Issues: Qualification – Performance (interim evaluation), and Discrimination (other); Ruling Date: May 13, 2015; Ruling No. 2015-4150; Agency: Department for Aging and Rehabilitative 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 for Aging and Rehabilitative Services
Ruling Number 2015-4150
May 13, 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 March 19, 2015 grievance with the Department of Aging and Rehabilitative 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 office services specialist. On or about February 23, 2015, the grievant received a five-month interim performance evaluation. That evaluation rated the grievant as a "below contributor" performer. The grievant initiated a grievance challenging the interim evaluation, as well as an alleged "hostile work environment," on or about March 19, 2015. The grievant asked the agency head to qualify the grievance for hearing, but her request was denied. 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).

Interim Performance Evaluation

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]

In this instance, the grievant challenges an interim performance evaluation, which is an informal supervisory action akin to a written counseling.[7] An interim performance evaluation does not generally constitute an adverse employment action because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[8] Therefore, the grievant's claims relating to her receipt of the interim performance evaluation do not qualify for a hearing.[9]

We note that while the interim performance evaluation has not had an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against the grievant. Should the interim performance evaluation grieved in this instance later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.

Hostile Work Environment

The grievant further asserts that her supervisor has created a "hostile work environment." For a claim of a hostile work environment or 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 conduct; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and

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[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 Grievance Procedure Manual* § 4.1(c).
[8] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[9] 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 agency files, 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.*

(4) imputable on some factual basis to the agency.[10] 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.[11] "[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."[12] However, the grievant must raise more than a mere allegation of harassment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination or retaliation.

In this case, the grievant appears to challenge the allegedly hostile manner in which her supervisor interacted with her. The grievant does not, however, assert that this alleged conduct was based on a protected status or conduct. Further, the conduct described by the grievant was not so severe or pervasive that it altered the conditions of her employment. Prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[13] For these reasons, the grievant's claim of a hostile work environment does not qualify for a hearing.

CONCLUSION

For the foregoing reasons, the grievant's March 19, 2015 grievance does not qualify for hearing. EDR's qualification rulings are final and nonappealable.[14]

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[10] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).
[11] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142-43 (4th Cir. 2007).
[12] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[13] 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).
[14] *See* Va. Code § 2.2-1202.1(5).