Issues: Qualification – Performance (arbitrary/capricious performance evaluation) and Work Conditions (supervisor/employee conflict); Ruling Date: March 27, 2015; Ruling No. 2015-4104, 2015-4105, 2015-4106, 2015-4107; Agency: Department of Motor Vehicles; 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 Motor Vehicles
Ruling Numbers 2015-4104, 2015-4105, 2015-4106, 2015-4107
March 27, 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 his August 21, 2014, August 26, 2014, and two November 1, 2014 grievances with the Department of Motor Vehicles (the "agency") qualify for a hearing. For the reasons discussed below, these grievances do not qualify for a hearing.

FACTS

The grievant is employed by the agency as a Division Manager at a call center. On or about August 21, 2014, he filed a grievance ("Grievance 1") alleging ongoing retaliation. The factual background provided by the parties indicates that the grievant destroyed certain personnel records in 2013 and that there was some dispute between the grievant and agency management as to the appropriate procedure for records retention and destruction. The grievant asserts that, after discussing this issue with management, the agency retaliated against him in ways that are not clear by the descriptions in the grievance.

The grievant filed a second grievance on or about August 26, 2014 ("Grievance 2"), alleging that "a series of communications" that were "retaliatory in nature" took place after the grievant discussed his "intent to file" Grievance 1 with his supervisor. The grievant claims that management implied he had "somehow done something wrong" and made "efforts . . . to circumvent the rules of the grievance procedure . . . ."

In the first November 1, 2014 grievance ("Grievance 3"), the grievant alleges that, to retaliate for his grievance activity, his supervisor failed to "support management decisions on an office level," denied the grievant's request for Civil and Work-Related leave to prepare grievance-related materials, and declined to award the grievant Compensatory Leave for "extra hours worked."[1] The grievant filed another grievance on November 1, 2014 ("Grievance 4"), in which he claims that he received an email that was "retaliatory in nature" from management after he emailed the agency head directly to express his concerns about retaliation and other work-related issues.

[1] The grievant also asserts in Grievance 3 that the agency failed to respond to a request for documents under the Virginia Freedom of Information Act. It appears that the agency has since provided the grievant with the requested information. The grievant has not provided EDR with any information to suggest that this issue was not resolved by the agency.

After proceeding through the management steps, the grievances were not qualified for a hearing by the agency head. The grievant now appeals those determinations 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]

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]

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[8] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[9] Ultimately, to support a finding of retaliation, EDR must find that the protected activity was a but-for cause of the alleged adverse action by the employer.[10]

---

[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).
[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* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).
[9] *See, e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[10] *See id.* (citing Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013)).

Here, the grievant engaged in protected activity by discussing workplace-related issues with management and using the grievance procedure.[11] However, the majority of the management actions challenged in the grievances cannot be considered adverse employment actions. The grievant alleges, for example, that agency management has questioned him about the operations of the call center, hired a new supervisor to whom he now reports,[12] failed to provide him with management support, and communicated with him about his work-related issues in a manner that he believes is inappropriate and retaliatory. In large part, the grievant does not allege that the agency has taken any tangible action taken against him. Although the grievant now reports to a new supervisor, there has been no change in his Role title, salary, or job responsibilities. The grievant has identified no way in which his position tangibly changed as a result of the agency's hiring of a new supervisor position. In the absence of an adverse employment action, these issues do not qualify for a hearing on the theory that the agency engaged in retaliation.

The grievant's assertions that the agency denied his request for Civil and Work-Related Leave and did not award him Compensatory Leave for additional hours worked are the only issues that appear to arguably raise a question as to whether he has experienced an adverse employment action.[13] Assuming without deciding that the grievant has raised a question as to whether these management decisions were adverse employment actions, and even inferring a causal connection between the grievant's engagement in protected activity and the denial of his leave requests based on their temporal proximity,[14] we conclude that the agency has provided legitimate, nonretaliatory business reasons for those actions.

DHRM Policy 4.05, *Civil and Work-Related Leave*, provides that, upon request, an agency must grant leave time for an employee "to prepare as grievant for the grievance procedure." The policy further states that agencies "may establish *reasonable limits* for this use of Civil and Work-Related Leave to prevent abuse of state time."[15] In this case, the grievant originally requested sixteen hours of leave to work on Grievance 1. The agency informed the grievant that sixteen hours of leave would be excessive based on the circumstances in this case

[11] *See* Va. Code §§ 2.2-3000(A), 2.2-3004(A).

