

Issues: Qualification – Compensation (salary dispute), Discrimination (Race), Harassment (supervisor/employee conflict); Ruling Date: September 10, 2013; Ruling No. 2014-3661; Agency: University of Virginia; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the University of Virginia
Ruling Number 2014-3661
September 10, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) on whether his April 26, 2013 grievance with the University of Virginia (“University”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On April 26, 2013, the grievant initiated a grievance challenging alleged racial discrimination and misapplication of policy by the agency. After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the University President to qualify the grievance for hearing. The grievant’s request was denied and he requested a qualification ruling by 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.¹ Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.² 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.

Timeliness

In this case, the grievant asserts that the University has wrongfully stripped him of employees under his supervision, reassigned a former employee’s workload to him without

¹ See *Grievance Procedure Manual* §§ 4.1 (a), (b).

² See Va. Code § 2.2-3004(B).

compensation, and otherwise treated the grievant in a humiliating and disrespectful manner.³ The grievance procedure provides that grievances must be initiated within 30 calendar days of the conduct being challenged, unless just cause is shown.⁴ Here, it appears that the removal of the employees from the grievant's supervision occurred more than 30 days prior to the initiation of his grievance. Further, the grievant has not shown just cause for initiating this claim outside the 30-day period. Accordingly, this claim is untimely and will not be considered further in this ruling.⁵ The grievant's claims regarding compensation may be untimely as well, but this is a closer determination. For the reasons set forth below, however, even if these claims are deemed timely for purposes of this ruling, they nevertheless do not qualify for hearing.⁶

Compensation

The grievant asserts that the University failed to compensate him because of his race and, fairly read, as a misapplication or unfair application of policy. The grievance procedure generally limits grievances that qualify for a hearing 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 As the alleged failure to compensate the grievant for performing additional duties could in some circumstances constitute an adverse employment action, for purposes of this ruling only, we will assume the grievant's compensation claims satisfy this threshold standard.

i. Discrimination

The grievant asserts that three years ago, he was assigned to perform the duties of a co-worker who left employment with the University and that the University has denied him temporary or acting pay for performing those duties because of his race. For a claim of discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, there must be facts that raise a sufficient question as to

³ The grievant also alleges that his supervisor refused to deal with his claims of discrimination raised in an earlier grievance. The document to which the grievant refers was not a formal grievance under the state employee grievance procedure, but rather a letter to his supervisor. We also note that the University has apparently addressed the grievant's complaints of discrimination through its Human Resources office, its "Respect@" procedure, and the University's office for Equal Opportunity Programs.

⁴ *Grievance Procedure Manual* § 2.2.

⁵ With respect to any challenge by the grievant to his 2012 evaluation as part of his April 26, 2013 grievance, that claim is also untimely, as the evaluation was issued in September 2012 and the reviewer responded to the grievant's challenge to that evaluation on December 13, 2012. Accordingly, this claim will not be addressed further in this ruling.

⁶ See EDR Ruling No. 2010-2651.

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).

whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.¹⁰

The University denies the grievant's claims of discrimination. It asserts that the grievant was given the additional duties after the workload in his work unit dropped a significant 46% due to a reduction in business and the increase in duties from the reassignment merely brought the grievant back to a full workload. The University also notes the duties at issue were those of one of his subordinates who left employment, and that the grievant was already expected to perform these duties in the subordinate's absence or other situations in which help was needed. In addition, the University asserts that only one other person in the grievant's department received acting pay during the same time period; and in that situation, unlike the grievant's, the individual receiving the acting pay assumed responsibility for a number of new employees, different types of work, and different job responsibilities. During the same time, a co-worker of the grievant requested acting pay for additional work but his request was denied.

