Issues: Qualification – Discipline (failure to report without notice), and Retaliation (other protected right); Ruling Date: January 22, 2014; Ruling No. 2014-3784; Agency: Department of Social Services; Outcome: Qualified in Full.

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 Number 2014-3784
January 22, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether her August 30, 2013 grievance with the Department of Social Services (the "agency") qualifies for a hearing. For the reasons set forth below, this grievance is qualified for a hearing in full.

FACTS

The grievant is employed by the agency as an Administrative Staff Assistant. On or about August 28, 2013, she was issued a Group II Written Notice for failing to report to work without notice on two dates. She filed a grievance on or about August 30, 2013, alleging that her supervisor has engaged in behavior that is harassing and retaliatory and has otherwise created a hostile work environment. After proceeding through the management resolution steps, the agency declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

DISCUSSION

Written Notice

By statute and under the grievance procedure, all formal disciplinary actions (i.e., Written Notices, terminations, suspensions, demotions, transfers and assignments resulting from formal discipline) automatically qualify for a hearing.[1] During the management resolution steps, the agency apparently did not consider the grievance as a challenge to the August 28 Written Notice. There is no discussion of the Written Notice in the step responses or the agency head's qualification decision. While the grievant did not raise the agency's failure to address her arguments relating to the Written Notice as a matter of compliance during the management resolution steps, she has informed EDR that she filed the grievance to challenge the Written Notice. Fairly read, her grievance incorporates a challenge to the Written Notice. Consequently, the grievant's claims with regard to the Written Notice are qualified for a hearing.

At the hearing, the agency will have the burden of proving that the Written Notice was "warranted and appropriate under the circumstances."[2] The employee will have the burden of raising and establishing any affirmative defenses, as well as any evidence of mitigating

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[1] Va. Code § 2.2-3004 (A); *Grievance Procedure Manual* § 4.1(a).
[2] *Grievance Procedure Manual* § 5.8.

circumstances.[3] This ruling in no way determines whether the agency's actions in issuing the Written Notice were proper or improper, but merely reflects that further exploration of the facts by a hearing officer is warranted.

Workplace Harassment

The grievant alleges that her supervisor has engaged in retaliation and has otherwise created a hostile work environment. In support of these claims, the grievant argues that her supervisor has issued Written Notices and counseling memos because the grievant used leave pursuant to the Family and Medical Leave Act ("FMLA") and that her supervisor frequently yells at and behaves unprofessionally in her interactions with the grievant and other employees. The agency asserts that it has implemented progressive discipline in the form of counseling memos and Written Notices to address issues with the grievant's attendance and work performance.

For a claim of hostile work environment or workplace harassment to qualify for a hearing, the grievant must present evidence that raises a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or prior protected activity; (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.[4] "[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."[5]

The grievant's use of FMLA leave in 2012 was a protected activity. After the grievant returned from FMLA leave on or about November 1, 2012, she received multiple counseling memoranda and interim evaluations documenting issues with her attendance and work performance. Specifically, the grievant received (1) a counseling memo on or about November 14, 2012, (2) a counseling memo and interim evaluation on or about February 13, 2013, (3) a Notice of Improvement Needed/Substandard Performance and a second interim evaluation on or about May 15, 2013, and (4) follow up memos reporting her progress in completing the improvement plan outlined in the Notice of Improvement Needed/Substandard Performance on or about June 25 and August 22, 2013. The grievant was also issued a due process notice on or about August 22, 2013 relating to the conduct for which she was disciplined on August 28.

The grievant further asserts that, throughout her employment with agency and specifically during this time period, her supervisor has yelled at, berated, and "rolled her eyes" at the grievant and other employees. While she is unable to identify precise dates on which this conduct may have occurred she claims that her supervisor behaves this way frequently and consistently. The grievant seems to assert that the allegedly retaliatory issuance of the Written Notice and other documents and her supervisor's allegedly harassing behavior together make up the hostile work environment to which she claims to have been subjected.

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[3] *Id*.
[4] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[5] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

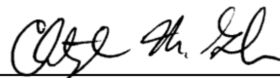
Although the counseling memos and interim evaluations appear in part to be intended to document ongoing work performance and attendance issues, they also relate to instances in which the grievant was absent from work for hospitalization and/or other medical treatment. Indeed, the grievant claims that she has required medical treatment multiple times specifically because of "stress induced illnesses" caused by her supervisor's allegedly harassing behavior. Furthermore, the August 28, 2013 Written Notice was issued in part because the grievant failed to report to work during a time period in which she claims to have been absent from work for medical reasons. The close proximity in time between when the grievant returned from FMLA leave and the agency began to issue a series of performance management documents, culminating in the August 28 Written Notice, raises a question as to whether there could be a connection between the grievant's use of FMLA leave and her supervisor's allegedly retaliatory actions. Further, taking all the allegations together over the last year or so, including the formal disciplinary action, the grievance raises a question that these occurrences, if related to the retaliation allegation, could rise to the level of severe or persuasive conduct.

Because the grievance raises a sufficient question as to the elements of a claim of harassment potentially as a result of the grievant's use of FMLA leave, the claim is qualified for a hearing. At the hearing, the grievant will have the burden of proving that the agency's actions were retaliatory and/or a violation of the FMLA such that it created a hostile work environment. If the hearing officer finds that this is the case, he may order the agency to cease any such activity and "take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence."[6] This ruling in no way determines that the agency's actions with respect to the grievant were harassing, hostile, or otherwise improper, but merely reflects that further exploration of the facts by a hearing officer is warranted.

CONCLUSION

The grievant's August 30, 2013 grievance is qualified for hearing in full. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing using the Grievance Form B.

EDR's qualification rulings are final and nonappealable.[7]



Christopher M. Grab
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Office of Employment Dispute Resolution

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[6] *Rules for Conducting Grievance Hearings* § VI(C)(3).
[7] *See* Va. Code § 2.2-1202.1(5).