

Issues: Qualification – Discrimination (Race and Gender), Retaliation (Other Protected Right), Work Conditions (Employee/Supervisor Conflict); Ruling Date: April 30, 2014; Ruling No.2014-3857; Agency: Department of Professional and Occupational Regulation; 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 Professional and Occupational Regulation
Ruling Number 2014-3857
April 30, 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 February 11, 2014 grievance with the Department of Professional and Occupational Regulation (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a Licensing Specialist III. Her job duties include helping the agency’s customers on the telephone by addressing inquiries “pertaining to . . . licensing requirements and application status.” On or about January 8, 2014, the agency received a complaint from a customer about an interaction with an agency employee over the phone. The agency had reason to believe that the employee in question was the grievant. On January 13, 2014, the grievant’s supervisor and the agency’s Human Resources director met with the grievant to gather information about the complaint. On the following day, January 14, the grievant met with the agency head to discuss the issue further.

After receiving no further follow up communications from the agency in relation to the status of its investigation of the customer complaint, the grievant filed a grievance on or about February 11, 2014, alleging that her supervisor, the Human Resources director, and the agency head had all “discriminated, harassed, retaliated against, and singled [her] out.” After proceeding through the management resolution 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.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

¹ See *Grievance Procedure Manual* § 4.1.

² Va. Code § 2.2-3004(B).

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 or agency policy may have been misapplied or unfairly applied.³

Further, 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

The grievant claims that the actions of agency management in the January 13 and January 14 meetings were discriminatory, retaliatory, and made her feel "harassed" and "singled out." In support of these assertions, the grievant argues that "[n]o evidence or documentation" was given to her at either meeting, that she was "told more investigation would take place" but was never given any additional information, and that she was felt she was "being 'set up' and treated unprofessionally" by the agency head during the January 14 meeting. The grievant claims that, during the January 13 meeting, she learned a customer "reported a complaint" about an agency employee the previous week, was questioned by her supervisor and the Human Resources director about whether she had spoken to the customer, and was not provided with "any information to what the customer related" in the complaint. The grievant further asserts that, when she met with the agency head on January 14 to discuss the customer complaint further, the agency head acted unprofessionally, accused her of lying, shared information that had been withheld from her in the January 13 meeting, and otherwise "harassed" and "manipulated" her.

To further support her arguments, the grievant asserts that the agency head improperly allowed an employee in the Human Resources office to have some involvement with the grievance at issue here, despite his awareness that this employee and the grievant had a personal relationship, in an attempt to "cause friction" and harass the grievant. She also claims that agency management took photos of her workstation and telephone as part of its inquiry into the customer complaint and that this action was improper, and that the agency head allegedly shared information with the customer who filed the complaint about "what disciplinary action would be taken" against the grievant.⁷

As discussed above, only grievances that involve adverse employment actions qualify for a hearing. This includes grievances that allege acts of discrimination, retaliation, and/or

³ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b), (c).

⁴ See *Grievance Procedure Manual* § 4.1(b).

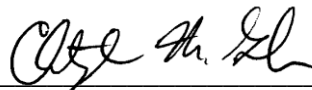
⁵ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁷ EDR has been unable to identify any information in the grievance record to show what, if any, information was actually shared with the customer.

workplace harassment.⁸ In this case, EDR cannot conclude that the agency's decision to investigate possible misconduct by an employee in the manner described here is, in itself, an adverse employment action. Even if we accept as true all of the grievant's claims regarding the action of agency management on January 13 and January 14, there is nothing to indicate that any of these actions had an adverse impact on the terms, conditions, or benefits of the grievant's employment. At the time the grievance was initiated, for example, the agency had not taken any corrective action to address the issue, such as formal discipline, demotion, or transfer.⁹ Furthermore, no information related to the meetings or any potential corrective action have been placed in the grievant's personnel file, although the agency did indicate that this incident could be considered as part of the grievant's 2014 "Interim Assessment and annual evaluation."¹⁰ While the grievant may disagree with the agency's decision to investigate the customer complaint, the way in which the inquiry was conducted, and the agency's conclusion that the grievant was involved in the incident, none of her claims raise a question as to whether she has experienced an adverse employment action. As a result, the grievance does not qualify for a hearing on this basis.¹¹

In conclusion, nothing in this ruling is meant to indicate that EDR condones or approves of any of the actions alleged to have occurred by the grievant, if they in fact occurred as she describes. This ruling only determines that, under the grievance statutes, this grievance does not qualify for a hearing because the grievant has not experienced an adverse employment action. Furthermore, nothing in this ruling prevents the grievant from presenting the issues raised here as background evidence, if it is relevant, in any other grievance that may proceed to a hearing. EDR's qualification rulings are final and nonappealable.¹²



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⁸ See *Grievance Procedure Manual* § 4.1(b).

⁹ After this grievance was initiated, the agency issued a Counseling Memorandum related to the customer complaint to the grievant. The Counseling Memorandum is the subject of a separate grievance and will not be addressed in this ruling. See *Grievance Procedure Manual* § 2.4 (stating that "[o]nce [a] grievance is initiated, challenges to additional management actions or omissions cannot be added," but must be challenged in a separate grievance).

¹⁰ If any such information is used to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below Contributor" annual performance rating, the grievant may contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.

¹¹ Even assessing the grievant's arguments under the framework used for claims of workplace harassment, the facts in this case do not 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 such that the terms, conditions, or benefits of the grievant's employment were altered. See, e.g., EDR Ruling No. 2014-3836; EDR Ruling No. 2012-3125.

¹² See Va. Code § 2.2-1202.1(5).