

Issues: Qualification – Work Conditions (supervisor/employee conflict), Management Actions (assignment of duties), Discrimination (other), and Retaliation (grievance activity); Ruling Date: June 26, 2013; Ruling No. 2013-3638; Agency: Virginia Community College System; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the Virginia Community College System
Ruling Number 2013-3638
June 26, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether his January 16, 2013 grievance with the Virginia Community College System (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant was hired as a Recruitment Analyst with the agency on September 10, 2012. The grievant claims that the position was “slated for another employee” who had been pre-selected by his supervisor, and that she protested the agency’s decision to hire him. As a result, he alleges that shortly after he was hired his supervisor began limiting his work assignments and responsibilities and has been giving those tasks to other employees. The grievant also claims that, when his supervisor assigns him work, her scrutiny of his performance is “unprofessional and harassing.” Furthermore, the grievant argues that his supervisor has not reviewed his Employee Work Profile (“EWP”) with him or set expectations for his duties and performance, and that she maintains different relationships with other employees of the agency.¹

On or about January 16, 2013, the grievant filed a grievance challenging these management actions. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that 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.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

¹ In his response to the first step-respondent and thereafter, the grievant has attempted to raise issues with his compensation. Because additional management actions or omissions cannot be added to a grievance after it is filed, this ruling will not address the grievant’s arguments regarding his compensation. *Grievance Procedure Manual* § 2.4. The grievant may file another grievance if he wishes to challenge additional management actions or omissions.

² See *Grievance Procedure Manual* § 4.1.

³ Va. Code § 2.2-3004(B).

decision, or whether state policy may have been misapplied or unfairly applied.⁴

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 In this case, the grievant has challenged multiple management actions related to his employment. Specifically, the grievant claims that: (1) he was “not supposed to be selected” for the position he currently holds and was hired over his supervisor’s protest; (2) his supervisor has been “constructively limiting [his] work” with the hope that he will “resign, transfer, and find employment elsewhere;” (3) his supervisor exercises an “unprofessional and harassing” level of supervision over his work and identifies issues that are “extremely trivial;” (4) his supervisor has not reviewed his EWP with him; and (5) his supervisor maintains different relationships with other employees of the agency.⁸

In support of these claims, the grievant asserts that between November 2012 and January 2013 his supervisor did not give him any work to perform for more than twenty days, but routinely provided daily tasks and assignments to other employees.⁹ Although the grievant argues that his supervisor’s relationships with other employees are “clearly different,” and several other employees have described the grievant’s relationship with his supervisor as “strained” or “limited,” he has not provided specific examples of how this has affected his own employment, other than the claim that his supervisor assigns tasks to other employees, but not to him. Likewise, the grievant states that “it is completely known in the office” that another candidate had allegedly been pre-selected for his position, but does not identify specific facts showing how this has affected him, other than the limitation of his work assignments. The grievant also claims that his supervisor has “[y]elled at and belittled other employees” and “[c]ommunicated to other employees in a harassing, unprofessional manner,” but does not state that this behavior, or any other such behavior, has been directed at him specifically. He further explains that, in one instance, his supervisor was overly critical of his work performance because she instructed him to prepare an email “exactly” as she directed. Finally, as of January 2013 the grievant had not received or signed an EWP, although since filing this grievance he and his supervisor have both reviewed and signed an EWP for his position.¹⁰

⁴ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁵ See *Grievance Procedure Manual* § 4.1(b).

⁶ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁷ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁸ The grievant also appears to claim that other management actions not raised in the grievance were motivated by retaliation based on his participation in the grievance process. The grievant may file another grievance if he wishes to challenge additional management actions or omissions, if timely as to those actions or omissions.

⁹ While the grievant argues that he was not given daily tasks and assignments by his supervisor, the grievant has not alleged that he has been given no duties to perform. For example, it appears the grievant was provided work by other managers and occasionally by his supervisor.


¹⁰ Because the agency has addressed the grievant’s claims with respect to his EWP, for purposes of this ruling that issue will be considered moot.

The grievant may raise legitimate concerns about his employment and his supervisor's conduct. Indeed, the second step-respondent seemingly agreed with several of the grievant's claims. He has recommended that the grievant's supervisor receive counseling about delegating responsibilities to the grievant and maintaining consistent and professional relationships with all employees of the agency and also directed her to review the grievant's EWP with him. In light of the second step-respondent's instruction and in reviewing the totality of the challenged conduct, none of the alleged actions or omissions has resulted in an adverse employment action. Because the grievant has not demonstrated that there has been any adverse effect on the terms, conditions, or benefits of his employment, this grievance does not qualify for a hearing on this basis.

In addition, the grievant's assertions regarding the management actions at issue, taken as a whole, could amount to a claim of workplace harassment. 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 an abusive or hostile work environment.¹¹ "[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."¹²

After reviewing the facts as presented by the grievant, EDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment. The allegedly hostile work environment challenged by the grievant essentially involves disparate workloads among employees and unprofessional conduct by a supervisor, neither of which rise to the level of adverse employment actions or severe or pervasive conduct.¹³ Prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.¹⁴ Because the grievant has not raised a sufficient question as to the existence of an abusive or hostile work environment, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.¹⁵



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¹¹ See generally *Gillam v. S.C. Dep't of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

¹² *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

¹³ See EDR Ruling No. 2011-2891 (and authorities cited therein).

¹⁴ *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. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996).

¹⁵ See Va. Code § 2.2-1202.1(5).