Issues: Qualification – Discipline (counseling memo), Retaliation (grievance activity), Management Actions (assignment of duties), Work Conditions (supervisor/employee conflict); Ruling Date: August 21, 2013; Ruling No. 2014-3673; Agency: Department of Social 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 Social Services
Ruling Number 2014-3673
August 21, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether her May 31, 2013 grievance with the Department of Social Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant initiated a grievance on May 31, 2013, challenging the issuance of a May 21 Notice of Improvement Needed/Substandard Performance, alleging that her supervisor retaliated against her and claiming the she has been subject to unequal treatment and an "intimidating and confrontational" work environment. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to 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, 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]

Notice of Improvement Needed/Substandard Performance

The grievant claims that the Notice of Improvement Needed/Substandard Performance is unfounded and that the agency did not follow state policy for issuing a written counseling. The

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

grievance procedure, however, 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]

The management action challenged here, a Notice of Improvement Needed/Substandard Performance, is a form of written counseling. It is not equivalent to a Written Notice of formal discipline. 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] Therefore, the grievant's claims relating to her receipt of the Notice of Improvement Needed/Substandard Performance do not qualify for a hearing.[8]

While the Notice of Improvement Needed/Substandard Performance 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 Notice of Improvement Needed/Substandard Performance 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.

Unequal Treatment

The grievant further argues that she has been treated unequally by her supervisor "as compared to colleagues with [the] same and/or like work responsibilities." As stated above, management reserves the exclusive right to manage the affairs and operations of state government.[9] Therefore, a grievance challenging management's assignment of duties, the methods by which work activities are undertaken, or work activity which reasonably may be expected to be a part of an employee's job content do not qualify for a hearing absent facts that

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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* 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.*
[9] Va. Code § 2.2-3004(B).

raise a sufficient question as to whether discrimination, retaliation, or a misapplication of policy has occurred.[10]

Here, the grievant asserts that she has not been treated the same as other employees because she is not able to perform tasks in the same way as other employees with similar responsibilities. The grievant argues, for example, that her supervisor has limited her ability to manage tasks by restricting the circumstances in which she may travel for work-related purposes and conduct face-to-face meetings with clients. She also claims that employees in her work group with "similar or exact work responsibilities" perform their jobs "in a manner that [she] is not allowed to do."

The grievant's claims largely relate to changes implemented by her supervisor to the means by which work should be carried out and that apply to all employees who perform work similar to the grievant's. In early 2013, the grievant's supervisor modified her work group's management of clients and tasks to limit work-related travel and meetings as part of an effort to reduce agency and client expenses. While these changes may have affected the grievant's work responsibilities by limiting travel and client meetings, they have also affected other employees in the same way.

In addition, while the grievant and other employees in her work group may share the same Role title, their Employee Work Profiles ("EWP's") vary widely as to individual core responsibilities, with the result that they do not all perform exactly the same work. The grievant and her co-workers may share some broad work responsibilities that support their work group's overall goals. However, they clearly do not all perform the same type of work and would not reasonably be expected to perform tasks in the same manner.

The grievance procedure accords much deference to management's exercise of judgment, including such decisions as the assignment of tasks and designation of the methods by which such tasks should be completed. EDR will not second-guess management's decisions in these matters absent facts that raise a question as to whether the challenged management actions may have been motivated by discrimination or retaliation, or whether a mandatory policy provision was misapplied or unfairly applied. The grievant has not presented facts that raise such a question, and the grievance does not qualify for a hearing on this basis.

Hostile Work Environment

Finally, the grievant claims, essentially, that she has been subjected to workplace harassment from her supervisor. Specifically, she asserts that her work environment is "increasingly intimidating and controversial" in a manner "akin to bullying or being singled out." In the analysis of a claim of workplace harassment, 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

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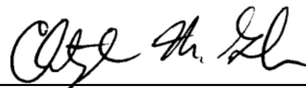
[10] *Grievance Procedure Manual* §§ 4.1(b), (c).

abusive or hostile work environment.[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]

After reviewing the facts as presented by the grievant, EDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment. The allegedly hostile work environment challenged by the grievant appears to be based largely on poor communication between the grievant and her supervisor. The grievant states, for example that she and her supervisor have had a "complete breakdown in communication" and cannot trust one another. During the second step meeting, several witnesses confirmed that there is tension between the grievant and her supervisor. The grievant also refers to general criticism, "badgering," and "reprimands" from her supervisor related to the completion of assigned tasks. While this type of conduct from a supervisor may not be a good management practice, if it has indeed occurred, 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.

CONCLUSION

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



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[11] *See generally* Gillam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[12] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[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).
[14] *See* Va. Code § 2.2-1202.1(5).