

Issues: Qualification – Work Conditions (Employee/Supervisor Conflict) and Discipline (Counseling Memo); Ruling Date: February 6, 2013; Ruling No. 2013-3505; Agency: Department of Corrections; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2013-3505
February 6, 2013

The grievant has requested a ruling on whether his August 27, 2012 grievance with the Department of Corrections (“agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Corrections Officer at one of the agency’s facilities. On August 23, 2012, the grievant was assigned to supervise the sally port during count time. As the grievant was preparing to end his shift, a transport came into the sally port and the grievant informed the Watch Office over the radio about the transport. At first, Lieutenant G responded to the grievant, asking the grievant to handle the transport himself. The grievant declined Lieutenant G’s request. Then, over the radio, Lieutenant T instructed the grievant to handle the transport himself. Lieutenant T also informed the grievant that he wished to speak with the grievant upon his return to work on August 27, 2012.

On August 27, 2012, Lieutenant T advised the grievant that the two August 23, 2012 requests were direct orders from Lieutenants, and because the grievant had declined the first direct order from Lieutenant G, Lieutenant T was issuing a counseling memo to the grievant for his alleged insubordinate behavior.

On August 27, 2012, the grievant initiated this grievance alleging continual workplace harassment by Lieutenant T. The August 27, 2012 grievance proceeded through the management steps of the grievance process without resolution and the agency head denied the grievant’s request for hearing on November 30, 2012. The grievant now seeks a qualification determination from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management.

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.¹ Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.² Thus, claims relating

¹ See *Grievance Procedure Manual* § 4.1 (a) and (b).

² See Va. Code § 2.2-3004(B).

to issues such as to 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.³

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁴ 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."⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁶

In this case, there is no evidence that the grievant has experienced any significant effects as a result of the August 27, 2012 counseling memorandum or other allegations listed on the Grievance Form A that would rise to the level of an adverse employment action. The agency asserts that at no time was the grievant disciplined for the alleged insubordinate behavior, and no evidence was produced that would indicate otherwise. Further, we cannot find that the grieved issues rose to a "sufficiently severe or pervasive"⁷ level to support a claim of workplace harassment.⁸ Consequently, this grievance does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.⁹



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Director
Office of Employment Dispute Resolution

³ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

⁴ *See Grievance Procedure Manual* § 4.1(b).

⁵ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁷ For a claim of 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; (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. *See Gilliam v. S.C. Dep't of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

⁸ As courts have noted, prohibitions against harassment, such as those in Title VII, do not provide a "general civility code," *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998), or remedy all offensive or insensitive conduct in the workplace. *See, e.g., Beall v. Abbott Labs.*, 130 F.3d 614, 620-21 (4th Cir. 1997); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996).

⁹ Va. Code § 2.2-1202.1(5).