Issues: Qualification – Discrimination (race and gender), and Work Conditions (employee/supervisor conflict and other); Ruling Date: January 25, 2019; Ruling No. 2019-4814; Agency: Science Museum of Virginia; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of the Science Museum of Virginia
Ruling Number 2019-4814
January 25, 2019

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management on whether her October 19, 2018 grievance with the Science Museum of Virginia (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On October 19, 2018, the grievant submitted her grievance to the agency's human resources office. Her grievance challenges a hostile work environment on the basis of race and gender, and retaliation, apparently largely the result of actions by the agency head. In an attachment to the grievance form, the grievant addresses numerous events, not all of which relate to the grievant herself, at the agency over the past five to six years. However, the most immediate events that appear to be precipitating the grievance are a reorganization that removed certain areas of responsibility from the grievant's oversight and a move of the grievant's office. The agency represents that the grievant was informed of the reorganization and office move on September 10, 2018 and September 12, 2018, respectively. Accordingly, because the grievance did not appear to include any events that had occurred within the preceding 30 calendar days, the agency took the position that the grievance was untimely. The agency did, however, permit the grievance to be addressed at a single management step by the agency head. The agency head also declined to qualify the grievance for a hearing. The grievant now appeals that determination to EEDR.

DISCUSSION

Compliance

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance.[1] When an employee initiates a grievance beyond the 30 calendar-day period without just cause, the grievance is not in compliance with the grievance procedure and may be administratively closed. In this case, the agency contends that the grievant

[1] Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.2.

did not file the grievance within thirty calendar days of the management actions or omissions she disputes.

Fairly read, the grievance challenges an ongoing series of allegedly improper and/or harassing actions in the workplace. A claim of harassment, retaliation, or other workplace conduct that is ongoing, such as that alleged here, is raised in a timely manner if some agency action alleged to be part of the harassing or intimidating conduct occurred within the thirty calendar days preceding the initiation of the grievance.[2]

The grievant filed her grievance on October 19, 2018. Accordingly, to be timely, there must be some management action or inaction grieved as part of the allegedly discriminatory and/or retaliatory harassment that occurred on or after September 19, 2018. Based upon information contained in the grievance and gathered for purposes of this ruling, the only action that arguably occurred within this time period is the grievant's office move. The agency indicates that the grievant was informed of this office move on September 12, 2018. During EEDR's consideration of this ruling, the grievant indicated that the office move occurred on or about September 21, 2018, and was the only action identified occurring on or after September 19, 2018. Even assuming that the office move occurred within the 30 calendar days preceding the filing of the grievance, EEDR's conclusion is that the grievance is untimely to challenge the broader hostile work environment claimed.

While the grievant disputes the office move as discriminatory and/or retaliatory, the agency's response has provided legitimate business reasons for the move. It appears that prior to this move, the grievant had an office on one floor and also work space on another floor, close to her team. Consequently, when the agency was presented with the need to move offices because of a shortage of space, the grievant and other agency staff were moved involuntarily. However, the grievant was moved to office space on the floor where her team was located. Looking at this single action, EEDR has not reviewed information that raises a sufficient question that this office move was either motivated by a discriminatory purpose and/or the but-for result of retaliation.

Considering the totality of the circumstances in light of the issues set forth in the grievance, EEDR concludes that the grievant has not presented evidence that any action related to the ongoing pattern of allegedly discriminatory, retaliatory, and/or harassing behavior occurred within the thirty calendar days that preceded the initiation of the grievance. As a result, we must conclude that the grievance was not timely filed.

Furthermore, the grievant has not provided EEDR with any information that would that would justify her late filing. EEDR has long held that it is incumbent upon each employee to know his or her responsibilities under the grievance procedure.[3] A grievant's lack of knowledge about the grievance procedure and its requirements does not constitute just cause for failure to

[2] *See* Nat'l R.R. Pass. Corp. v. Morgan, 536 U.S. 101, 115-18 (2002) (holding the same in a Title VII hostile work environment harassment case); *see also* Graham v. Gonzales, No. 03-1951, 2005 U.S. Dist. LEXIS 36014, at *23-25 (D.D.C. Sept. 30, 2005) (applying *Morgan* to claim of retaliatory hostile work environment/harassment); Shorter v. Memphis Light, Gas & Water Co., 252 F. Supp. 2d 611, 629 n.4 (W.D. Tenn. 2003).
[3] *See, e.g.*, EDR Ruling Nos. 2006-1349, 2006-1350; EDR Ruling No. 2002-159; EDR Ruling No. 2002-057.

act in a timely manner. Thus, we conclude that the grievant has failed to demonstrate just cause for her delay.

Qualification – Office Move

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[4] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[5] 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.[6]

Further, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."[7] 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."[8] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9]

Because we have assumed that the grievant's office move occurred within the 30 calendar days preceding the filing of her grievance, we will address this single issue as to whether it would qualify for a hearing. However, an office move is not generally an adverse employment action. A grievance challenging solely a move of an employee's office would not meet this definition without other significant, material factors that are not present in this case. Accordingly, because the only issue assumed to be timely raised in the October 19, 2018 grievance is not an adverse employment action, the grievance does not qualify for a hearing.

EEDR's compliance and qualification rulings are final and nonappealable.[10]

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Director
Office of Equal Employment and Dispute Resolution

[4] *See Grievance Procedure Manual* § 4.1.
[5] Va. Code § 2.2-3004(B).
[6] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[7] *See Grievance Procedure Manual* § 4.1(b).
[8] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[9] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[10] Va. Code § 2.2-1202.1(5).