

Issues: Qualification – Performance (arbitrary/capricious performance evaluation),
Compensation (position classification), and Retaliation (complying with any law);
Ruling Date: March 19, 2015; Ruling No. 2015-4099; Agency: University of Virginia;
Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the University of Virginia
Ruling Number 2015-4099
March 19, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether her December 1, 2014 grievance with the University of Virginia (the “University”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the University as an Education Support Specialist II, with a University job title of Medical Education Coordinator. On or about October 31, 2014, the grievant received her annual performance evaluation for 2013-2014. She received an overall rating of “Inconsistent” for the year. The grievant appealed her evaluation using the University’s internal performance evaluation appeal procedure. When the internal appeal process did not resolve the grievant’s issues with her evaluation, she initiated a grievance on or about December 1, 2014. In her grievance, the grievant alleges that her job responsibilities have been modified but her “position description was not changed to reflect what [she] was being told.” As a result, she asserts that she “was evaluated very unfairly as a direct result of management’s indecisiveness regarding [her] position expectations” and disputes her performance evaluation rating of “Inconsistent.” After proceeding through the management steps, the grievance was not qualified for a hearing by the University president. 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 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, whether state policy may have been misapplied or unfairly applied or whether a performance evaluation was arbitrary and/or capricious.³

¹ See *Grievance Procedure Manual* § 4.1.

² Va. Code § 2.2-3004(B).

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

Furthermore, 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

Performance Evaluation

In this case, the grievant received an overall rating of “Inconsistent” on the University’s evaluation scale. The University evaluates its employees using a scale that consists of five ratings: “Unsatisfactory,” “Inconsistent,” “Effective,” “Highly Effective,” and “Exceptional.”⁷ Based on information provided by the University, ratings of “Inconsistent,” “Effective,” and “Highly Effective” are equivalent to a rating of “Contributor” on the DHRM evaluation scale.⁸ A satisfactory performance evaluation is not an adverse employment action.⁹ Thus, where the grievant presents no evidence of an adverse action relating to the evaluation, such a grievance does not qualify for a hearing. In this case, although the grievant disagrees with some of the information contained in her performance evaluation, she received ratings of “Inconsistent,” “Effective,” and “Highly Effective” on each of the individual factor ratings and her overall performance rating was “Inconsistent.” Most importantly, the grievant has presented no evidence that the performance evaluation itself or any procedural abnormalities in the creation and/or filing of the performance evaluation have detrimentally altered the terms or conditions of her employment. As a result, the grievance does not qualify for a hearing on this basis.¹⁰

Retaliation and Harassment

The grievant further asserts that she is “excluded from key communications as a form of retaliation,” apparently because she has attempted to address issues related to her position classification and assignment of duties with University management. She further asserts that she

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 See also University of Virginia Policy HRM-018, *Performance Management for University Staff Employees*.

⁸ DHRM Policy 1.40, *Performance Planning and Evaluation*, uses a system with three evaluation ratings: “Below Contributor,” “Contributor,” and “Extraordinary Contributor.”

⁹ E.g., EDR Ruling No. 2013-3580; EDR Ruling No. 2010-2358; EDR Ruling No. 2008-1986; see also *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 377-378 (4th Cir. 2004) (holding that although his performance rating was lower than his previous yearly evaluation, there was no adverse employment action where the plaintiff failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment).

¹⁰ Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the “Act”). Under the Act, if the grievant gives notice that she wishes to challenge, correct or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This “statement of dispute” shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

feels that the job responsibilities of others are “being shifted to [her]” and that she is “being dumped on,” and requests that University management treat her “with respect, and fairly.”

Taken as a whole, the grievant’s assertions appear to amount to a claim that the University has engaged in retaliation and/or harassment that have created a hostile work environment. For a claim of hostile work environment or 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 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.¹¹ 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 an abusive or hostile work environment.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

The grievant may be raising legitimate concerns about her employment and University management. Having reviewed 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 retaliatory hostile work environment. The alleged retaliation and harassment challenged by the grievant essentially involve disparate work assignments among employees and potentially unprofessional conduct, neither of which generally rise to the level of an adverse employment action or severe or pervasive conduct.¹⁴ Prohibitions against harassment do not provide a “general civility code” or prevent all offensive or insensitive conduct in the workplace.¹⁵ 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.

Position Classification

The grievant also appears to claim that the agency has misapplied and/or unfairly applied policy by assigning her work tasks that should be performed by a Simulation Technology Specialist, which is considered equivalent to an Education Support Specialist III by the University. In effect, she seems to argue that her position is inappropriately classified as a Medical Education Coordinator. The grievant requests that the University revise her job description “to reflect [her] actual job duties.”

For the grievant’s claim to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy or whether the

¹¹ See *Gilliam v. S.C. Dep’t of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

¹² See generally *id.* at 142-43.

¹³ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

¹⁴ See generally EDR Ruling No. 2012-3125 (and authorities cited therein).

