Issues: Qualification – Discipline (other), Discipline (counseling memo), Discrimination (race), Work Conditions (employee/supervisor conflict); Ruling Date: February 26, 2016; Ruling No. 2016-4299; Agency: Virginia Community College System; Outcome: Partially Qualified.

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

QUALIFICATION RULING

In the matter of the Virginia Community College System
Ruling Number 2016-4299
February 26, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether her September 30, 2015 grievance with the Virginia Community College System (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is partially qualified for a hearing.

FACTS

The grievant is employed as a Human Resource Analyst at one of the agency's community colleges. On or about September 30, 2015, she initiated a grievance challenging the issuance of two Written Notices, alleging that her supervisor and coworkers have engaged in "harassment, disruptive behavior, unprofessional behavior, discriminatory comments," and raising additional issues relating to "lack of confidentiality, quality control, proper performance management, communication, [and] leadership . . . ." After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

DISCUSSION

Written Notices

By statute and under the grievance procedure, all formal disciplinary actions (i.e., Written Notices, terminations, suspensions, demotions, transfers and assignments resulting from formal discipline) automatically qualify for a hearing.[1] The grievant clearly disputes the agency's issuance of two Written Notices: a Group I Written Notice dated August 5, 2015, and a Group II Written Notice dated September 23, 2015. Consequently, the grievant's challenge to the Written Notices is qualified for a hearing.[2]

[1] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(a).

[2] The grievance procedure typically requires that a grievance must be initiated "**within 30 calendar days** of the date the employee knew or should have known of the management action or omission being grieved." *Grievance Procedure Manual* § 2.2. In cases where a grievance is not timely filed, "[t]he agency may raise the issue of timeliness at any point through the agency head's qualification decision." *Id.* Although the September 30 grievance does not appear to be timely to challenge the Group I Written Notice issued on August 5, the agency did not raise any claim regarding the timeliness of the grievance during the resolution steps or in the agency head's qualification decision. Accordingly, EDR finds that the agency has waived any potential arguments with regard to the timeliness of the challenge to the Group I Written Notice and it will proceed to a hearing as discussed above.

At the hearing, the agency will have the burden of proving that the Written Notices were "warranted and appropriate under the circumstances."[3] The grievant will have the burden of raising and establishing any affirmative defenses, as well as any evidence of mitigating circumstances.[4] This ruling in no way determines whether the agency's actions in issuing the Written Notices were proper or improper, but merely reflects that further exploration of the facts by a hearing officer is warranted.

Other Issues

In addition to her claims with respect to the agency's issuance of the Written Notices, the grievant has raised a variety of additional issues relating to her employment. Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[5] Furthermore, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[6] 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.[7]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[8] 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."[9] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[10]

Counseling Memo

The grievant appears to challenge the agency's issuance of a counseling memo on or about July 28, 2015. A counseling memo is a form of written counseling, and thus it is not equivalent to a Written Notice of formal discipline. A written counseling 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.[11] Therefore, the grievant's claims relating to her receipt of the Counseling Memo do not qualify for a hearing.

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[3] *Id.* § 5.8.
[4] *Id*.
[5] *See id.* § 4.1.
[6] Va. Code § 2.2-3004(B).
[7] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[8] *See Grievance Procedure Manual* § 4.1(b).
[9] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[10] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[11] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

Discrimination

In addition, the grievant argues that the agency has engaged in discrimination based on her race. Grievances that may be qualified for a hearing include actions that occurred due to discrimination on the grounds of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, genetics, disability, or veteran status.[12] For a claim of discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[13]

The grievant's claim of discrimination in this case appears to largely relate to the agency's actions with respect to diversity generally, rather than to the grievant specifically. For example, the grievant claims she assisted another employee in promoting diversity within the agency, but "appropriate acknowledgement was not made related to our initiatives and major efforts." She also argues that "there were missed opportunities to obtain a minority for positions." The grievant does, however, assert that other employees in her work group made "discriminatory comments" and that her supervisor "has treated [her] differently due to her race." However, EDR has been unable to identify any information in the over 900-page grievance record to show the nature or even a description of the alleged discriminatory comments or the ways in which the grievant has allegedly been treated differently than others by her supervisor. A grievance must present more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. Having reviewed the voluminous grievance record, EDR finds that the grievant's allegations, though concerning, do not raise a sufficient question as to whether the grievant was subjected to discriminatory conduct by her supervisor or other employees because of her race. Consequently, the grievant's claim of discrimination does not qualify for a hearing.

