Issues: Qualification – Work Conditions (employee/supervisor conflict), Discipline (counseling memo), and Performance (arbitrary/capricious evaluation); Ruling Date: May 11, 2016; Ruling No. 2016-4335; Agency: Virginia Department of Health; Outcome: Not Qualified.

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

## QUALIFICATION RULING

In the matter of the Virginia Department of Health
Ruling Number 2016-4335
May 11, 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 November 28, 2015 grievance with the Virginia Department of Health (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

### FACTS

The grievant is employed as a Program Support Technician at one of the agency's office locations. On or about November 28, 2015, she initiated a grievance alleging that her supervisor had discriminated against her because of her race and/or national origin[1] and engaged in conduct that otherwise created a hostile work environment. The grievant also disputes the content of her annual performance evaluation, claims that it contains "[f]ictitious [a]ccounts" of her "work performance and behavior at work," alleges that her supervisor gave her a memorandum containing additional "inaccurate statements" relating to her performance evaluation, and disputes her receipt of a Written Counseling Memo on November 20, 2015. After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.

### 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.[3] Thus, claims relating to issues such as

[1] The grievant further argues that the allegedly discriminatory conduct was based on her language. Under state policy and the grievance procedure, an employee's language is not a protected status that can support a claim of discrimination or workplace harassment. Executive Order 1 (2014); DHRM Policy 2.05, *Equal Employment Opportunity*; DHRM Policy 2.30, *Workplace Harassment*; *Grievance Procedure Manual* § 4.1(b). To the extent the grievant's claim of language-based discrimination is consistent with her assertion that her supervisor engaged in discriminatory conduct on the basis of her race and/or national origin, those arguments will be addressed below.
[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).

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]

Further, 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 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]

*Hostile Work Environment*

Taken as a whole, the issues raised in the grievance amount to an assertion that the grievant's supervisor engaged in discrimination that created a hostile work environment. For example, the grievant argues that she experienced "discriminatory treatment" when her supervisor directed her and another employee of her race to complete "an unnecessary project" after a disagreement regarding the completion of certain work tasks, and that another employee of the same race as the supervisor was not required to participate in the project. The grievant further states that she received an email from her supervisor containing "inaccurate statements" about the circumstances surrounding the disagreement and claims that, on other occasions, her supervisor engaged in "disparate treatment" and otherwise singled out the grievant based on her race and/or national origin.[8]

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 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

[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[5] *See Grievance Procedure Manual* § 4.1(b).
[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] The grievant also asserts that her supervisor retaliated against her by making "inaccurate statements" in a meeting because the grievant discussed the supervisor's phone use in the office with her. Even assuming the grievant engaged in protected activity sufficient to support a claim of retaliation, *see* Va. Code § 2.2-3004(A), *Grievance Procedure Manual* § 4.1(b)(4), the grievance does not qualify for a hearing based on this claim for the same reasons as those discussed below with regard to the grievant's assertion that the supervisor created a hostile work environment.
[9] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

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]

The grievant argues that the supervisor's alleged improper conduct was based on her race and/or national origin, which could arguably support a claim of discrimination and/or workplace harassment.[12] Even assuming that the grievant's allegations are true and that the grieved management actions rose to a sufficiently severe or pervasive level to create a hostile work environment, however, a hearing officer would be unable to address this claim effectively were the grievance qualified for hearing. EDR has recognized that there are some cases when qualification is inappropriate, even if a grievance challenges a management action that might qualify for a hearing, such as workplace harassment. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In this case, a hearing officer would be unable to award any meaningful relief under the grievance procedure with respect to the grievant's allegations of harassment. Without deciding whether the grievant has raised a question as to whether her supervisor engaged created a hostile work environment, events that happened after the grievant initiated the grievance have rendered her claims regarding the alleged harassment moot. The grievant's supervisor, who allegedly engaged in the discriminatory and/or harassing complained of by the grievant, no longer works for the agency. At a hearing to determine whether the supervisor had created a hostile work environment, a hearing officer would have the authority to "order the agency to create an environment free from" the allegedly harassing behavior or "take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence."[13] Even if the grievant were able to establish that workplace harassment had occurred, the relief available through the grievance process would be meaningless as the grievant's supervisor is no longer employed by the agency and there is no indication that the grievant has complained of discrimination, harassment, or other improper conduct since the supervisor's departure. Further, the grievant has in effect received the relief she requested in her grievance as she has been removed from the supervision of her former supervisor. A direction from a hearing officer to cease the offending conduct would have no effect because that conduct apparently ceased when the supervisor's

[10] *See generally id.* at 142-43.
[11] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[12] *See* Executive Order 1 (2014); DHRM Policy 2.05, *Equal Employment Opportunity*; DHRM Policy 2.30, *Workplace Harassment*.
[13] *Rules for Conducting Grievance Hearings* § VI(C)(3).

employment with the agency ended. Accordingly, there is no reason for the grievance to proceed to a hearing. This issue is, therefore, not qualified a hearing and will not proceed further.[14]

*Performance Evaluation*

The grievant further asserts that her performance evaluation for the 2014-2015 evaluation cycle contains "inaccurate and malice [sic] statements" with which she disagrees and disputes the "Below Contributor" rating she received on one of the individual factor ratings.[15] The grievant also argues that, after she expressed her concerns about the evaluation, she received a memorandum from her supervisor containing additional inaccurate comments about her work performance. However, the grievant received an overall rating of "Contributor" on her performance evaluation.[16] A satisfactory performance evaluation is not an adverse employment action.[17] 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, she received ratings of "Contributor" on all but one of the 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 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 grievance does not qualify for a hearing on this basis.[18]

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[14] This ruling does not mean that EDR deems the alleged behavior of the supervisor, if true, to be appropriate, only that the grievant's claim of workplace harassment does 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 reoccurs.

[15] The grievant received her performance evaluation on or about September 28, 2015, and filed the grievance on November 28, 2015. Although the grievance may not have been timely filed to challenge the content of the evaluation, *see Grievance Procedure Manual* § 2.2, the agency appears to have addressed the grievant's issues with her evaluation during the management steps and, in any event, did not raise a claim of initiation noncompliance before or in the agency head's qualification decision. *See id.* § 6.2. Accordingly, EDR considers any claims of timeliness noncompliance relating to the content of the evaluation waived. As an additional matter, we note that management actions that are not timely challenged, such as the grievant's performance evaluation in this case, may appropriately be presented and considered as background evidence in cases involving workplace harassment as part of the overall pattern of allegedly improper conduct.

[16] See DHRM Policy 1.40, *Performance Planning and Evaluation*, for additional discussion of performance evaluation procedures for state employees.

[17] *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).

[18] Although this 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.*

*Counseling Memorandum*

Finally, the grievant disputes the agency's issuance of a Written Counseling Memo on November 20, 2015. The management action challenged by the grievant, a Written Counseling Memo, is a form of written counseling. 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.[19] Therefore, the grievant's claims relating to her receipt of the Written Counseling Memo do not qualify for a hearing.[20]

EDR's qualification rulings are final and nonappealable.[21]

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[19] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[20] *See* supra note 18 for information about additional rights that may be available to the grievant under the Virginia Government Data Collection and Dissemination Practices Act with regard to the Written Counseling Memo.
[21] *See* Va. Code § 2.2-1202.1(5).