Issues: Qualification – Discipline (other – due process letter), and Work Conditions (employee/supervisor conflict); Ruling Date: October 15, 2013; Ruling No. 2014-3723, 2014-3724; Agency: Department of Behavioral Health and Developmental 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 Behavioral Health and Developmental Services
Ruling Numbers 2014-3723, 2014-3724
October 15, 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 the two grievances she initiated on or about June 12, 2013 with the Department of Behavioral Health and Developmental Services ("agency") qualify for a hearing. For the reasons discussed below, neither grievance qualifies for a hearing.

FACTS

The first June 12, 2013 grievance alleges that an agency manager, Mr. G, used disrespectful language toward her during an exchange on June 9, 2013. The agency indicates that it investigated the grievant's allegations and took appropriate action to address them with Mr. G.

The second June 12, 2013 grievance challenges a due process letter received by the grievant on or about June 12, 2013, which she asserts contained a forged date. The grievant alleges that her supervisors engaged in fabricating documents in order to have her terminated from employment. In response, the agency states that the due process letter had mistakenly been dated for the previous day. In order to correct this error, the agency re-issued the due process letter to the grievant and granted her additional time to respond to it.

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

[1] *See Grievance Procedure Manual* §§ 4.1 (a), (b).
[2] *See* Va. Code § 2.2-3004(B).

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, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Thus, typically, a 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]

Management Interaction

The grievant alleges that a manager, Mr. G, engaged in disrespectful treatment towards her, yelling and using "harsh, disrespectful, and malicious words." The grievant does not specify the actual words used by Mr. G in this conversation.[7] Based upon the information provided, there is no indication that the grievant has experienced any significant effect as a result of this occurrence that would rise to the level of an adverse employment action. This ruling does not mean that EDR deems any alleged actions taken by Mr. G, if true, to be appropriate, only that this grievance does not qualify for a hearing based on the information presented to EDR. To the extent that the grievant also argues that Mr. G may have engaged in a pattern of behavior that could constitute workplace harassment, based on a review of the facts as stated in her grievance, we cannot find that the grieved issues rose to a "sufficiently severe or pervasive" level such that an unlawfully abusive or hostile work environment was created.[8] Thus, the grievance does not qualify for a hearing on this basis.

Due Process Letter

The second June 12 grievance challenges a due process letter issued to the grievant on or about the same date. The grievant states that the letter was "backdated" by one day and thus, was executed improperly. She claims that agency management thus fabricated documents in order to have her terminated. In its response, the agency indicates that the letter was dated the day it was drafted and presented to management for review and approval, which was June 11. Two agency managers reviewed and signed the letter but failed to update the date to June 12, the date that the grievant received the letter. Upon realization of this error, the agency re-issued the letter to grievant on June 17, and included a new deadline for the grievant's response to the letter.

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[3] *Id.* at § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).
[4] *See Grievance Procedure Manual* § 4.1(b).
[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] *See, e.g.,* Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[7] The grievant alleges that Mr. G "transmits words to [her] like [she is] a slave on his plantation," however, she provides no further information that would support an assertion of discrimination based upon race.
[8] *See generally* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

The agency argues that the date issue was a simply mistake, and the second step-respondent found no evidence of improper motive by management upon her investigation.

A due process letter is not equivalent to a Written Notice of formal discipline. Such memoranda do not generally constitute adverse employment actions, because such actions, in and of themselves, do not have a significant detrimental effect on the terms, conditions, or benefits of employment.[9] Here, the grievant primarily challenges the issue of the due process letter's date and the circumstances surrounding the agency's correction of the date. While it appears that the grievant accurately asserts that the agency initially made an error in the letter issued to her, we cannot find that the agency's actions in correcting this error had an adverse effect on the terms of the grievant's employment in order that this issue would qualify for a hearing.[10]

Further, the grievant has not alleged discrimination, retaliation, or discipline improperly influenced the issuance of this letter. Therefore, her claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy in its actions. In order 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, EDR has found no mandatory policy provision that the agency has violated, and the grievant has cited to none. Further, we do not find sufficient information exists in this instance to support an allegation that the agency's action was inconsistent or otherwise arbitrary or capricious. The agency provided an explanation for the error made and took appropriate action to correct the situation such that the grievant experienced no harm as a result. As such, the grievant's challenge to the due process letter issued by the agency does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.[11]

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Director
Office of Employment Dispute Resolution

[9] *See* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).
[10] We note that, should the due process letter 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. In this instance, it appears the grievant has already done so.
[11] Va. Code § 2.2-1202.1(5).