Retaliation and Workplace Harassment

Fairly read, the remainder of the grievant's claims, taken as a whole, amount to a claim that the agency has engaged in retaliation and/or harassment that has created a hostile work environment. For a claim of workplace 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 prior protected activity; (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.[14] 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.[15] "[W]hether

[12] *See*, *e.g.*, Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.
[13] *See* Hutchinson v. INOVA Health Sys., Inc., Civil Action No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *4 (E.D. Va. April 8, 1998).
[14] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[15] *See generally id* at 142-43.

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."[16]

In this case, the grievant appears to allege that she engaged in protected activity by supporting other agency employees who disagreed with their performance evaluations and by using leave to maintain "work-life balance" and "provide some assistance with the overwhelming experiences, struggles, trouble, and hardships of this work environment." Even assuming that these actions constitute protected activity under the grievance procedure,[17] EDR finds that the conduct challenged by the grievant is not sufficiently severe or pervasive to alter the conditions of her employment. In support of her claim that she has been subjected to a hostile work environment, for example, the grievant argues that the agency improperly conducted an internal investigation of her allegation of harassment that determined the complaint was unfounded; that her supervisor has "made aggressive comments to [her] out in the open"; that meetings with her supervisor are "extremely informal, unprofessional and insensitive and lack attentiveness and preparedness"; that "proper performance management is not maintained consistently throughout the HR office and within the College"; that there are "extreme quality control issues and wasted resources and inefficiencies" within her work group; and that she has been subjected to "harassing, aggressive, and bullying behavior" from coworkers.

While the grievant may be raising legitimate concerns about her employment and her supervisor's and/or coworkers' conduct, EDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment. While we appreciate the grievant's concerns regarding the allegedly improper behavior of her supervisor and coworkers, prohibitions against harassment do not provide a "general civility code"[18] or remedy all offensive or insensitive conduct in the workplace.[19] 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.[20] In this case, the challenged conduct cannot be found to rise to this level.[21] In the absence of such evidence, this issue cannot qualify for a hearing.[22]

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[16] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

[17] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).

[18] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (citation omitted).

[19] *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).

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

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

[22] This ruling does not mean that EDR deems the alleged behavior of the grievant's supervisor and coworkers, if true, to be appropriate, only that the grievant's claims of workplace harassment do not qualify for a hearing. Moreover, this ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.

CONCLUSION

For the reasons set forth above, the grievant's claims regarding the issuance of the Group I Written Notice on August 5, 2015, and the Group II Written Notice on September 23, 2015 are qualified for a hearing. The remaining issues presented in the grievance are not qualified and may not proceed further.[23] While these additional management actions and/or omissions do not qualify for a hearing, some of the facts presented in relation to these claims may be relevant to the grievant's arguments regarding the Written Notices. To the extent this is the case, evidence related to the other issues cited in the grievance may be presented by the grievant as background information at the hearing as to why the Written Notices were improperly issued. The hearing officer will not, however, have the authority to order relief for any of the specific management actions challenged in the grievance other than the Written Notices.[24]

Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing using the Grievance Form B. EDR will provide the appointed hearing officer with an appointment packet containing the portion of the grievance paperwork related to the issues qualified for hearing, rather than the entire 900-page file, much of which appears to address issues that were not qualified for hearing. Any documentation either party wishes the hearing officer to consider will need to be presented as exhibits at the hearing. EDR's lack of inclusion of a document in the appointment packet in no way prevents either party from presenting such documents to the hearing officer for consideration as part of the hearing record.

EDR's qualification rulings are final and nonappealable.[25]

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[23] To the extent this ruling does not address any specific issue raised in the grievance, EDR has thoroughly reviewed the grievance record and has determined that the grievance does not raise a sufficient question as to whether the grievant experienced an adverse employment action, whether discrimination, retaliation, or discipline may have improperly influenced any management decision cited in the grievance, or whether the agency may have misapplied and/or unfairly applied state policy that would warrant qualification of any additional issue(s) other than the Written Notices.

[24] *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.").

[25] *See* Va. Code §§ 2.2-1202.1(5).