

Issues: Qualification – Performance (arbitrary/capricious performance evaluation) and Miscellaneous (other issues); Ruling Date: April 13, 2016; Ruling No. 2016-4308, 2016-4309; Agency: Department of Social Services; Outcome: Partially Qualified.



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

QUALIFICATION RULING

In the matter of the Department of Social Services
Ruling Numbers 2016-4308, 2016-4309
April 13, 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 her November 13, 2015 and November 16, 2015 grievances with the Department of Social Services (the “agency”) qualify for a hearing.

FACTS

The grievant is employed by the agency as a Financial Services Manager I. On or about October 15, 2015, the grievant received her annual performance evaluation for 2014-2015, on which she received an overall performance rating of “Contributor.” During this time, as the result of “many allegations and unresolved issues” relating to the grievant’s allegedly improper conduct as the manager of her work group, the agency temporarily removed the grievant’s supervisory responsibilities on or about June 8, 2015.¹ The grievant’s supervisor provided her with “temporary expectations and duties to complete” during that time period, which included “working towards improving communications and interpersonal skills” On or about November 13, 2015, the agency notified the grievant that her “progress towards the requested improvements [had] not met the expectations provided” and that her supervisory duties would be permanently removed. The agency appears to have taken no other formal action to address issues with the grievant’s managerial conduct. The grievant’s Role title, Pay Band, salary, and other benefits have not been affected by the change in her job duties.

The grievant initiated a grievance regarding the performance evaluation on or about November 13, challenging the agency’s decision to rate her “Below Contributor” with respect to her “responsibilities as a manager” and alleging that the evaluation was “capricious, unreasonable, and unsupported by facts and truth.” The grievant further alleges that her performance evaluation was a “disciplinary action[] taken based on the opinion of vindictive staff and their reporting false information” On or about November 16, 2015, the grievant initiated a second grievance disputing the agency’s decision to permanently remove her supervisory responsibilities, alleging that the change in her job duties is a form of “retaliation and disciplinary action[],” and requesting the “[r]einstatement of all [her] duties” as a manager.

¹ The grievant filed a grievance to challenge the temporary removal of her supervisory duties. That grievance was addressed in EDR Ruling Number 2016-4188.

After proceeding through the management steps, both grievances were not qualified for a hearing by the agency head. The grievant now appeals those determinations to EDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out and the reassignment or transfer of employees within the agency 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.³

Further, 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

Performance Evaluation

In her November 13 grievance, the grievant contends that the agency's decision to rate her "Below Contributor" on the core responsibility relating to her "responsibilities as a manager" was arbitrary and disciplinary in nature. However, the grievant received an overall rating of "Contributor" on her performance evaluation for the 2014-2015 evaluation cycle.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. In this case, although the grievant disagrees with some of the information contained in her performance evaluation and the individual factor rating of "Below Contributor" relating to her management responsibilities, she received ratings of "Contributor" on all of the other individual factor ratings and her overall performance rating was "Contributor." Most importantly, the grievant has presented no evidence that the performance evaluation itself or any

² See Va. Code § 2.2-3004(B).

³ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

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. 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).

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 November 13 grievance does not qualify for a hearing.⁹

Removal of Supervisory Duties

In the November 16 grievance, the grievant alleges that the permanent removal of her supervisory duties was intended as a form of disciplinary action based on allegations from other employees that she had engaged in misconduct and/or inappropriate behavior, and not “on the actions of [her] success as a manager.” For state employees subject to the Virginia Personnel Act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the policies and procedures promulgated by DHRM.¹⁰ For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.¹¹ These safeguards are in place to ensure that disciplinary actions are appropriate and warranted.

Where an agency has taken informal disciplinary action against an employee, a hearing cannot be avoided for the sole reason that a Written Notice did not accompany the disciplinary action. Rather, even in the absence of a Written Notice, a hearing is required where the grieved management action resulted in an adverse employment action against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance).¹² Depending on all the facts and circumstances, a reassignment or transfer with significantly different responsibilities can constitute an adverse employment action.¹³ In this case, we find the grievant has presented evidence to demonstrate that the change in her job duties raises a sufficient question as to whether she has experienced an adverse employment action.¹⁴

⁹ Although the November 13 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 her 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 Va. Code § 2.2-2900 *et seq.*

¹¹ See DHRM Policy 1.60, *Standards of Conduct*.

¹² See, e.g., EDR Ruling Nos. 2007-1516, 2007-1517; EDR Ruling Nos. 2002-227, 2002-230; see also Va. Code § 2.2-3004(A) (stating that grievances involving “transfers and assignments . . . resulting from formal discipline or unsatisfactory job performance” may qualify for a hearing).

