Issue: Qualification - Retaliation (grievance activity); Ruling Date: May 5, 2014; Ruling No. 2014-3874; Agency: Department of Corrections; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of Department of Corrections
Ruling Number 2014-3874
May 5, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") of the Department of Human Resource Management ("DHRM") on whether his March 25, 2014 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the following reasons, the grievance does not qualify for hearing.

FACTS

The grievant is employed with the agency as a Corrections Captain. On March 25, 2014, the grievant initiated a grievance challenging a number of actions by the agency, which he alleges were taken in retaliation for his successful 2011 appeal of a grievance matter to the circuit court. After the parties failed to resolve the grievance during the management steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request and the grievant has appealed 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, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as to 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.

[1] *See Grievance Procedure Manual* §§ 4.1 (a), (b).
[2] *See* Va. Code § 2.2-3004(B).

The grievant alleges that since February 2012, following his successful appeal of a grievance matter to the circuit court in 2011, he has been subjected to retaliatory harassment by the agency. For a claim of a retaliatory hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on protected conduct; (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.[3] "[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."[4]

In this case, the grievant asserts that the agency retaliated against him for his previous grievance activity by contacting him regarding a DWI traffic charge and his return to work while he was on short-term disability ("STD"), questioning the grievant regarding the DWI charge, interfering with his performance of his job duties, questioning the grievant's work performance, advising the grievant of potential disciplinary action, denying him a consecutive two-week vacation, failing to support a "healing environment," failing to acknowledge examples of good performance, and otherwise harassing him. In response, the agency states that "it is not against policy" to contact an employee on STD to discuss a DWI charge allegedly received prior to the STD leave, and it asserts that the remaining examples cited by the grievant relate merely to "a large staff trying to run a complex organization." In addition, during the course of the grievance process, the agency agreed to take steps to improve communications within the grievant's work unit and give the grievant greater involvement in decision-making, and has "changed the policy preventing [the grievant] from taking a two week vacation as long as [the grievant] and [his] supervisor can agree on dates."

After reviewing the facts, EDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level such that an unlawfully abusive or hostile work environment was created,[5] as there is no indication that the terms, conditions, or benefits of the grievant's employment were detrimentally impacted.[6] As courts have repeatedly noted, prohibitions against harassment do not provide a "general civility code"[7] or remedy all offensive or insensitive conduct in the workplace.[8] EDR also notes the agency's efforts to resolve the concerns raised by the grievant. For these reasons, the grievant's retaliatory harassment claims do not qualify for a hearing. This ruling is limited, however, to the narrow question of whether the grieved conduct is sufficiently severe or pervasive to create an abusive or hostile work environment and does not reach the issue of whether the challenged conduct is retaliatory in nature. Further, this ruling does not preclude the

[3] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).
[4] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[5] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[6] *See generally* Gunten v. Maryland, 243 F.3d 858, 869 (4th Cir. 2001) (discussing retaliatory harassment, for which EDR applies an identical qualification standard); *see also* EDR Ruling No. 2014-3836; EDR Ruling No. 2012-3125.
[7] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).
[8] *See, e.g.*, Beall v. Abbott Labs, 130 F.3d 614, 620-21 (4th Cir. 1997); Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).

grievant from presenting the issues raised here as background evidence, if relevant, in any future grievance about subsequent agency actions should the alleged conduct continue or worsen.

EDR's qualification rulings are final and nonappealable.[9]

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[9] Va. Code § 2.2-1202.1(5).