hearing officer cannot direct "the methods, means or personnel" by which agency work activities are carried out, *Grievance Procedure Manual* § 5.9(b), or mandate a specific outcome under policy unless "written policy requires a particular result without the exercise of agency discretion," *Rules for Conducting Grievance Hearings* § VI(C)(1).
[14] *Grievance Procedure Manual* § 5.9(b).
[15] *See* Va. Code § 2.2-1202.1(5).