¹³ See *James*, 368 F.3d at 376; *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999); see also *Edmonson v. Potter*, 118 Fed. Appx. 726, 729 (4th Cir. 2004).

¹⁴ For instance, the grievant no longer supervises any employees, whereas she formerly managed a team of five. Though the grievant reports to the same supervisor, it appears the grievant is expected to follow instructions given to her by the acting supervisor, who was previously her subordinate and currently occupies the grievant’s former position as the manager of the work group.

The November 16 grievance also raises a sufficient question as to whether the agency's primary intent in permanently removing the grievant's supervisory duties from her job duties was to correct or punish perceived unsatisfactory job performance or conduct. Although this action was not accompanied by a Written Notice, the circumstances surrounding the changes to the grievant's employment involve multiple instances of alleged conduct that could have been addressed with appropriate disciplinary action under DHRM Policy 1.60, *Standards of Conduct*. For example, the grievant received notice that the agency was contemplating the issuance of disciplinary action on July 21, 2015 based on violations of state and agency policies that prohibit workplace violence and/or harassment. The agency issued a written counseling memorandum on July 31, 2015, in which it requested that the grievant "make effort to improve her communication and interactions to co-workers and management."

The information provided by the parties further indicates that, after the issuance of the counseling memorandum and while the grievant's change in job duties was considered temporary, she did not follow agency security standards, failed to complete assigned tasks as requested, and did not attend multiple meetings after she had been instructed to do so. Based on these aspects of the grievant's performance, as well as additional perceived deficiencies in her workplace behavior, the agency appears to have concluded that the grievant would not be effective in a supervisory capacity. Other than the permanent changes in her job duties, EDR is unaware of any action taken by the agency to correct or address these instances of potential misconduct.

Whether the agency's change to the grievant's job duties was primarily intended to punish or correct her behavior or work performance is a factual determination that a hearing officer, not this Office, should make. At the hearing, the grievant will have the burden of proving that the change in her job responsibilities was adverse and disciplinary.¹⁵ If the hearing officer finds that it was, the agency will have the burden of proving that its decision was reasonable, based in fact, and carried out in accordance with the discretion granted to the agency under policy.¹⁶ Should the hearing officer find that the change in her duties was adverse, disciplinary, and unwarranted and/or inappropriate under this standard, he or she may order the agency to restore the grievant's supervisory responsibility, just as he or she may rescind any formal disciplinary action.¹⁷ This qualification ruling in no way determines that the grievant's change in job duties constituted unwarranted informal discipline or was otherwise improper, but only that further exploration of the facts by a hearing officer is warranted. The grievance is qualified as to the grievant's challenge to the permanent changes in her job responsibilities.¹⁸

¹⁵ *Rules for Conducting Grievance Hearings* § VI(B)(1).

¹⁶ *Cf. Cobert v. Miller*, 800 F.3d 1340, 1344-45 (Fed. Cir. 2015) (stating that, in cases involving the geographical reassignment of federal employees, the agency must demonstrate that its "decision to reassign the employee was a bona fide determination based on legitimate management considerations in the interests of the service" (quoting *Ketterer v. U.S. Dep't of Agric.*, 2 M.S.P.R. 294, 298 (1980))); *Frey v. Dep't of Labor*, 359 F.3d 1355, 1357-58 (Fed. Cir. 2004) (affirming a decision of the Merit Systems Protection Board that deficiencies in a federal employee's work performance were sufficient to warrant a geographical reassignment).

¹⁷ *See, e.g.*, EDR Ruling No. 2002-127.

¹⁸ *See Va. Code* § 2.2-3004(A) (stating that grievances involving "transfers and assignments . . . resulting from formal discipline or unsatisfactory job performance" may qualify for a hearing).

In the grievance, the grievant also contends that the agency's decision to remove her supervisory duties was retaliatory in nature and a misapplication and/or unfair application of policy. Because the grievant's claim of informal disciplinary action qualifies for a hearing, EDR considers it appropriate to send these alternative theories and claims regarding the changes in the grievant's job duties for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues. As with the grievant's claim that the change in her job duties was disciplinary, the grievant will have the burden of proving that the agency's action was retaliatory and/or contrary to state or agency policy.¹⁹

CONCLUSION

The November 13, 2015 grievance disputing the content of the grievant's performance evaluation is not qualified for a hearing and may not proceed further. The grievant's November 16, 2015 grievance is qualified for a hearing as discussed above. 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's qualification rulings are final and nonappealable.²⁰



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¹⁹ *Rules for Conducting Grievance Hearings* §§ VI(C)(1), VI(C)(3).

²⁰ See Va. Code § 2.2-1202.1(5).