

Issue: Qualification – Performance (arbitrary/capricious evaluation); Ruling Date: May 27, 2015; Ruling No. 2015-4156; Agency: College of William and Mary; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the College of William and Mary
Ruling Number 2015-4156
May 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 her March 19, 2015 grievance with the College of William and Mary (the “College”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the College as an assistant to a Director of Development. On or about December 1, 2014, the grievant appears to have received her annual performance evaluation for 2013-2014. She received an overall rating of “Satisfactory” for the year. The grievant initiated a grievance challenging the performance evaluation, as well as alleged harassment, on March 19, 2015. After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. Her request was denied, and 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).

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 case, the grievant received an overall rating of “Satisfactory” on her performance evaluation.⁷ A satisfactory performance evaluation is not an adverse employment action.⁸ Thus, where the grievant presents no evidence of an adverse action relating to the evaluation, such a grievance does not qualify for a hearing. 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.⁹

Harassment/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 (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

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 DHRM Policy 1.40, *Performance Planning and Evaluation*, for additional discussion of performance evaluation procedures for state employees.

⁸ *E.g.*, EDR Ruling No. 2015-4123; 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).

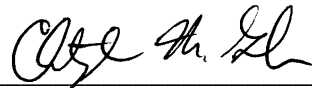
⁹ Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the “Act”). Under the Act, if the grievant gives notice that she wishes to challenge, correct or explain information contained in his 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.*

¹⁰ *See generally* *White v. BFI Waste Services, LLC*, 375 F.3d 288, 296-97 (4th Cir. 2004).

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.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 challenges the allegedly hostile manner in which her supervisor interacted with her. The grievant appears to assert that this harassment was based on the grievant's educational level and/or her need to take leave for doctor's appointments. While the need for medical leave could arguably create a protected status, an individual's educational level is not a prohibited basis for discrimination.¹³ Further, to the extent the grievant has alleged a protected status, 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.¹⁴ Lastly, even if the grievant were able to show the existence of severe or pervasive conduct, there is no evidence to show that this conduct was the result of prohibited discrimination or retaliation, rather than for some other reason. Accordingly, the grievant's claim of a hostile work environment does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.¹⁵



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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 See, e.g., Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.

¹⁴ *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).

¹⁵ See Va. Code § 2.2-1202.1(5).