Issue: Qualification – Retaliation (grievance activity); Ruling Date: March 9, 2015; Ruling No. 2015-4110; Agency: Department of Social Services; 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 Social Services
Ruling Number 2015-4110
March 9, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether her December 23, 2014 grievance with the Department of Social Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as an Exception Processing Manager. On or about December 8, 2014, the grievant left work on medical leave and subsequently applied for short-term disability benefits. Initially, it appears there was some confusion as to whether the grievant intended to resign or use sick leave, and the agency asked the grievant to return her identification badge and parking credentials. While she was out of work, the grievant requested access to her office and state-owned computer. The agency permitted the grievant to have limited access to her state computer during normal business hours and with management supervision. On or about December 23, 2014, the grievant initiated a grievance alleging that she was "asked to turn in [her] access and State ID Badges" and was "denied use of [her] office and computer without supervision" as a form of retaliation because she had previously filed two grievances.[1] The December 23 grievance further challenges agency management's decision to reduce a Written Notice the grievant issued to a subordinate employee "due to extenuating circumstances." After proceeding through the management steps, the December 23 grievance was not qualified for a hearing by the agency head.[2] The grievant now appeals that determination to EDR.

[1] The two grievances have been qualified for hearing, and the hearing is currently pending.

[2] In her qualification decision, the agency head stated that the grievant had "added additional relief" after initiating her grievance and that "the Grievance Procedure does not allow additions to the Grievance Form A once it has been submitted to management." While the agency is correct that "challenges to additional management actions or omissions cannot be added" after a grievance is initiated, *Grievance Procedure Manual* § 2.4, that provision only prohibits an employee from adding additional *issues* to a grievance after it is initiated. For example, an employee may not amend a grievance to challenge a Written Notice that is issued after the grievance has been filed. An employee is free to present additional requests for relief in the same way that she may argue alternative theories or claims as to why a particular management action is improper after the grievance is initiated. *See, e.g.*, EDR Ruling No. 2014-3928.

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.[3] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[4] 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.[5]

Retaliation

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8]

In this case, the grievant asserts that the agency asked her to turn in her access and identification badges and has not been given reasonable access to her state computer during her medical absence from work. She claims that information related to the two qualified grievances is saved on her work computer and that the agency's actions have limited her ability to effectively challenge the agency actions that she disputes.[9] While we understand the grievant's concerns, she does not allege that the agency has taken any tangible action against her. For example, she does not assert that she has been disciplined, dismissed, demoted, or otherwise subject to an agency action resulting in a significant change in her employment status or in the terms, conditions, or benefits of her employment. In the absence of such claims, the grievance does not raise a sufficient question that an adverse employment action has occurred to qualify for a hearing.

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[3] *See Grievance Procedure Manual* § 4.1.
[4] Va. Code § 2.2-3004(B).
[5] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[6] *See Grievance Procedure Manual* § 4.1(b).
[7] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[9] Though it is not a dispositive factor in this case, we do note that it would typically be within management's discretion to implement reasonable restrictions on an employee's access to state property during an extended absence from work. In this case, the agency's offer to allow the grievant to use her state computer with supervision during normal work hours does not appear to be an unreasonable limitation on the grievant's ability to retrieve information related to her grievances while she on sick leave.

Discipline of Subordinate Employee

EDR has further recognized that, even if a grievance challenges a management action that might qualify for a hearing, there are some cases when qualification is inappropriate. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In this case, the grievant challenges the agency's decision to reduce a Written Notice she issued to an employee whom she supervises. The *Grievance Procedure Manual* provides that a hearing officer does not have the authority to "[take] any adverse action against an employee," except to uphold or reduce disciplinary action(s) challenged in a grievance.[10] Similarly, a hearing officer has no authority to modify a Written Notice issued to an employee other than a grievant. As a result, even if the grievant's challenge to the agency's reduction of the discipline were qualified for a hearing, a hearing officer would be unable to grant any relief. This issue is, therefore, not qualified and will not proceed further.

CONCLUSION

While the December 23 grievance does not qualify for a hearing, some of the facts presented in the grievance may be relevant to the issues raised in the two other grievances that the agency has qualified for a hearing. To the extent this is the case, evidence related to the issues discussed in this ruling may be presented by the grievant as background information at the hearing on the other two grievances. The hearing officer will not, however, have the authority to order relief for any of the specific management actions challenged in the December 23 grievance.[11]

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

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[10] *Grievance Procedure Manual* § 5.9(b).
[11] *See Rules for Conducting Grievance Hearings* § V(C) ("Challenges to management actions or omissions that have not been qualified in the grievance assigned to the hearing officer are not before that hearing officer, and may not be resolved or remedied.").
[12] *See* Va. Code § 2.2-1202.1(5).