

Issues: Qualification – Performance Evaluation (Notice of Improvement Needed), and Discrimination (Race); Ruling Date: June 22, 2016; Ruling No.2016-4362; Agency: Department of Historic Resources; 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 Historic Resources
Ruling Number 2016-4362
June 22, 2016

The grievant has requested a ruling on whether her April 20, 2016 grievance with the Department of Historic Resources (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 finds that this grievance does not qualify for a hearing.

FACTS

On April 15, 2016, the grievant received a Notice of Improvement Needed. The grievant initiated a grievance to challenge this management action on or about April 20, 2016. The grievant alleges that the agency discriminated and retaliated against her in issuing the Notice of Improvement Needed. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management. Since the time of her appeal, the grievant has resigned from employment with the agency.

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 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

¹ See *Grievance Procedure Manual* § 4.1.

² Va. Code § 2.2-3004(B).

³ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

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

Notice of Improvement Needed

The management action challenged in this grievance, a Notice of Improvement Needed, is a form of written counseling. It is not, as the grievant appears to allege, 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.⁷ Therefore, the grievant’s claims relating to her receipt of the Notice of Improvement Needed do not qualify for a hearing. To the extent that the grievance challenges additional items addressed within the Notice of Improvement Needed that may be considered adverse, due to the fact that the grievant is no longer employed with the agency, a hearing officer would have no way to address such issues. Qualification for a grievance hearing would be inappropriate where, as here, further effectual relief that a hearing officer could potentially grant is unavailable.

Discriminatory/Retaliatory Harassment

In addition, the grievant alleges that she was subjected to a course of what would amount to discriminatory and/or retaliatory workplace harassment by supervisors. For a claim of a discriminatory/retaliatory work environment or 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 protected status or 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.⁸

In this case, the grievant has asserted race as grounds for her discrimination claim, and her desire to “simply follow the law or exercise [her] rights under the law” as the basis for her claim of retaliation. The grievant claims that there had been recent discussion “of a discriminatory nature” that occurs without regard to her feelings. She cites to discussions at agency meetings regarding the Confederate flag and monuments, the inclusion of minority employees for the agency’s Board, an alleged lack of interest by the agency head in participating in certain projects, and discussion of African-American history as it relates to slavery, among

⁴ See *Grievance Procedure Manual* § 4.1(b).

⁵ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

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)..

other examples. To support her claim of retaliation, the grievant points out several instances where she states she sought additional information on whether proposed agency activities complied with law and policy, and subsequently felt as though she met with resistance from management.

In response, the agency categorically denies the existence of any discriminatory or retaliatory actions. It asserts that the purpose of providing the grievant with the Notice of Improvement Needed was to afford her, as a manager, the chance to improve her overall leadership skills once higher level agency management became aware of the existence of the cited issues. The agency denies that the Notice of Improvement Needed was issued in retaliation for any attempt on the grievant's part to comply with any law. With respect to the discussions that the grievant states she perceived as being discriminatory in nature, the agency indicates that the very nature of its work involves dealing with difficult subjects in Virginia history. Should the grievant have raised her concern at the time of the discussions or immediately thereafter, the agency would have attempted to resolve any complaints she may have had; however, the fact that such conversations were had regarding controversial issues was based upon a legitimate business need to conduct its regular operations. After reviewing the facts, EDR cannot find that the alleged actions rose to a sufficiently severe or pervasive level such that an unlawfully abusive or hostile work environment was created.⁹ Further, even if the grievant had established the existence of an abusive or hostile work environment, she has now left the agency and there is no meaningful relief that could be provided by a hearing officer. Thus, the grievant's claim of discriminatory/retaliatory harassment does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.¹⁰



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⁹ See generally *id* at 142-43.).

¹⁰ Va. Code § 2.2-1202.1(5).