¹⁵ *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).

challenged action, in its totality, is so unfair as to amount to a disregard of the intent of the applicable policy. The General Assembly has recognized that the Commonwealth's system of personnel administration should be "based on merit principles and objective methods" of decision-making.¹⁶ In addition, the Commonwealth's classification plan "shall provide for the grouping of all positions in classes based upon the respective duties, authority, and responsibilities," with each position "allocated to the appropriate class title."¹⁷

The above statutes evince a policy that would require state agencies and institutions to allocate positions having substantially the same duties and responsibilities to the same role. Importantly, the grievance procedure accords much deference to management's exercise of judgment, including management's assessment of the degree of change, if any, in the job duties of a position. While agencies are afforded great flexibility in making decisions such as those at issue here, agency discretion is not without limitation. Rather, EDR has repeatedly held that even where an agency has significant discretion to make decisions (for example, classifying a position in a particular Role), qualification is warranted where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.¹⁸

In support of her assertion that she should be classified as a Simulation Technology Specialist, the grievant claims that she has been assigned tasks that would ordinarily be performed by a Simulation Technology Specialist. Based on EDR's review of the grievance record and the information provided by the parties, it appears that the grievant sometimes assists Simulation Technology Specialists in setting up and running simulations. The grievant carries out these tasks under the supervision of a Simulation Technology Specialist. It appears that such requests have been made of the grievant during periods of time when staff turnover or shortages and/or workload imbalances have presented a legitimate business need for additional assistance from the grievant to ensure that her work group continues to operate effectively. In addition, the grievant explained in comments on her 2013-2014 performance evaluation that, during the performance cycle, she rebuilt and reconfigured a computer used for her work group's activities, "modified two iPad security cases" and mounted them for use, repaired a mannequin used for simulations, and "trouble shot many functionality challenges of equipment"

Even assuming, for purposes of this ruling only, that the potential position misclassification at issue here constitutes an adverse employment action,¹⁹ it appears that the University has exercised appropriate discretion under policy in determining the classification of the grievant's position. The grievant's position description states that she is responsible for providing "administrative, operational, logistical and fiscal support for all aspects of the medical simulation program" Her core job responsibilities consist, in part, of providing administrative support for her work group's daily operations, maintaining equipment, and managing inventory. The grievant's job description also states that she is responsible for

¹⁶ Va. Code § 2.2-2900.

¹⁷ *Id.* § 2.2-103(B)(1).

¹⁸ See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as "[i]n disregard of the facts or without a reasoned basis"); see also, e.g., EDR Ruling 2010-2365; EDR Ruling No. 2008-1879.

¹⁹ The grievant works in a position in Pay Band 3 and the Simulation Technology Specialist position is in Pay Band 4. As a result of her position classification, the grievant's maximum salary is lower and there is some basis to suggest that her career progression could be impacted as a result. Ultimately, this issue need not be fully discussed in this ruling because the grievance does not otherwise qualify for a hearing for the reasons described above.

performing pre-simulation activities, executing simulations, and carrying out post-simulation activities under the supervision of a Simulation Technology Specialist.

Comparing the grievant's assertions and the job responsibilities laid out in her position description, it does not appear that the grievant has actually been assigned any tasks that are not contemplated by her current position description. Assisting with simulations and repairing, maintaining, and troubleshooting equipment are duties that are explicitly contemplated as part of the grievant's core job responsibilities. That the grievant occasionally performs tasks that may also be carried out by a Simulation Technology Specialist, or that are carried out under the supervision of a Simulation Technology Specialist, does not, by itself, indicate that her position classification is inaccurate. Furthermore, to the extent the grievant may have been performing tasks that are not explicitly outlined in her position description, she "[m]ay be required to perform other duties as assigned." To the extent the grievant may have actually performed tasks outside of her core job responsibilities, EDR has reviewed nothing to indicate that those tasks have been so substantial and/or frequent that the University's classification of the grievant's position as an Education Support Specialist II constitutes a violation of policy that would warrant qualification for a hearing.²⁰ Furthermore, based on a review of the job classification structure provided on DHRM's website, EDR has found no inconsistencies in classifying the grievant's position as an Education Support Specialist II.²¹

Although the grievant disagrees with the University's assessment of how best to distribute her workload and assign tasks within her work unit, she has not raised a question as to whether the University misapplied and/or unfairly applied policy, acted in a manner that was inconsistent with other decisions regarding organization and/or classification of positions, or was otherwise arbitrary or capricious. In summary, it appears that the agency's classification of the grievant's position and the assignment of her duties is consistent with the discretion granted by policy. Accordingly, the grievance does not qualify for hearing on this basis.

EDR's qualification rulings are final and nonappealable.²²



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²⁰ In general, however, we note that it would be a best practice for management to ensure that substantial and continued job assignments outside of an employee's position description are adequately documented to ensure compliance with state classification and compensation policies.

²¹ For further information about the Career Group to which the Education Support Specialist Roles are assigned, as well as a general description of the complexity, results, and accountability for each Role, see DHRM's website at <http://web1.dhrm.virginia.gov/itech/DHRMWebAssets/careergroups/EducMediaServ/edu29140EducSupportServ.htm>.

²² See Va. Code § 2.2-1202.1(5).