[12] It is not apparent from the paperwork submitted by the grievant with any of his grievances that he ever specifically challenged the agency's hiring of his new supervisor. Indeed, the agency questions this as a new issue in one of the November 1, 2014 grievances. Furthermore, it is not clear that the grievant, if he intended to challenge this issue, initiated his grievance in a timely manner to challenge that action. Nevertheless, for the reasons discussed below, this claim would not qualify for a hearing anyway.

[13] EDR has previously held that management actions related to the use of leave that ultimately cause no loss in pay or other detrimental effect on the grievant's employment are not adverse employment actions. *See, e.g.*, EDR Ruling No. 2011-2835; EDR Ruling No. 2009-2161. Many courts, however, have held that the denial or cancellation of an employee's leave request is an adverse employment action. *See* Balinao v. Gonzalez, C.A. No. 9:06-0254-PMD-GCK, 2007 U.S. Dist. LEXIS 97440, at *49 (D.S.C. May 22, 2007); Liggett v. Rumsfeld, Civil Action No. 04-1363 (GBL), 2005 U.S. Dist. LEXIS 34162, at *10-13 (E.D. Va. Aug. 29, 2005); Scott-Brown v. Cohen, 220 F. Supp. 2d 504, 508-511 (D. Md. 2002). EDR is not persuaded that every situation in which an agency denies an employee's request for leave request is necessarily adverse. However, the facts in this particular case, considered in light of Fourth Circuit precedent, lead us to conclude that the grievant has raised at least an arguable question as to whether an adverse employment action has occurred here.

[14] *See* Tinsley v. First Union Nat'l Bank, 155 F.3d 435, 443 (4th Cir. Va. 1998) (stating that "merely the closeness in time between" an employee's exercise of protected activity and the adverse action is sufficient to establish a causal connection for a claim of retaliation under Title VII (citing Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989))).

[15] DHRM Policy 4.05, *Civil and Work-Related Leave* (emphasis added); *see Grievance Procedure Manual* § 8.6 (explaining that grievants may request Civil and Work-Related Leave time for certain types of grievance-related activity and stating that agencies may set "reasonable limits" on the use of such leave time).

and its past practices and approved four hours of Civil and Work-Related Leave. Under the facts presented, there was nothing unreasonable about agency's exercise of discretion to deny the original leave request. Indeed, we agree with the agency that two full workdays of leave time for grievance preparation would rarely be a reasonable request for grievance preparation.

DHRM Policy 3.10, *Compensatory Leave*, states that "[a]n exempt employee "may be awarded compensatory leave when the employee is required by the agency head or his/her designee to work more hours in a workweek than the agency head or his/her designee believes is reasonably expected for the accomplishment of the position's duties."[16] Although the grievant disagrees with the agency's position, this policy grants agencies the discretion to approve or deny an exempt employee's request for Compensatory Leave, depending upon the particular circumstances of the case. Here, there is nothing in the grievance record to suggest that the agency denied the grievant's request for Compensatory Leave because of his grievance activity. Indeed, the agency informed the grievant in one of its management step responses that, due to previous situations in which employees were improperly granted Compensatory Leave without appropriate authorization, management approval is required before Compensatory Leave can be awarded to exempt employees. EDR has not identified anything that would call into question that agency's justification for its limitation on granting Compensatory Leave to prevent improperly awarding additional leave time to exempt employees.

EDR's review of the grievance record shows that the agency's denial of the grievant's request for sixteen hours of Civil and Work-Related Leave and its decision not to grant Compensatory Leave were based on legitimate, nonretaliatory business reasons, and there is nothing to demonstrate that those reasons were merely a pretext for retaliation. Furthermore, there are no facts that would indicate the grievant's protected activity was the but-for cause of the leave-related actions. Accordingly, we conclude that the grievant's claims related to his leave requests do not raise a sufficient question as to whether retaliation has occurred, and they do not qualify for a hearing on this basis.

