Issue: Qualification – Retaliation (grievance activity); Ruling Date: November 13, 2013; Ruling No. 2014-3757; Agency: Department of Juvenile Justice; 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 Juvenile Justice
Ruling Number 2014-3757
November 13, 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 his August 21, 2013 grievance with the Department of Juvenile Justice (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about August 21, 2013, the grievant initiated a grievance challenging alleged retaliation by the agency. In particular, the grievant asserts that after he initiated a previous grievance, he was forced into mediation with his supervisor and informed by higher management that if the issues with his supervisor did not resolve, either he or his supervisor would "have to go." 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]

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

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

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 asserts that the head of his facility allegedly required him to engage in informal mediation with his supervisor in an attempt to resolve a previous grievance at the second-step level. In addition, he asserts that the same member of higher management "seems to believe that [he] should follow orders without question" and advised him that if he and his supervisor did not "work this out and communicate with each other then one of [them] will have to go."[7] He does not, however, allege that any tangible action was taken against him by agency: more specifically, he does not assert that he was disciplined, dismissed, demoted, or otherwise subject to an agency action resulting in a significant change in employment status or a change in the terms, conditions, or benefits of his employment. In the absence of such claims, the grievance does not raise a sufficient question that an adverse employment action has occurred to qualify for a hearing.[8]

In addition, the grievant's assertions regarding the management actions at issue, taken as a whole, could amount to a claim of harassment or hostile work environment. In the analysis of such a claim, 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 and abusive or hostile work environment.[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 physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[10]

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 agency's actions appear to reflect, at least in part, an attempt by the agency to resolve an ongoing conflict between employees and to clarify the respective roles and responsibilities of the grievant and his supervisor. Further, prohibitions against harassment do

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[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] Although the grievant apparently considers this statement to be a threat to his employment, this appears to be an inference on his part. First, the statement was made in the context of encouraging the grievant and his supervisor to resolve their continued conflict through "[getting] things off [their] chest" in a "professional" manner. Moreover, the statement was apparently directed to both the grievant and his supervisor, and it is unclear whether the reference to "hav[ing] to go" was to termination, reassignment, or some other plan, if one was actually being formulated or threatened..
[8] We note that in the event the grievant subsequently experiences an adverse employment action related to the alleged agency conduct at issue here, this ruling does not prevent the grievant from attempting to contest the merits of the agency's actions through a subsequent grievance challenging the related adverse employment action.
[9] *See generally* Gillam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[10] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[11] Because the grievant has not raised a sufficient question as to the existence of an abusive or hostile work environment, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.[12]

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Office of Employment Dispute Resolution

[11] 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).
[12] *See* Va. Code § 2.2-1202.1(5).