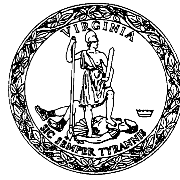
Issue: Qualification – Work Conditions (supervisor/employee conflict); Ruling Date: June 19, 2014; Ruling No. 2014-3907; Agency: Department of Corrections; Outcome: Not Qualified.



# *COMMONWEALTH of VIRGINIA*

***Department of Human Resource Management***

*Office of Employment Dispute Resolution*

## QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2014-3907
June 19, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management on whether his December 10, 2013 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons set forth below, this grievance does not qualify for a hearing.

## FACTS

The grievant is employed by the agency as a Utility Plant Specialist. He filed a grievance on or about December 10, 2013, alleging that an agency manager has engaged in behavior that is harassing and in violation of the Code of Ethics/Equal Employment Opportunity Statement that has been adopted by the agency head.[1] 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

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

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[1] The grievant also raises the issue of a bonus he did not receive in 2012. It appears that, during the management resolution steps, this issue was discussed with the grievant as background information regarding his claim of retaliatory harassment, but the agency asserts that this issue was not timely grieved insofar as any relief could be granted as to the bonus. We agree and will not further address that issue in this ruling.
[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

Further, 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 alleges that an agency manager has engaged in workplace harassment and violated the agency's Code of Ethics/Equal Employment Opportunity Statement. For a claim of workplace 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 a protected status; (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.[8] 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 and abusive or hostile work environment.[9] "[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."[10]

It seems that the only instance described by the grievant as retaliation or harassment occurred on December 3, 2013, during a meeting between the grievant and the agency manager, and in a subsequent email sent to the grievant by the manager. It appears that the grievant alleges that the manager harassed him during the meeting by raising his voice and then refusing to engage in further discussion with the grievant. The grievant also points to a follow up email sent to him by the manager in which the manager states, "[s]ince you would not verbally answer my question . . . when asked several times, I am requiring you to send me by email a written report." During the management resolution steps, upper management personnel in the agency met with both parties as well as witnesses to this incident, reviewed the documentation submitted by the grievant, and provided coaching to the grievant and the manager about handling similar situations more appropriately. Ultimately, none of the step respondents found workplace harassment or retaliation against the grievant had occurred.

The grievant may be raising legitimate concerns about his employment and his manager's conduct. After reviewing the facts presented by the grievant, however, EDR cannot find that the

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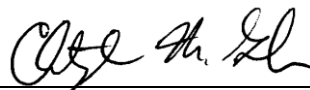
[5] *See Grievance Procedure Manual* § 4.1(b).
[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[8] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[9] *See generally id* at 142-43.
[10] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

grieved management actions rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment. The alleged workplace harassment challenged by the grievant essentially involves an instance of alleged unprofessional conduct by a supervisor, which does not generally rise to the level of an adverse employment action or severe or pervasive conduct. Prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[11] Because the grievant has not raised a sufficient question as to the existence of a severe or pervasive hostile work environment, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.[12]



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[11] 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).
[12] *See* Va. Code § 2.2-1202.1(5).