

Issues: Qualification – Retaliation (complying with any law and other protected right), Discrimination (disability), Performance (Notice of Improvement Needed), and Discipline (counseling memo); Ruling Date: September 27, 2013; Agency: Department of Medical Assistance Services; 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 Medical Assistance Services
Ruling Number 2013-3529
September 27, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) on whether her November 18, 2012 grievance with the Department of Medical Assistance Services (“agency”) qualifies for hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On November 18, 2012, the grievant initiated a grievance challenging a Notice of Performance Improvement Needed, a written counseling letter, and an alleged ongoing course of retaliation and harassment by agency management.¹ After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The grievant’s request was denied and she requested a qualification ruling from 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, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.³ Thus, claims relating to issues such as to 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.

¹ In the grievant’s submission to EDR regarding her qualification request, she also appears to assert a claim regarding the Administrative Procedure Act. Enforcement of this Act falls outside the scope of the grievance procedure, and as such, this claim will not be addressed in this ruling.

² See *Grievance Procedure Manual* §§ 4.1 (a), (b).

³ See Va. Code § 2.2-3004(B).

Adverse Employment Actions

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

In this case, the grievant is challenging a number of discrete agency actions which she alleges were retaliatory or misapplications and/or unfair applications of policy. These actions include, in part, a Notice of Performance Improvement Needed, a written counseling memorandum, and a failure to properly compute compensatory leave.⁷ During the pendency of the ruling, the parties resolved the compensatory leave issue. The remaining actions challenged by the grievant do not constitute adverse employment actions, as they did not result in a significant change in the grievant’s terms, conditions, or benefits of employment.⁸ Accordingly, these actions are not qualified for hearing.

Harassment

The grievant also appears to assert a claim of retaliatory and/or discriminatory harassment. For a claim of a hostile 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 a protected activity or status; (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 “[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

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

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

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

⁷ In her submission to EDR regarding qualification, the grievant also appears to challenge her 2012 performance evaluation, which rated her performance as “Contributor but Needs Improvement.” This claim does not appear to have been part of her initial grievance and may therefore not be considered now. *Grievance Procedure Manual* § 2.4. However, even assuming the performance evaluation was properly grieved, it would nevertheless not constitute an adverse employment action and thus could not serve as a basis for qualification. See, e.g., EDR Ruling No. 2011-3018.

⁸ See, e.g., EDR Ruling Nos. 2014-3682, 2014-3683; EDR Ruling No. 2014-3673. However, should the written counseling grieved in this case later serve to support an adverse employment action against the grievant, such as a formal Written Notice, 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.

⁹ See *Jensen v. Potter*, 435 F.3d 444, 449 (3d Cir. 2006); *Gunten v. Maryland*, 243 F.3d 858, 869-70 (4th Cir. 2001); see also *White v. BFI Waste Servs., LLC*, 375 F.3d 288, 296-97 (4th Cir. 2004).

physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.”¹⁰

In this case, the grievant appears to argue that she was subjected to an ongoing course of unfair and harassing conduct by her supervisor, and that this conduct was motivated by her prior complaints regarding management, her previous use of Family and Medical Leave, and her medical condition, among other improper reasons.¹¹ This alleged conduct includes, in part, an unfair distribution of work, the imposition of limitations and requirements on the grievant's ability to telework, attempts by her supervisor to organize the grievant's office and to require the grievant to organize her workload through an Excel spreadsheet, and excessive communication by her supervisor.

Even when considering this conduct as a whole, EDR cannot find that these issues rise to a “sufficiently severe or pervasive” level such that an unlawfully abusive or hostile work environment was created.¹² There is no indication that the terms, conditions, or benefits of the grievant's employment were detrimentally impacted.¹³ Further, even if we were to assume that the conduct alleged by the grievant was sufficient to create a hostile work environment, she has failed to present sufficient evidence that the grieved actions were motivated by her protected conduct or her medical condition. Accordingly, the grievant's harassment claims do not qualify for a hearing.

CONCLUSION

For all the foregoing reasons, the grievant's November 8, 2012 grievance is not qualified for hearing. EDR's qualification rulings are final and nonappealable.¹⁴



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Office of Employment Dispute Resolution

¹⁰ Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

¹¹ These activities constitute protected activity under the grievance procedure. See *Grievance Procedure Manual* § 4.1(b).

¹² See, e.g., Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007); Irvine v. Potter, 2013 U.S. Dist LEXIS 57942, at *19-22 (D. Ore. Apr. 22, 2013); Robinson v. Zurich N. Am. Ins. Co., 892 F. Supp. 2d 405, 437 (E.D.N.Y. 2012).

¹³ See *Gunten*, 243 F.3d at 869.

¹⁴ Va. Code § 2.2-1202.1(5).