Workplace Harassment

Taken as a whole, the grievant's assertions also appear to amount to a claim that the agency has engaged in retaliation and/or harassment that has created an alleged 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.[17] 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.[18] "[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;

[16] The grievant is employed in position that is exempt from the overtime provisions of the Fair Labor Standards Act. *See* DHRM Policy No. 3.10, *Compensatory Leave*.
[17] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[18] *See generally id.* at 142-43.

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."[19]

As stated above, attempting to address workplace concerns with management and use of the grievance procedure are forms of protected activity. Even assuming, however, that the management actions challenged in the four grievances could, in their totality, be considered sufficiently severe or pervasive as to constitute an adverse employment action for a claim of workplace harassment, the facts presented by the grievant do not establish that they were based on his exercise of protected activity. From EDR's review of the grievance record, it appears instead that there were nonretaliatory business reasons for the agency's actions.

For example, the allegedly harassing conduct challenged in Grievance 1 appears to consist of inquiries from management about the operations of the call center in which he works. While the grievant may perceive this as a reflection of the agency's confidence in his abilities or management practices, it is not improper for the agency to communicate with the grievant about potential issues in the call center. Indeed, part of the agency's responsibility is to ensure that all of its facilities operate in compliance with applicable law and policy, and discussing potential issues with the grievant would appear to be good management practice and a method of ensuring that the agency continues to operate effectively. The grievant has not presented anything to indicate that these inquiries were improper, unreasonable, or an abuse of management's supervisory discretion, much less that they were related to a retaliatory intent.

The allegedly retaliatory communications challenged in Grievance 2 consist largely of discussions between the grievant and agency management about the appropriate management representative to serve as the first step-respondent for Grievance 1.[20] EDR cannot conclude that the emails referenced by the grievant are anything other than a reasonable response on the agency's part to resolve a disagreement about the selection of the first step-respondent. In addition, it is unclear what, if any, specific management actions the grievant believes have occurred that demonstrate a "failure to support management decisions . . . ." While the grievant may be frustrated by agency management's response to his concerns, there are no facts showing that the agency has taken action to change the grievant's work responsibilities or make his job more difficult. Instead, it appears that the grievant and the agency have different perspectives about the type of supervision that is necessary and/or appropriate for the grievant to perform his duties in the call center.

As discussed more fully above, agencies have discretion under DHRM policy to approve requests for Civil and Work-Related Leave and to award Compensatory Leave to employees.[21] EDR has reviewed nothing that to suggest that the agency denied the grievant's requests because he engaged in protected activity. Finally, the agency's response to the grievant's attempt to present his issues to the agency head appears to be a request that the grievant pursue concerns through the agency's management structure first, rather than taking those issues directly to the agency head, in order to enhance the agency's ability to respond effectively to workplace disputes. There is nothing unreasonable or retaliatory about such a request. After reviewing the

[19] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[20] In addition, the emails challenged in Grievance 2 relate primarily to the agency's potential noncompliance with the grievance procedure in its selection of the first step-respondent, and we fail to see how these actions could be considered retaliatory. Although the agency did not make this argument during the management steps, matters of noncompliance with the grievance process are appropriately addressing using the process set forth in Section 6 of the *Grievance Procedure Manual*, not the filing of an additional grievance. *See Grievance Procedure Manual* § 2.4.
[21] *See* DHRM Policy 3.10, *Compensatory Leave*; DHRM Policy 4.05, *Civil and Work-Related Leave*.

facts presented by the grievant, EDR cannot find that the grieved management actions were taken because the grievant engaged in protected activity. A grievance challenging a hostile work environment must raise more than a mere allegation of retaliation or workplace harassment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited retaliation based on protected activity.

The management actions referenced in the grievances, from EDR's analysis, appear to represent attempts by the agency to communicate with and manage the work performance of the grievant. That the grievant disagrees with some of the agency's management decisions and practices does not, by itself, raise a sufficient question as to whether an agency has engaged in workplace harassment to qualify for a hearing. In short, EDR cannot find that the grievances raise a question as to whether the agency engaged in any of the challenged management actions because of the grievant's protected activity. There is nothing in the grievance record to demonstrate that the agency lacked a legitimate basis or justification for the actions complained of by the grievant. For these reasons, the grievances do not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.[22]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[22] *See* Va. Code § 2.2-1202.1(5).