

Issue: Qualification – Work Conditions (employee/supervisor conflict); Ruling Date: April 4, 2016; Ruling No. 2016-4324; Agency: Virginia Commonwealth University; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of Virginia Commonwealth University
Ruling Number 2016-4324
April 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 her November 23, 2015 grievance with Virginia Commonwealth University (the “University”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the University as a manager. On or about November 23, 2015, the grievant initiated a grievance challenging a number of alleged actions and/or omissions by the University. After proceeding through the management steps, the grievance was not qualified for a hearing. The grievant now appeals that determination to EDR.¹

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, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government, including the establishment of performance expectations and the rating of employee performance against those expectations.³ 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.⁴

In addition, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁵ 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

¹ Additional facts as relevant to the particular claims are discussed further below.

² See *Grievance Procedure Manual* § 4.1.

³ Va. Code § 2.2-3004(B).

⁴ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁵ See *Grievance Procedure Manual* § 4.1(b).

status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁷

In this case, the grievant asserts, among other things, that her supervisor failed to provide her with her 2014-2015 performance evaluation on a timely basis, conducted a meeting with her regarding her performance on or about October 23, 2015, criticized her over her handling of a subordinate’s performance, advised her of complaints regarding the grievant’s use of a religious title in email, accused her of making “rude remarks” and “loud gestures” about a co-worker’s vacation, discussed with the grievant her “periodic outburst[s],” advised the grievant of her dissatisfaction regarding how and when information is conveyed, addressed with the grievant her concern that the grievant does not take responsibility for things over which she has direct control, and expressed to the grievant a concern that the grievant did not convey the supervisor’s instructions accurately to others.⁸ In addition, the grievant is concerned that an issue with a co-worker, which the grievant claims has been resolved, should not be considered by her supervisor in evaluating her performance. She also challenges a response she received from an employee within human resources regarding a request for documents.⁹

The grievant appears to argue that the challenged conduct, considered in the aggregate, constitutes harassment creating a hostile work environment.¹⁰ 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.¹¹ In the analysis of such a claim, the “adverse

⁶ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁷ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁸ To the extent the grievant raises concerns regarding conduct occurring after November 23, 2015—such as, for example, the allegations regarding her performance evaluation set forth in the grievant’s March 9, 2016 letter to EDR — those matters may not be considered as part of her November 23 grievance and must instead be challenged in a separate grievance. *See Grievance Procedure Manual* § 2.4 (“Once a grievance is initiated, challenges to additional management actions or omissions cannot be added.”) With respect to the grievant’s challenges to alleged failures by the University to comply with the grievance procedure, those challenges must be pursued through the process set forth in Section 6.3 of the *Grievance Procedure Manual*. As the grievant has advanced her grievance through to the qualification stage without doing so, the grievant’s claims of noncompliance are now moot. *See id.* at § 6.3.

⁹ The grievant asserts that she is entitled to information regarding the accusations against her discussed in her grievance, citing DHRM Policy 6.05, *Personnel Records Disclosure* and DHRM Policy 6.10, *Personnel Records Management*. These policies provide that employees “must be given access to any information maintained in supervisors’ files that pertain to them, unless such information is protected by law.” DHRM Policy 6.10, *Personnel Records Management*. From the information provided by the grievant, however, it is not clear that any materials regarding the allegations are contained in any supervisory files “pertain[ing] to” the grievant. The grievant does not appear to specifically seek the requested documents as relief in her grievance, and it does not appear that she has asked EDR to rule on any alleged noncompliance by the University in failing to provide documents under the grievance procedure. However, to the extent the grievant still seeks the requested documentation, she may wish to consider initiating a FOIA request.

¹⁰ To the extent the grievant argues within certain of her allegations that the University has misapplied policy, the grievant has either not cited to particular policies that have been allegedly violated or her allegations of policy violations do not rise to the level of being “adverse employment actions” to qualify for a hearing.

¹¹ *See Gilliam v. S.C. Dep’t of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

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 an abusive or hostile work environment.¹² “[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.”¹³

In this case, 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”¹⁴ or remedy all offensive or insensitive conduct in the workplace.¹⁵ Further, much of the conduct cited by the grievant relates to her supervisor’s efforts to relay concerns regarding the grievant’s performance.¹⁶ 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, and the conduct must be based on an individual’s protected status or previous protected activity.¹⁷ In this case, upon reviewing all the information submitted by the grievant in her grievance paperwork, even taking her allegations as true, the challenged conduct cannot be found to rise to this level.¹⁸ Further, the University has advised EDR that the grievant has received her performance evaluation with a satisfactory rating of “Achiever.” In light of all these factors, there is no basis on which to qualify the grievant’s November 23, 2015 grievance.¹⁹

EDR’s qualification rulings are final and nonappealable.²⁰



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¹² See generally *id* at 142-43.

¹³ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

¹⁴ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (citation omitted).

¹⁵ 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).

¹⁶ The grievant has also specifically challenged her supervisor’s alleged comments that she would “contact HR” as a “threat.” EDR is not persuaded by the grievant’s characterization of this incident. Involving HR in a given employment situation is not properly viewed as a threat but rather as an attempt to involve an appropriate resource in resolving workplace difficulties.

¹⁷ See *Gilliam v. S.C. Dep’t of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

¹⁸ See generally *Gunten v. Maryland*, 243 F.3d 858, 869 (4th Cir. 2001).

¹⁹ 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 University may have misapplied and/or unfairly applied state policy that would warrant qualification.

²⁰ See Va. Code § 2.2-1202.1(5).