

Issue: Qualification – Grievance Procedure (Other Issue); Ruling Date: March 25, 2013; Ruling No. 2013-3559A; Agency: Department of Motor Vehicles; Outcome: Not Qualified.



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

AMENDED QUALIFICATION RULING

In the matter of the Department of Motor Vehicles
Ruling Number 2013-3559A
March 25, 2013

The grievant has requested a ruling on whether his April 21, 2012 grievance with the Department of Motor Vehicles (DMV or the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On April 21, 2012, the grievant initiated a grievance challenging the agency's alleged threats of retaliation and attempts to "unlawful[ly] and improper[ly]" influence his actions as a first step-respondent in the grievance process. After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and the grievant has requested a qualification ruling by 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.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 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.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."³ Thus, typically, the threshold question is

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

² See Va. Code § 2.2-3004(B).

³ See *Grievance Procedure Manual* § 4.1(b).

whether the grievant has suffered an adverse employment action.⁴ 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, the grievant claims that members of the agency’s Human Resources staff attempted to pressure him into changing the first step response he had written for a subordinate’s grievance, and that these attempts included threats of retaliation. He does not, however, allege that any tangible action was taken against him by the agency: more specifically, he does not assert that he was disciplined, dismissed, demoted, or otherwise subject to an agency action resulting in a significant change in employment status or a change in the terms, conditions, or benefits of his employment. In the absence of such claims, the grievance does not raise a sufficient question that an adverse employment action has occurred to qualify for a hearing.⁷

While this grievance does not qualify for hearing, the grievant’s allegations nevertheless raise an important issue regarding the respective roles of step-respondents, higher-level management, and Human Resources in the grievance process. The grievance procedure requires agencies and first step-respondents to strike a careful balance between independent evaluation by the step-respondent and appropriate guidance and input by the agency. Section 3.1 of the *Grievance Procedure Manual* provides that the first step-respondent must “identify the issues, gather information and review the facts,” and then provide a written response that “address[es] the issues and the relief requested and [notifies] the employee of his/her procedural options.” EDR has previously held that these responsibilities include a duty for the first step-respondent to “familiarize himself with the basic facts and circumstances giving rise to the grievance, such that he could provide a reasoned response.”⁸

The grievance procedure does not require, however, that a first step-respondent carry out these responsibilities without input and guidance from higher level management and Human Resources, even if such counsel is not expressly sought by the step-respondent. To the contrary, because a step-respondent is in effect acting on behalf of the agency, guidance from these sources may be both necessary and appropriate. For example, while the grievance statute gives each step-respondent the right to grant relief, the statute also provides that this authority is subject to approval by the agency head.⁹ In addition, Section 3.1 of the *Grievance Procedure Manual* requires a first step-respondent to notify the agency’s Human Resources Office when a

⁴ As noted in EDR Ruling Nos. 2013-3446, 2013-3447, although for the past six years EDR has used the “materially adverse action” standard for retaliation claims, we are returning to the “adverse employment action” standard for the assessment of all claims, including retaliation, as to whether they qualify for hearing. See Va. Code § 2.2-3004(A).

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 We note that in the event the grievant subsequently experiences an adverse employment action related to the alleged agency conduct at issue here, this ruling does not prevent the grievant from attempting to contest the merits of the agency’s actions through a subsequent grievance challenging the related adverse employment action.

⁸ EDR Ruling Nos. 2009-2200, 2009-2201; See also EDR Ruling No. 2013-3542.

⁹ Va. Code § 2.2-3003(D).

grievance is received, a mandate which clearly contemplates some involvement by Human Resources in the grievance process. We caution, however, that this opportunity to provide guidance should not be used to deprive a step-respondent of his or her ability to make an independent assessment and response. Although step-respondents should consider any guidance they receive, efforts by higher-level management or Human Resources to pressure or force a step-respondent into providing a particular response may, under some circumstances, constitute noncompliance with the grievance process. Further, adverse employment actions taken as a result of a step-respondent's reasonable and appropriate actions under the grievance procedure could become the basis for retaliation claims.

EDR's qualification rulings are final and nonappealable.¹⁰ The nonappealability of such rulings became effective on July 1, 2012. Because the instant grievance was initiated prior to that date, it is not EDR's role to foreclose any appeal rights that may still exist for the grievant under prior law. If the grievant wishes to attempt to appeal the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal with the circuit court pursuant to former Va. Code § 2.2-3004(E). EDR makes no representations as to whether such an appeal is proper or can be accepted by the circuit court. Such matters are for the circuit court to decide. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.



Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁰ Va. Code § 2.2-1202.1(5).