Issues: Qualification – Discipline (Counseling Memo), Performance (Notice of Improvement Needed), Benefits/Leave (Annual Leave), and Retaliation (Prior Grievance Activity); Ruling Date: May 7, 2013; Ruling No. 2013-3596, 2013-3597, 2013-3598; 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 Social Services
Ruling Numbers 2013-3596, 2013-3597, 2013-3598
May 7, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") on whether her October 25, 2012 and two February 7, 2013 grievances with the Department of Social Services (the "agency") qualify for a hearing. For the reasons discussed below, these grievances do not qualify for a hearing.

FACTS

On or about July 17, 2012, the grievant received an informal Memo of Counseling regarding her attendance at work. This memo also stated that, for a period of six months (i.e., until January 17, 2013), the grievant's leave requests would be approved only if the grievant presented supporting documentation from a qualified medical professional or qualified skilled trades professional verifying the medical or emergency necessity of the request.

In August and September 2012, the agency conducted a harassment investigation based on a complaint that the grievant had acted inappropriately towards a male coworker. The agency completed the investigation and issued a final report containing its findings on September 28, 2012. The investigation determined that the grievant's conduct rose to the level of workplace harassment and created a hostile work environment. The report recommended sensitivity training for all employees in the grievant's work unit; the agency did not issue formal discipline or take other corrective action based on the results of the investigation.

The grievant requested several days of annual leave from her supervisor on October 18 and October 24, 2012. Because the leave requests did not comply with the requirements stated in the July 17 Memo of Counseling, the grievant's supervisor denied the requests. On or about October 25, 2012, the grievant initiated a grievance challenging the conclusions in the sexual harassment investigation report and her supervisor's denial of the leave requests.

On January 8, 2013, the grievant received two Notices of Intent to issue formal disciplinary action: one for requesting grievance documentation under false pretenses, and one for leaving the workplace without permission to hand-deliver grievance documents to EDR. At some point prior to 10:11 P.M. in the evening of January 8, the grievant returned to work without

permission to draft responses to the Notices of Intent, and remained at the workplace until approximately 4:47 A.M. on January 9. The grievant's supervisor became aware of the grievant's actions on January 9 and immediately issued a written Memo of Counseling for entering the workplace after hours without authorization.

Also on January 9, 2013, the grievant received a Notice of Improvement Needed/Substandard Performance based on the grievant's alleged poor performance and lack of professionalism. The grievant initiated two separate grievances on or about February 7, 2013: one challenging the Memo of Counseling and one challenging the Notice of Improvement Needed/Substandard Performance.

After proceeding through the management steps, the agency head declined to qualify any of the three grievances for a hearing. The grievant now appeals those determinations 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.[1] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] 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.[3]

Adverse Employment Action

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]

Three of the management actions challenged in these grievances (two Memos of Counseling and one Notice of Improvement Needed/Substandard Conduct) are forms of written

[1] *See Grievance Procedure Manual* § 4.1.
[2] Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b) and (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) (citation omitted).

counseling. They are not equivalent to a Written Notice of formal discipline. A 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.[7] In addition, the agency did not pursue any disciplinary action, formal or informal, based on the findings contained in the sexual harassment investigation report. In the absence of disciplinary action, the statements contained in the report alone do not constitute an adverse employment action.[8] As a result, the grievant's claims relating to her receipt of the written counseling memos and the conclusions of the agency's sexual harassment investigation do not qualify for a hearing.[9]

Misapplication/Unfair Application of Leave Policy

The grievant's October 25, 2012 grievance also asserts that the agency misapplied policy by denying her the use of annual leave on two occasions. The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[10] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Further, and as discussed above, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[11] For purposes of this ruling and with respect to the denial of her leave requests only, it will be assumed that the grievant has alleged an adverse employment action, in that she asserts management action limiting her use of annual leave, which is a benefit of her employment.[12]

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[7] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

[8] In addition to her disagreement with the conclusions of the agency's investigation, the grievant has expressed a desire to have a hearing to clear her name of the social stigma of the agency's findings. With respect to these grievances, her claims do not qualify for a name-clearing hearing. *See* Sciolino v. City of Newport News, 480 F.3d 642, 646 (4th Cir. 2007) (holding that a person's due process right to clear her name is triggered when an agency investigation's findings "(1) placed a stigma on [her] reputation; (2) were made public by the employer; (3) were made in conjunction with [her] termination or demotion; and (4) were false.")

[9] 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 she wishes to challenge, correct, or explain information contained in her 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 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.*

[10] *See* Va. Code § 2.2-3004(B).

[11] *See Grievance Procedure Manual* § 4.1(b).

