Issues: Qualification – Performance (arbitrary/capricious evaluation) and Work Conditions (hostile work environment), and Consolidation of Grievances for a Single Hearing; Ruling Date: March 18, 2014; Ruling No. 2014-3823, 2014-3824; Agency: Department of Social Services; Outcome: Qualified (arbitrary/capricious evaluation), Not Qualified (hostile work environment) and Consolidation Granted.

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

QUALIFICATION AND CONSOLIDATION RULING

In the matter of the Virginia Department of Social Services
Ruling Numbers 2014-3823, 2014-3824
March 18, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether two grievances she filed with the Virginia Department of Social Services (the "agency") qualify for a hearing.[1] For the reasons discussed below, the November 6, 2013 grievance is qualified and consolidated with the grievant's pending dismissal grievance for a single hearing. The October 8, 2013 grievance does not qualify for a hearing.

FACTS

The grievant has been employed in her current position since 2006. In January 2012, the grievant began working with a new supervisor. Since that time, the grievant claims that the new supervisor has created a hostile work environment and engaged in discriminatory and retaliatory practices. On or about October 8, 2013,[2] 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.

Additionally, in October 2013, the grievant received an overall "Below Contributor" rating on her annual performance evaluation. On or about November 6, 2013, she filed a grievance to challenge the evaluation. She alleges that the evaluation was based upon arbitrary and capricious facts, and that she was improperly denied reasonable accommodations for a disability that would improve her performance. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant also appeals this 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.[3] Additionally, the grievance statutes and procedure reserve to management the exclusive right to

[1] In addition to the two grievances at issue here, the grievant has also filed a dismissal grievance, dated February 21, 2014, as well as two other grievances, dated October 8, 2013 and November 4, 2014, concerning two separate disciplinary actions.
[2] While the grievant appears to have dated her grievance October 9, 2013, the agency noted it as having been received on October 8, 2013. This ruling will subsequently refer to the grievance as the "October 8, 2013" grievance.
[3] *See Grievance Procedure Manual* § 4.1.

manage the affairs and operations of state government.[4] 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.[5]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8]

October 8, 2013 grievance

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.[9] In the analysis of a workplace harrassment 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 and abusive or hostile work environment.[10] "[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."[11]

In this case, the grievant claims that she was treated differently than other employees in the office due to discriminatory and retaliatory behavior by her supervisor. She asserts that her supervisor did not apply policies consistently within the office, creating a hostile work environment for her. The documentation provided with the grievance packet further indicates that the grievant alleges that she has been denied reasonable accommodations for an unspecified disability. In response, the agency denies that the grievant was subjected to any hostile work environment, discriminatory or retaliatory practices.

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[4] Va. Code § 2.2-3004(B).
[5] *Id*. § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[6] *See Grievance Procedure Manual* § 4.1(b).
[7] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[9] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[10] *See generally id*.
[11] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

The agency produced evidence that, pursuant to the grievant's allegations, an investigation was conducted in which the grievant and her supervisor were interviewed and all relevant documentation, including personnel files and policies, were reviewed. As the basis of her claims, the grievant stated that she was subject to requirements that no other employees had to follow, as well as disciplined inconsistently from similarly situated employees.[12] Finally, she claimed that her requests for accommodations for her disability were not addressed by her supervisor. The agency determined as part of this investigation that the facts of the case did not support the grievant's allegations of retaliation or discrimination. The agency asserts that the grievant has been treated consistently with other employees, as well as with state and agency policy. With respect to accommodations requested by the grievant, the agency indicates that the grievant's supervisor attempted to engage in an interactive process with her in order to get accommodations put into place, but was met with no response by the grievant.

After reviewing the facts as presented by the grievant and the agency, EDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment. Even taking the grievant's assertions as accurate, the work environment challenged by the grievant primarily involves disparate workloads among employees and allegedly unprofessional conduct by a supervisor, neither of which rise to the level of adverse employment actions or severe or pervasive conduct as described here.[13] Prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[14] The grievant has challenged in separate grievances the discipline she received and she may raise any or all of the theories mentioned here as part of those cases. Likewise, the grievant may raise the issue of how reasonable accommodations or the lack thereof may have impacted her performance in the November 6, 2013 grievance discussed below. However, the October 8, 2013 grievance has not raised a sufficient question as to the existence of an abusive or hostile work environment, and accordingly, it does not qualify for a hearing.[15]

November 6, 2013 grievance

The grievance statutes and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.[16] Accordingly, for the grievant's November 6, 2013 grievance challenging her performance evaluation to qualify for a hearing, there must be facts raising a sufficient question

[12] The grievant may still raise the issue of inconsistent discipline in her grievances challenging formal disciplinary actions issued to her.
[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. Balt. Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).
[15] The failure to provide appropriate accommodations may be considered an adverse employment action in itself. *See* EDR Ruling No. 2011-2691. However, nothing in the information presented by the grievant indicates that there was such a failure when she filed the October 8, 2013 grievance. For instance, it appears that the grievant had made request(s) for "accommodations," but did not specify the nature of those accommodations or why they were needed in response to questions by the agency. To the extent that any alleged failure to accommodate may have affected the other grieved actions, the grievant will be able to explore these matters at hearing as to those grievances that do qualify.
[16] *See* Va. Code § 2.2-3004(B) (reserving to management the exclusive right to manage the affairs and operations of state government).

as to whether the grievant's performance rating, or an element thereof, was "arbitrary or capricious."[17] "Arbitrary or capricious" means that management determined the rating without regard to the facts, by pure will or whim. However, upon EDR's investigation into this matter, the agency has agreed to qualify this grievance for a hearing, as it is interrelated to the grievant's ultimate dismissal. Thus, EDR deems it appropriate to qualify this matter in full in order that a hearing officer may further explore the underlying facts in this case.

Consolidation

EDR strongly favors consolidation and will consolidate grievances when they involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.[18] EDR finds that consolidation of the November 6, 2013 grievance with the pending February 20, 2014 dismissal grievance is appropriate. The grievances share common themes and claims and, moreover, consolidation is not impracticable in this instance. Therefore, these grievances will be consolidated for a single hearing for adjudication by a hearing officer to help ensure a full exploration of what could be interrelated facts and issues.

CONCLUSION

Based on the foregoing, the grievant's November 6, 2013 grievance is qualified for hearing and consolidated with the grievant's February 20, 2014 grievance for a single hearing. The October 8, 2013 grievance does not qualify for hearing. A hearing officer will be appointed in a forthcoming letter. EDR's rulings on qualification and compliance are final and nonappealable.[19]

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Office of Employment Dispute Resolution

[17] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).
[18] *Grievance Procedure Manual* § 8.5.
[19] *See* Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).