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QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2021-5153
October 21, 2020

The grievant seeks a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") as to whether his July 8, 2020 grievance with the Virginia Department of Transportation (the "agency") qualifies for a hearing. For the reasons set forth below, the grievance is not qualified for a hearing.

FACTS

The grievant works for the agency as a Transportation Operator II. On March 30, 2020, the grievant was part of a work crew assigned to a road patching job, which entailed spreading a layer of stone from a truck over wet asphalt. The grievant operated the truck, driving it in reverse over the asphalt while two other operators on the back of the truck attended to spreading the stone layer properly. While the grievant was driving during this operation, the truck hit a power line, causing it to snap. After an investigation, the agency determined that the incident was preventable and that the grievant, as the truck operator, bore some responsibility. On June 10, 2020, the agency issued to the grievant a Group I Written Notice on grounds that he should have taken actions to prevent damaging the power line.[1]

On or about July 8, 2020, the grievant initiated a grievance challenging the Written Notice, asking the agency to remove the discipline, hold other responsible parties accountable, provide monetary compensation for stress related to the incident, and prevent any retaliation against him. He argued that, in the driver's seat, he had no visibility to the rear of the truck and, per the agency's standard practice for such operations, he relied on the operator at the back of the truck on the driver's side to guide him with hand signals and to alert him of any hazards. He alleged that agency management was unfairly blaming him for the incident based on racial discrimination and retaliation.[2] Acknowledging that the grievant was an experienced operator with a good safety

[1] While the agency noted the risk that such incidents pose to people and agency property, it appears that no such harm occurred in this instance.

[2] The grievant alleges that the agency issued him a Group I Written Notice in retaliation for a charge of racial discrimination he had filed with the U.S. Equal Employment Opportunity Commission, still pending when the Written Notice was issued. The grievance record indicates that the agency referred the new discrimination and retaliation allegations in the grievance for investigation by its Civil Rights Division, which did not sustain them.

record, the second-step respondent reduced the Written Notice to a counseling letter, noting that the grievant had still been responsible for identifying hazards like the power line before beginning the operation. The grievant maintained he was not at fault and continued to advance his grievance. The agency asserted it had held all responsible parties accountable and would not tolerate retaliation, but it otherwise declined to grant additional relief or to qualify the grievance for a hearing. The grievant has appealed 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, or whether state policy may have been misapplied or unfairly applied.[5]

Further, the grievance procedure generally limits grievances that qualify 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 any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8]

In this case, the grievant continues to challenge the agency's documentation of unsatisfactory performance, which now consists of a Letter of Counsel issued to the grievant on July 21, 2020. The Letter reflects agency management's view that the grievant bore some responsibility for damaging the power line during the March 30 incident because he failed to identify the hazard posed by the power line before beginning the operation and accounting for it as the truck operator. Such written counseling is an example of an informal supervisory action. It is not equivalent to a Written Notice of formal discipline, which the agency initially issued to the grievant but ultimately rescinded during the management resolution steps. Written counseling does not generally constitute an adverse employment action because such action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[9]

Nevertheless, the grievant alleges that the assignment of blame to him, even if now documented only by an informal supervisory action, was improperly motivated by race

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[3] *See* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1. For example, the issuance of formal discipline, such as a Written Notice, automatically qualifies for a hearing, while counseling memoranda generally do not qualify. *See id.*
[4] Va. Code § 2.2-3004(B).
[5] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[6] Va. Code § 2.2-3004(A); *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* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

discrimination and/or retaliation for filing an earlier race-discrimination complaint. DHRM Policy 2.05, *Equal Employment Opportunity*, requires that "all aspects of human resource management be conducted without regard to race . . . ." For a claim of race discrimination to qualify for a grievance hearing, the grievance must present facts that raise a sufficient question as to whether the issues describe an adverse employment action that has resulted from prohibited discrimination. However, if the agency provides a legitimate, nondiscriminatory business reason for the acts or omissions grieved, the grievance will not be qualified for hearing absent sufficient evidence that the agency's proffered justification was a pretext for discrimination.[10] Similarly, a claim of retaliation may qualify for a hearing only if the grievant presents evidence raising a sufficient question whether the grievant's protected activity[11] is causally connected to a subsequent adverse employment action against him.[12] Ultimately, a successful retaliation claim must raise a sufficient question as to whether, but for the grievant's protected activity, the adverse action would not have occurred.[13] As explained above, the grievance record here does not reflect that an adverse action has occurred. Accordingly, EDR cannot find that the grievant's claims in this case qualify for a hearing.[14]

Although it is not apparent that the Letter of Counsel in itself has adversely affected the terms, conditions, or benefits of the grievant's employment, it could be used to support an adverse employment action against him in the future. Should the informal supervisory action grieved in this instance later serve to support an adverse employment action, such as a formal Written Notice or a "Below Contributor" overall annual performance rating, this ruling does not prevent the grievant from contesting the merits of these allegations through a subsequent grievance challenging a related adverse employment action. Similarly, this ruling addresses only whether the grievant has alleged claims that qualify for a hearing and takes no position on the merits of the discrimination claims that the grievant may have raised through other processes. To the extent the grievant experiences future actions that he believes are part of a pattern of discrimination or retaliation, nothing in this ruling prevents him from challenging such actions in a subsequent grievance, which could potentially qualify for a hearing if it sufficiently alleges an adverse employment action.

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[10] *See* Strothers v. City of Laurel, Md., 895 F.3d 317, 327-28 (4th Cir. 2018); *see*, *e.g.*, EDR Ruling No. 2017-4549.

[11] Only the following activities are protected activities under the agency's grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." Va. Code § 2.2-3004(A); *see also Grievance Procedure Manual* § 4.1(b)(4). Under this standard, a charge of discrimination filed with the appropriate federal authority, as the grievant has cited here, would be an activity protected against retaliation.

[12] *See* Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338 (2013)).

[13] *Id.*

[14] 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 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 his 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.* However, EDR notes that the Letter of Counsel indicates it will not be contained within the grievant's personnel file but only in his supervisor's file for purposes of performance review.

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

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[15] *See* Va. Code § 2.2-1202.1(5).