Issue: Qualification – Performance (Notice of Improvement Needed); Ruling Date: May 20, 2016; Ruling No. 2016-4333; 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 Number 2016-4333
May 20, 2016

The grievant has requested a ruling on whether her September 14, 2015 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons discussed below, the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (DHRM) finds that this grievance does not qualify for a hearing.

FACTS

The September 14, 2015 grievance challenges a written performance counseling received by the grievant on or about August 31, 2015. The grievant asserts that the written counseling was arbitrary and capricious in nature, and given to her in retaliation for her reporting to management a situation involving another officer's allegedly threatening behavior. After the grievance proceeded through the management steps, the agency head declined to qualify this grievance for a hearing. The grievant now appeals that determination.

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.[1] Additionally, 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, as well as the contents of statutes, ordinances, personnel policies, procedures, rules, and regulations, 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, 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

[1] *See Grievance Procedure Manual* § 4.1.
[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).

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]

The management action challenged in this grievance is a type of counseling memorandum. A counseling memo 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.[7] Therefore, the grievant's challenge to the written performance counseling issued to her does not qualify for a hearing. However, should the performance counseling grieved in this case later serve to support an adverse employment action against the grievant, such as a formal disciplinary action or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.

To the extent that the grievance can be fairly read as alleging the existence of a hostile work environment, EDR cannot find that the grievance qualifies on this basis. For a claim of hostile work environment or 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; (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.[8] 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.[9] "[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."[10]

The grievant claims that she felt threatened by another employee and reported the alleged threat to management. She indicates that she was reassigned to another shift so that she would not interact with this particular employee. However, she asserts that she has in fact had several other interactions with this person and still feels threatened. EDR attempted to contact the grievant on several occasions to request further information on this subject, but has not received a reply from the grievant. In response to requests from EDR, the agency provided information about the incident, which involved a brief verbal interaction between the grievant and another employee. The agency asserts that it has taken appropriate action to address the situation by

[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] *See, e.g.*, Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] *See* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).
[8] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[9] *See generally id* at 142-43.
[10] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

speaking with both the grievant and the other employee about their parts in the interaction and taking steps to separate them.

The grievant may be raising legitimate concerns about her employment. After reviewing the facts presented by the grievant, however, EDR cannot find that the grieved actions rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment. The alleged workplace harassment challenged by the grievant essentially involves unprofessional conduct by a coworker, which does not generally rise to the level of an adverse employment action or severe or pervasive conduct. Prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[11] Because the grievant has not raised a sufficient question as to the existence of a severe or pervasive hostile work environment, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.[12]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[11] Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("[C]onduct must be extreme to amount to a change in the terms and conditions of employment . . . ."); *see* Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).
[12] Va. Code § 2.2-1202.1(5).