Issues: Qualification – Management Actions (recruitment/selection), and Work Conditions (employee/supervisor conflict); Ruling Date: March 4, 2016; Ruling No. 2016-4301, 2016-4302; Agency: Department of Corrections; 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 Corrections
Ruling Numbers 2016-4301, 2016-4302
March 4, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether his October 15, 2015 and December 15, 2015 grievances with the Department of Corrections (the "agency") qualify for a hearing. For the reasons discussed below, these grievances do not qualify for a hearing.

FACTS

The grievant is employed at one of the agency's facilities as a cognitive counselor. On October 15, 2015, the grievant initiated a grievance challenging a selection procedure for a Unit Manager position for which he competed unsuccessfully. Subsequently, on December 15, 2015, the grievant initiated a grievance regarding what he alleges are inappropriate comments by a manager. After proceeding through the management steps, the grievances were not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.

DISCUSSION

October 15, 2015 Grievance—Selection

By statute and under the grievance procedure, complaints relating solely to issues such as the hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to a hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[1] Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment action."[2] Thus, typically, a 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."[3] Adverse employment actions include any agency

[1] Va. Code § 2.2-3004(C); *see Grievance Procedure Manual* §§ 4.1(b), (c).
[2] *Grievance Procedure Manual* § 4.1(b).
[3] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[4] For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action, in that it appears the position he applied for would have been a promotion.

In the grievance, the grievant appears to assert that he was not selected for the position even though he was more qualified than the selected applicant.[5] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. State hiring policy is designed to ascertain which candidate is best suited for the position, not just to determine who might be qualified to perform the duties of the position.[6] Moreover, the grievance procedure accords much deference to management's exercise of judgment, including management's assessment of applicants during a selection process. Thus, a grievance that challenges an agency's action like the selection in this case does not qualify for a hearing unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.[7].

In this case, EDR's review indicates that the successful candidate was considered by the agency to have more relevant experience than the grievant, including having previously worked as a unit manager. In addition, it appears that the successful candidate was considered to have more clearly conveyed his knowledge, skills, and abilities during the interview process. The agency's recruitment policy states that its employment decisions are based on an individual's "merits, qualifications, eligibility, and suitability" for the position.[8] Agency decision-makers deserve appropriate deference in making determinations regarding a candidate's knowledge, skills, and abilities. As a result, EDR will not second-guess management's decisions regarding the administration of its procedures absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious. In this case, although the grievant may disagree with the agency's decision, EDR has reviewed nothing that would reasonably suggest that the agency's selection process disregarded the pertinent facts or was otherwise arbitrary or capricious. Accordingly, the grievance does not raise a sufficient question as to whether the agency misapplied and/or unfairly applied policy, and therefore does not qualify for a hearing on this basis.

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[4] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

[5] The grievant asserts that the notes of one of the interviewers provide no explanation for his decision not to recommend the grievant. However, the grievant has not identified any policy violated by this alleged failure and EDR is aware of no policy imposing such a requirement. *See* DHRM Policy No. 2.10, *Hiring*; DOC Operating Procedure 170.1, *Recruitment, Selection, and Appointment*, § IV(J).

[6] *See* DHRM Policy No. 2.10, *Hiring*; DOC Operating Procedure 170.1, *Recruitment, Selection, and Appointment*, § IV(A)(1).

[7] *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as "[i]n disregard of the facts or without a reasoned basis.").

[8] DOC Operating Procedure 170.1, *Recruitment, Selection, and Appointment*, § IV(A)(1) .

December 15, 2015 Grievance—Harassment

The grievant also asserts that he was subjected to workplace harassment. 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 (such as race, age, or sex) 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.[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]

In this case, the grievant asserts that the manager's comments to him constituted sexual harassment.[12] While the grievant may be raising understandable concerns regarding the manager's conduct, EDR cannot find that the grieved management actions were so significant as to create an abusive or hostile work environment. Prohibitions against harassment do not provide a "general civility code"[13] or remedy all offensive or insensitive conduct in the workplace.[14] 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.[15] In this case, the challenged conduct cannot be found to rise to this level.[16] In the absence of such evidence, this issue cannot qualify for a hearing.[17]

EDR's qualification rulings are final and nonappealable.[18]

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[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).
[12] The grievant also asserts that he was subjected to more generalized "workplace harassment." However, alleged harassment which is not based on a protected status or conduct cannot be qualified for hearing.
[13] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (citation omitted).
[14] *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).
[15] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[16] *See generally* Gunten v. Maryland, 243 F.3d 858, 869 (4th Cir. 2001).
[17] This ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.
[18] Va. Code § 2.2-1202.1(5).