

Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: March 15, 2019; Ruling No. 2019-4859; Agency: Department of Alcoholic Beverage Control; 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 Department of Social Services
Ruling Number 2019-4859
March 15, 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 18, 2018 grievance with the Department of Social Services (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

On or about October 18, 2018, the grievant initiated a grievance alleging that a former supervisor (also employed with the agency) provided inaccurate information in a reference check in relation to a position the grievant applied for with the agency. The grievant asserts that this supervisor indicated she was not eligible for rehire in the reference check. She additionally states that it was this reference that led her to not receive the position. The grievant believes the former supervisor provided the information in retaliation for an earlier grievance the grievant filed in 2018. 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 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

Further, while grievances that allege retaliation may qualify for a hearing,⁴ the grievance procedure generally limits grievances that qualify to those that involve “adverse employment

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).

⁴ See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: “participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.” *Grievance Procedure Manual* § 4.1(b)(4).

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

EEDR obtained a copy of the reference check information the former supervisor provided regarding the grievant in the internal selection process. The reference check is largely satisfactory and indicates that the grievant would be a “good fit” for the position. The final question on the form is “[w]ould you rehire?” The grievant’s former supervisor indicated she would not rehire the grievant, stating that she “is a good worker, but there [were] communication issues between us. Nothing to do with performance, just personality.” This response does not indicate that the grievant was ineligible for rehire, but rather states the former supervisor’s opinion about the grievant and their working relationship. Further, it would not be proper to characterize this reference check as “false,” in the sense that it represents the former supervisor’s perceptions and opinions, which do not appear to have been provided in bad faith.

The grievant has also provided evidence from an outside reference checking service, which contacted the former supervisor for, in essence, a fabricated reference check. According to the documents submitted by the grievant, the former supervisor did indicate to the reference checking service that the grievant was not eligible for rehire, which would be inaccurate information. Presuming that the documentation is accurate, we would not equate providing incorrect information in this fabricated reference check to doing so in an actual reference check. Nevertheless, the grievant is understandably concerned about information that could be conveyed by her former supervisor in future reference checks. EEDR would recommend that agency management provide the former supervisor with guidance about its policies for reference checks and also ensure that the former supervisor understands that she should not state that the grievant is ineligible for rehire in future reference checks.

Based on the foregoing, there is not a basis to qualify any of the issues raised in this grievance for a hearing. Because the reference actually provided by the former supervisor does not appear to be false or in bad faith, there is no basis to find that it was retaliatory. Accordingly, because the grievance does not raise a sufficient question of retaliation or any other qualifiable matter, the grievance does not qualify for hearing.

EEDR’s qualification rulings are final and nonappealable.⁸



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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 See Va. Code § 2.2-1202.1(5).