

Issue: Qualification – Work Conditions (employee/supervisor conflict); Ruling Date: January 19, 2016; Ruling No. 2016-4288; Agency: Virginia Department of Transportation; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2016-4288
January 19, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) of the Department of Human Resource Management (“DHRM”) on whether her August 21, 2015 grievance with the Virginia Department of Transportation (“agency”) qualifies for hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about August 14, 2015, the grievant initiated a grievance challenging “hostile work environment” and “harassment” by a supervisor. Among other actions, the grievant argues that this harassment included a counseling memorandum issued on August 11, 2015, criticism of the timing of her lunch breaks, criticism of her work performance, and other previous verbal and written counselings.¹ After the parties failed to resolve the grievance during the management resolution steps, the grievant asked that the agency qualify the grievance for hearing. The grievant’s request was denied and she has requested a qualification ruling by 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, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.³ Thus, claims relating to issues such as to 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.

¹ In her request for qualification, the grievant appears to raise claims about management conduct occurring after August 14, 2015, when she initiated her grievance. Challenges to additional management actions may not be added to a grievance once it has been initiated. See *Grievance Procedure Manual* § 2.4. As such, these additional claims will not be considered here. In addition, to the extent the grievant now attempts to raise challenges to the manner in which the agency has conducted the grievance procedure, these claims were required to be addressed through the noncompliance process set forth in Section 6.3 of the *Grievance Procedure Manual*. As the grievant did not raise these claims prior to the qualification process, challenges to any noncompliance by the agency during the management resolution steps are deemed waived. See *Grievance Procedure Manual* § 6.3.

² See *Grievance Procedure Manual* §§ 4.1 (a), (b).

³ See Va. Code § 2.2-3004(B).

The grievant alleges that she was subjected to a hostile work environment and harassment. 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 protected conduct or on a protected status, such as race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, genetics, disability, or veteran status;⁴ (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.⁵ “[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.”⁶

In this case, the grievant does not appear to have alleged in her grievance that the challenged supervisory conduct was based on a protected status or a retaliatory motive.⁷ However, even if EDR were to assume that such a basis existed, the conduct challenged by the grievant is not sufficiently severe or pervasive to alter the conditions of employment. While we appreciate the grievant’s concerns regarding her supervisor’s alleged actions, prohibitions against harassment do not provide a “general civility code”⁸ or remedy all offensive or insensitive conduct in the workplace.⁹ For workplace conduct to constitute an actionable hostile environment, the conduct must rise to a “sufficiently severe or pervasive” level such that an unlawfully abusive or hostile work environment was created.¹⁰ In this case, the challenged conduct cannot be found to rise to this level.¹¹ In the absence of such evidence, this grievance cannot qualify for hearing.¹²

EDR’s qualification rulings are final and nonappealable.¹³



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⁴ See, e.g., Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.

⁵ See generally *White v. BFI Waste Services, LLC*, 375 F.3d 288, 296-97 (4th Cir. 2004).

⁶ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

⁷ The grievant appears to allege that she has been subjected to retaliation since she initiated her grievance. Although these claims cannot be considered as part of her current grievance, if such claims are still timely, they may be pursued through another grievance. See discussion at n.1.

⁸ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

⁹ See, e.g., *Beall v. Abbott Labs*, 130 F.3d 614, 620-21 (4th Cir. 1997); *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996).

¹⁰ See *Gilliam v. S.C. Dep’t of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

¹¹ See generally *Gunten v. Maryland*, 243 F.3d 858, 869 (4th Cir. 2001).

¹² We note, however, that this ruling in no way precludes the grievant from initiating a subsequent grievance regarding supervisory conduct she regards as hostile or harassing that has occurred since she filed the grievance or that may occur in the future.

¹³ Va. Code § 2.2-1202.1(5).