While the grievant may disagree with the University's decisions, this disagreement does not mean those decisions are racially motivated. The grievant has presented no evidence to challenge the University's assertion that there was an almost 50% reduction in the workload performed by the grievant and his subordinates. He also has not demonstrated that the additional work performed was so significantly different than those duties he previously performed as to warrant acting pay or that his total workload exceeded the work he performed prior to the dramatic reduction in business. In addition, the grievant has not shown that employees of different races received acting pay under similar circumstances. Rather, the majority of the evidence presented by the grievant more clearly suggests difficulties in communication, incomplete information, and a poor supervisor-subordinate relationship than any discriminatory bias. Accordingly, we conclude that the grievant has not presented sufficient evidence that the legitimate, non-discriminatory reasons stated by the University are pretextual for the grievant's claim of race discrimination to qualify for hearing.

ii. Misapplication and/or Unfair Application of Policy

The grievant also appears to argue that the University's failure to give him additional compensation for assuming a co-worker's duties constitutes a misapplication and/or unfair application of policy. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

University policy allows temporary or acting pay where an employee assumes significant additional duties and responsibilities. The decision to grant temporary or acting pay is within the

¹⁰ See *Hutchinson v. INOVA Health Sys., Inc.*, Civil Action No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *4 (E.D. Va. April 8, 1998).

discretion of management, however. Such pay is not mandatory whenever additional duties are assumed. Instead, temporary or acting pay is generally awarded when the employee assumes a new role, additional duties that are not within the scope of the employee's existing job are added, or the employee is assigned to a new project.

As previously noted, in this case the University has put forth evidence showing that duties were reassigned to the grievant because his own workload had been significantly impacted by a reduction in business and that the duties assigned to him were within the scope of his existing job. In addition, the University has presented evidence showing that temporary or acting pay is only rarely awarded in the grievant's department. Finally, the University states that the only employee to receive temporary pay during the period challenged by the grievant received a number of additional employees reporting to him as well as new and different responsibilities and types of work.

Accordingly, we find that the grievant has not shown that the University's actions violated a specific mandatory policy provision or were outside the scope of the discretion granted to the University by applicable policy. While the grievant questions the agency's decision, there is no evidence that the agency disregarded the intent of the applicable policies, which allow management flexibility in making individual pay decisions. The grievant has also not presented sufficient evidence that the failure to award temporary pay was inconsistent with other decisions made by the University, was otherwise arbitrary or capricious, or was without a reasoned basis. For these reasons, the grievant's claim of a misapplication and/or unfair application of policy is not qualified for hearing.

Harassment

The grievant also appears to assert a claim of harassment or hostile work environment on the basis of race. For a claim of a discriminatory 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 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.¹¹ “[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.”¹²

In this case, the grievant argues that he was subjected to an ongoing course of humiliating and disrespectful conduct by his supervisor, and that this conduct was motivated by his race. This alleged conduct includes, in part, his supervisor failing to address the grievant's complaints, looking at the grievant “as if [he] was not there,” and being denied the authority to submit

¹¹ See generally *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183-84 (4th Cir. 2001).

¹² *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

requisitions independently.¹³ Even taken together, this Department cannot find that these issues rise to a “sufficiently severe or pervasive” level such that an unlawfully abusive or hostile work environment was created.¹⁴ There is no indication that the terms, conditions, or benefits of the grievant’s employment were detrimentally impacted. Accordingly, the grievant’s harassment claims do not qualify for a hearing.

CONCLUSION

For all the foregoing reasons, the grievant’s April 26, 2013 grievance is not qualified for hearing. EDR’s qualification rulings are final and nonappealable.¹⁵



Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹³ To the extent the grievant asserts that the University’s failure to pay him additional compensation was part of this alleged pattern of harassment, for the reasons set forth above, he has not shown this action was motivated by race and therefore it cannot support a claim of harassment based on race.

¹⁴ See *Gilliam v. S.C. Dep’t of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007). As courts have noted, prohibitions against harassment, such as those in Title VII, do not provide a “general civility code,” *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998), or remedy all offensive or insensitive conduct in the workplace. See, e.g., *Beall v. Abbott Labs.*, 130 F.3d 614, 620-21 (4th Cir. 1997); *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996).

¹⁵ Va. Code § 2.2-1202.1(5).