Issue: Qualification – Work Conditions (employee/supervisor conflict); Ruling Date: May 18, 2015; Ruling No. 2015-4143; Agency: Department of Medical Assistance 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 Medical Assistance Services
Ruling Number 2015-4143
May 18, 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 March 2, 2015 grievance with the Department of Medical Assistance Services (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant was employed by the agency as Program Support Technician Senior.[1] On or about March 2, 2015, she initiated a grievance alleging that she has "consistently been emotionally and mentally abused, harassed, and targeted" by her supervisor and her supervisor's supervisor "since August 2014" and requested that the agency facilitate "a professional resolution to these issues."[2] After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. 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.[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]

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[1] The grievant is not employed by the agency for reasons which will be discussed at greater length below.
[2] During the management resolution steps, it appears that the grievant informed the second step-respondent she wished to conduct a mediation session with several members of agency management, including the supervisors who had allegedly engaged in harassing conduct.
[3] *See Grievance Procedure Manual* § 4.1.
[4] Va. Code § 2.2-3004(B).
[5] *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."[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 cases involving claims of workplace harassment, 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.[9] 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.[10] "[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."[11]

The grievant has not identified any protected status on which a claim of workplace harassment is based.[12] Instead, the grievant appears to argue that the alleged harassment began when she raised questions about workplace issues to management in an informal meeting. Such conduct could arguably amount to protected conduct to support a claim of retaliatory harassment.[13] However, even if the alleged harassment could be shown to be causally related to the questions raised by the grievant to management, a hearing officer would be unable to address this claim effectively were the grievance qualified for hearing. EDR has recognized that there are some cases when qualification is inappropriate, even if a grievance challenges a management action that might qualify for a hearing, such as workplace harassment. 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.

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[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] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[10] *See generally id* at 142-43.
[11] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). Ultimately, we need not fully discuss the question of whether the grievant was subject to workplace harassment or experienced an adverse employment action, because no effectual relief is available through the grievance process, as discussed below.
[12] *See* Executive Order 1 (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.
[13] *See* Va. Code § 2.2-3000.

Even though a hearing officer is not limited to the specific relief requested by the grievant,[14] this is a case where a hearing officer would be unable to award any meaningful relief under the grievance procedure. Without deciding whether the grievant has raised a question as to whether her supervisor or her supervisor's supervisor created a hostile work environment, events that happened after she initiated her grievance have rendered her claims regarding the alleged harassment moot in this case. It appears that, on or about April 3, 2015, the grievant was terminated from her employment with the agency. At a hearing to determine whether agency employees had engaged in workplace harassment, a hearing officer would have the authority to "order the agency to create an environment free from" the allegedly harassing behavior or "take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence."[15] Even if the grievant were able to establish that workplace harassment had occurred in this case, the relief available through the grievance process would be meaningless because the grievant is no longer employed by the agency and not subject to potential reinstatement given the dismissal was not apparently grieved. It would be pointless to hold a grievance hearing to determine whether agency employees created a hostile work environment where, as here, a direction from a hearing officer to cease the offending conduct would do nothing to modify the agency's decision to terminate the grievant.[16] Accordingly, there is no reason for the grievance to proceed to a hearing. The grievance is, therefore, not qualified and will not proceed further.

EDR's qualification rulings are final and nonappealable.[17]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[14] *Rules for Conducting Grievance Hearings* § VI(A).
[15] *Id.* § VI(C)(3).
[16] Based on the date of her termination, April 3, 2015, the thirty calendar day time period during which the grievant could have initiated a dismissal grievance with EDR to challenge her termination has passed, and EDR is not currently aware of any such grievance being initiated. *See Grievance Procedure Manual* §§ 2.4, 2.5.
[17] *See* Va. Code § 2.2-1202.1(5).