

Issues: Qualification – Performance (arbitrary/capricious performance evaluation),
Management Actions (assignment of duties), and Discipline (counseling memo);
Ruling Date: October 16, 2013; Ruling No.2014-3703; Agency: Virginia Community
College System; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of Virginia Community College System
Ruling Number 2014-3703
October 16, 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 April 29, 2013 grievance with the Virginia Community College System (“College”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On April 29, 2013, the grievant initiated a grievance challenging her 2012 performance evaluation, a letter of reprimand, and the elimination of her supervisory duties.¹ Subsequently, the grievant raised concerns about a formal written counseling, dated May 2, 2013, which the College agreed to consider.² After the parties failed to resolve the grievances during the management resolution steps, the grievant asked the agency head to qualify the grievances for hearing. The agency head denied the grievant’s request, and the grievant now seeks a qualification ruling by EDR.³

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.⁴ Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.⁵ Thus, claims relating to issues such as to the methods, means, and personnel by which work activities are to be carried

¹ The grievance also challenges any loss of pay resulting from the elimination of her supervisor and database responsibilities. It appears, however, that no loss in pay occurred. Further, although the grievance challenges the removal of the grievant’s duties as a database administrator, those duties were subsequently returned to the grievant and will therefore not be considered further in this ruling.

² Section 2.4 of the *Grievance Procedure Manual* provides that additional management actions or omissions cannot be added once a grievance is initiated. However, as the College agreed to accept the addition of the May 2, 2013 letter of reprimand, we will consider it in this ruling.

³ The grievant appears to have raised a number of objections to the College’s conduct during the management resolution steps. The grievant did not challenge this alleged noncompliance through the procedure set forth in Section 6.3 of the *Grievance Procedure Manual* and as such, those claims will not be addressed here.

⁴ See *Grievance Procedure Manual* § 4.1.

⁵ See Va. Code § 2.2-3004(B).

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.

Adverse Employment Action

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁶ 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."⁷ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁸

In this case, the grievant challenges a letter of reprimand, a formal written counseling, her 2012 "Contributor" performance evaluation,⁹ and the elimination of her supervisory duties. The letter of reprimand, formal written counseling, and 2012 "Contributor" rating clearly do not constitute adverse employment actions, as they did not result in a significant change in employment status or a change in the terms, conditions, or benefits of her employment.¹⁰ As these acts do not satisfy the threshold requirement of an adverse employment action, they are not qualified and will not be considered further in this ruling.

Assessing whether the removal of the grievant's supervisory duties was an adverse employment action is a more difficult determination. The grievant did not suffer a loss in pay and her job title did not change. However, her supervisory duties were not an insignificant part of her job, consisting of supervising 5 wage/part-time employees and comprising at least 20% of her job duties. In light of these facts, for purposes of this ruling only, we will assume the removal of these duties constituted an adverse employment action.

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;¹¹ (2) the

⁶ See *Grievance Procedure Manual* § 4.1(b).

⁷ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁸ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁹ Although the grievant was rated as "Below Contributor" in at least two areas, her overall evaluation rated her as a "Contributor."

¹⁰ See, e.g., EDR Ruling No. 2014-3673; EDR Ruling Nos. 2014-3682, 2014-3683; EDR Ruling No. 2011-3018. However, should the letter of reprimand and/or 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.

¹¹ See Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.¹² Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹³

In this case, the grievant asserts that the removal of her supervisory duties was in retaliation for having reported her manager's allegedly unethical management practices as part of a rebuttal to her 2012 evaluation. The grievant's action would constitute a protected activity under the grievance procedure.¹⁴ The College, however, has provided a legitimate business reason for the removal of duties—concerns, based on complaints, that the grievant had “popped” in the face (meaning, hit in some manner) an employee she supervised and had otherwise treated her subordinates and colleagues in a disrespectful or inappropriate manner. Although the grievant has denied the allegations against her, she has failed to present sufficient indication that this reason stated by the College was a mere pretext for an improper motive. Accordingly, the grievant's claim of retaliation is not qualified for hearing.

Misapplication and/or Unfair Application of Policy

Broadly read, the grievance also asserts a claim that the College misapplied and/or unfairly applied policy when removing the grievant's supervisory duties. 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. 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.

In this case, the College apparently removed the grievant's supervisory duties as a result of information it had received about the grievant allegedly “popping” one of her subordinates and other complaints regarding her conduct as a supervisor. Although the grievant challenges the College's authority to eliminate her supervisory duties on this basis, state policy gives management broad discretion to reassign or revise work duties.¹⁵ Neither of the two policies arguably most applicable to the College's action—DHRM Policy 1.40, *Performance Planning*

¹² See, e.g., EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

¹³ See Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981).

¹⁴ See Va. Code §§ 2.2-3000, 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 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).

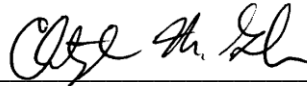
¹⁵ See generally DHRM Policy 1.40, *Performance Planning and Evaluation*.

and Evaluation and DHRM Policy 1.60, *Standards of Conduct*—appear to explicitly preclude or prohibit the action taken by the College.¹⁶ Further, the grievant has not presented evidence showing the College’s actions violated a mandatory policy provision of any other state or College policy.

It also does not appear that the College’s actions were arbitrary or capricious, and no information presented by the grievant supports an alternative conclusion. While the grievant denies the College’s allegations, the College appears to have based its action on a legitimate concern regarding the grievant’s conduct towards the employees she supervised. Under these facts, we cannot find the removal of the grievant’s supervisory duties was arbitrary or capricious.¹⁷ Thus, because we cannot find that policy has been misapplied and/or unfairly applied the grievance cannot qualify on this basis.

CONCLUSION

For all the foregoing reasons, the grievant’s April 29, 2013 grievance does not qualify for hearing. EDR’s qualification rulings are final and nonappealable.¹⁸



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¹⁶ With respect to the grievant’s claim that she was entitled to due process under Policy 1.60 prior to the removal of her supervisory duties, this action did not constitute a “disciplinary action” under that policy. See DHRM Policy 1.60, *Standards of Conduct*.

¹⁷ *Grievance Procedure Manual* § 9 (defining “arbitrary or capricious” as an action taken “[i]n disregard of the facts or without a reasoned basis.”).

¹⁸ Va. Code § 2.2-1202.1(5).