Issue: Qualification – Management Actions (Assignment of Duties);   Ruling Date: March 3, 2015;   Ruling No. 2015-4026;   Agency: Virginia Department of Health; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of the Virginia Department of Health
Ruling Number 2015-4026
March 3, 2015

The grievant has requested a ruling on whether her February 9, 2014 grievance with the Virginia Department of Health (the agency) qualifies for a hearing. For the reasons discussed below, the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (DHRM) finds that this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as an Office Service Specialist. She filed a grievance on or about February 9, 2014, alleging that she is being harassed and bullied in the workplace and has had certain duties removed from her job requirements, in retaliation for raising concerns regarding proper use of state vehicles and other travel procedures within her office. 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.[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 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, or whether a performance evaluation was arbitrary or capricious.[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

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[1] *See Grievance Procedure Manual* § 4.1.
[2] *See* Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1 (b), (c).
[4] *See Grievance Procedure Manual* § 4.1(b).

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]

Reassignment of Job Duties

Fairly read, the grievant's claim raises an allegation that the agency has misapplied or unfairly applied policy in reassigning a portion of her job duties. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. However, under the facts presented to EDR, it does not appear that the reassignment of duties raised by the grievant in this instance amounted to an adverse employment action.

A reassignment of job duties may constitute an adverse employment action if a grievant can show that the reassignment had some significant detrimental effect on the terms, conditions, or benefits of his/her employment.[7] A reassignment or transfer with significantly different responsibilities, or one providing reduced opportunities for promotion can constitute an adverse employment action, depending on all the facts and circumstances.[8] However, in general, a reassignment of duties will not rise to the level of an adverse employment action.[9] Further, subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.[10]

Based on the information presented in this grievance, it appears that the agency removed certain duties from the grievant's job responsibilities, but the grievant has maintained her job title, salary, and other benefits of employment. Specifically, the agency determined that review of travel reimbursement and leave accounting functions should be conducted at a supervisory level, and thus transferred those duties away from the grievant in order to have an increased level of oversight by agency management.[11] In this instance, the grievant has presented insufficient evidence that these changes have had a significant detrimental effect on her employment. In fact, a review of the grievant's current Employee Work Profile reveals that these duties composed less than ten percent of the grievant's overall job responsibilities. Accordingly, the grievance does not qualify for a hearing on this basis.

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[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] *See*, *e.g.*, *Holland*, 487 F.3d at 219.
[8] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 375-77 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253, 255-256 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 Fed. App'x. 726, 729 (4th Cir. 2004).
[9] *See* Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996).
[10] *See*, *e.g.*, Jones v. D.C. Dep't of Corr., 429 F.3d 276, 284 (D.C. Cir. 2005); *James*, 368 F.3d at 377; Fitzgerald v. Ennis Bus. Forms, Inc., No. 7:05CV00782, 2007 U.S. Dist. LEXIS 875, at *14-15 (W.D. Va. Jan. 8, 2007); Stout v. Kimberly Clark Corp., 201 F. Supp. 2d 593, 602-03 (M.D.N.C. 2002).
[11] To the extent that the grievant claims that she also lost the authority to utilize an agency credit card, the agency has now returned that portion of her job duties to the grievant.

Retaliation/Workplace Harassment

The grievant also alleges that her former supervisor and another employee, Ms. H., have engaged in retaliation and harassment against her, thus creating a hostile work environment, because she raised concerns with agency management over these employees' reporting and approval of leave and travel. For a claim of hostile work environment 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 or 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.[12] "[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."[13]

In this case, the grievant alleges that her former supervisor and Ms. H. told lies about her in the workplace, and on one occasion Ms. H. made an inappropriate joke about her in front of other employees. She alleges that these actions, in addition to her supervisor's removing some of her job duties as described above, constitute a pattern of harassment and bullying. After reviewing the facts presented by the grievant, however, EDR cannot find that the 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 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.[14] Furthermore, it appears that the agency has removed the grievant's former supervisor from the grievant's chain of command, and removed Ms. H from the grievant's office. 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.[15]

EDR's qualification rulings are final and nonappealable.[16]

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[12] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).
[13] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[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] To the extent that the grievant requests an independent investigation by EDR/DHRM of her office, even assuming EDR had the authority to do so, we decline.
[16] Va. Code § 2.2-1202.1(5).