Issues: Qualification – Discipline (Counseling Memo), and Work Conditions (supervisor/ employee conflict); Ruling Date: February 12, 2019; Ruling No. 2019-4816; Agency: Virginia Department of Transportation; 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 Virginia Department of Transportation
Ruling Number 2019-4816
February 12, 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 September 27, 2018 grievance with the Virginia Department of Transportation (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about August 30, 2018, the grievant was issued a memo (the "Counseling Memo") to address perceived issues with her work performance. The grievant initiated a grievance on September 27, 2018 disputing the issuance of the Counseling Memo, and alleging that improper retaliation and discrimination influenced her supervisor's decision to issue the memo. After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head's designee. The grievant now appeals that determination to EEDR.

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]

Counseling Memo

In this case, the grievant disputes that the Counseling Memo was warranted, and argues that it was issued as an act of retaliation and/or discrimination. While grievances that allege retaliation or discrimination may qualify for a hearing, the grievance procedure generally limits

[1] *See Grievance Procedure Manual* § 4.1.
[2] Va. Code § 2.2-3004(B).
[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

grievances that qualify 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]

The management action challenged here—a Counseling Memo—is not equivalent to a Written Notice of formal discipline. EEDR has long held that 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] In this instance, the Counseling Memo appears to consist primarily of reminders to the grievant to be professional and respectful at work and to follow directives issued by her supervisor, which are important responsibilities for any employee. The issuance of the Counseling Memo was not an adverse employment action and, therefore, the grievant's claims relating to her receipt of the Counseling Memo do not qualify for a hearing.[8]

While the Counseling Memo has not had an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against the grievant. Should the Counseling Memo grieved in this instance later serve to support an adverse employment action against the grievant, such as a formal Written Notice 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.

Hostile Work Environment

Fairly read, the grievance also alleges that agency management has engaged in retaliation, discrimination, and/or harassment that have created a hostile work environment. 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 or prior protected activity; (3) sufficiently severe or pervasive so as to alter the

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[4] *See Grievance Procedure Manual* § 4.1(b).
[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] *See, e.g.*, EDR Ruling No. 2017-4443, EDR Ruling No. 2017-4434, EDR Ruling No. 2017-4419; *see also* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[8] 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.*

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 an abusive or hostile work 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 she has raised questions to her supervisor regarding the intent of her communications, challenged the status quo in the workplace, and ultimately requested mediation with her supervisor to work on improving communication. However, she asserts that her supervisor then issued the Counseling Memo to her, the day prior to the established mediation session, as retaliation for these activities. In further support of her assertion that her supervisor has engaged in harassing and/or discriminatory behavior, the grievant claims that, being an African-American female, she is targeted by her supervisor for expressing ideas or recommendations, and that her supervisor shared confidential medical information with another employee in violation of the Americans with Disabilities Act. Further, the grievant asserts that her supervisor treats her differently from other employees with respect to requesting leave and telework.

Having thoroughly reviewed the documentation and facts as presented by the grievant, however, EEDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment. Mere allegations of discrimination, without more, do not raise a question sufficient for adjudication at a grievance hearing. In general, the grievant's claim of workplace harassment appears to be based largely on disagreements with her supervisor regarding her work duties and performance. In this case, the facts alleged by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.[12] Though the grievant may reasonably disagree with the issuance of the Counseling Memo and other supervisory actions, prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[13] Because the grievant has not raised a sufficient question as to the existence of severe or pervasive harassment reaching the level of an abusive or hostile work environment, the grievance does not qualify for a hearing on this basis.

This ruling does not mean that EEDR deems the alleged behavior of the grievant's supervisor, if true, to be appropriate, only that this grievance does not qualify for a hearing based

[9] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[10] *See generally* Gillam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[11] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[12] *See Grievance Procedure Manual* § 4.1.
[13] 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).

on the evidence presented to EEDR. Moreover, this ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.

CONCLUSION

For the reasons set forth above, this grievance does not qualify for a hearing. EEDR's qualification rulings are final and nonappealable.[14]

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Director
Office of Equal Employment and Dispute Resolution

[14] *See* Va. Code § 2.2-1202.1(5).