[12] During the management steps, the agency's representatives concluded that the grievance, initiated on October 25, 2012, was not timely to challenge the agency's leave denial because it issued the Memo of Counseling limiting the grievant's leave use on July 17, 2012, and the grievant had not initiated her grievance within 30 days of that date. The grievant did not experience any adverse action (i.e., denial of leave) as a result of the Memo of Counseling until the agency denied her requests on October 18 and October 24, 2012. Because she filed her grievance within 30 days of the adverse actions at issue, this grievance is timely to challenge the agency's denial of leave.

In relevant part, Department of Human Resource Management ("DHRM") Policy 4.10 states:

> Employees must request and receive approval from their supervisors to take annual leave. Employees should make their requests for leave as far in advance as possible. When practical, and for as long as the agency's operations are not affected adversely, an agency should attempt to approve an employee's request for annual leave. However, supervisors may deny the use of annual leave because of agency business requirements. Approval of leave may be rescinded if the needs of the agency change.[13]

This policy provides management the discretion to approve or deny an employee's request for leave. Agencies are afforded great flexibility in making such decisions, but this discretion is not without limitation. EDR has repeatedly held that even where an agency has significant discretion to make decisions (for example, an agency's assessment of a position's job duties), qualification is warranted where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[14]

In this case, the agency's July 17, 2012 written counseling states that, over approximately a four-month period, the grievant's leave usage and schedule adjustments were excessive. She used a total of 134.5 hours of leave between March 25 and July 16, 2012. Multiple times, the grievant did not obtain approval in advance or requested adjustments to her hours to avoid using leave. The agency concluded that the grievant's work performance, as well as the work of other staff, had been affected adversely by this four-month pattern of absenteeism and notified the grievant that, for a six-month period beginning on July 17, future leave requests would be approved only with documentation attesting to the medical or emergency nature of the grievant's absence.[15] On October 18 and October 24, 2012 the grievant requested leave, which was denied based on the July 17 written counseling. Based on the grievant's frequent absences between March and July 2012, the agency's decision to restrict her leave, and deny subsequent leave requests, was reasonable. While the grievant may disagree with the agency's conclusions, EDR cannot second-guess the agency's decision that such restrictions were necessary to fulfill its business requirements and minimize the negative impact of the grievant's absenteeism. The grievant's allegations do not raise a significant question as to whether the agency's action was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious, and consequently the October 25, 2012 grievance does not qualify for a hearing on this basis.[16]

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[13] DHRM Policy 4.10, *Annual Leave*.

[14] *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); *see also, e.g.*, EDR Ruling 2008-1879.

[15] From the grievance record, it also appears that the agency imposed a similar restriction on the grievant's leave use in November 2011, while she was working for the agency in a different capacity.

[16] This ruling only determines that under the grievance statutes this grievance does not qualify for a hearing. This ruling does not address whether the grievant may have some other legal or equitable remedy.

Retaliation

The grievant also alleges that the denial of her leave requests on October 18 and October 24, 2012 and the written counseling memos issued on January 9, 2013 were retaliatory. She alleges that the agency denied her leave requests because of its findings in the sexual harassment investigation, and that it issued the two written counseling memos on January 9 because she filed the October 25, 2012 grievance challenging the agency's investigation and the denial of her leave requests.

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[17] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity;[18] in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[19] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[20]

As discussed above, the written counseling memos are not adverse employment actions and do not, therefore, qualify for a hearing. To the extent that the denial of leave requests is an adverse employment action, it also does not qualify for a hearing because the grievant has not presented facts in support of her retaliation argument. The grievant must raise more than a mere allegation of retaliation – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of retaliation based on participation in a protected activity.[21] The grievant has not presented such evidence. The agency has demonstrated that its actions were the result of continuing issues with the grievant's work performance, not because of the sexual harassment investigation or because she participated in the grievance procedure. As a result, the grievances do not qualify for a hearing based on this argument.

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[17] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the 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." *Grievance Procedure Manual* § 4.1(b).

[18] Although for the past six years EDR has used a "materially adverse action" standard for retaliation claims, we are returning to an "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).

[19] *E.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).

[20] *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981).

[21] Contrary to the grievant's assertion at her meeting with the third step respondent during the management resolution steps for her February 7, 2013 grievances, a mere allegation that retaliatory action has occurred is not sufficient to prove a claim of retaliation. *Grievance Procedure Manual* § 4.1(b).

With respect to any other grievances filed by the grievant that may be qualified for a hearing, the factual issues discussed in this ruling may be relevant. Any such relevant facts may be presented in a future adjudication at the hearing officer's discretion to assure a full exploration of what could be interrelated facts and issues. The October 25, 2012 and February 7, 2013 grievances, however, are not qualified for a hearing and the various forms of relief requested in those grievances as to the particular management actions grieved may not be further addressed.

EDR's qualification rulings are final and nonappealable.[22]

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[22] *See* Va. Code § 2.2-1202.1(5).