Issues: Qualification – Discipline (Written Notice – failure to follow instructions), and Retaliation (complying with any law); Ruling Date: July 11, 2014; Ruling No.2014-3925; Agency: Virginia Department of Transportation; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2014-3925
July 11, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") on whether her May 5, 2014 grievance with the Virginia Department of Transportation (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed by the agency as a Program Administrative Specialist II. On or about April 8, 2014, the grievant was issued a Group II Written Notice for failure to follow her supervisor's instructions and insubordination.[1] On May 5, 2014, the grievant initiated a grievance challenging the disciplinary action and alleged retaliation by the agency. During the management resolution steps, the agency rescinded the Group II Written Notice, concluding that written or verbal counseling would have been a more appropriate way of addressing the grievant's conduct "for this one series of events." At the conclusion of the resolution steps, the grievant requested qualification of her grievance for hearing. The agency head's designee denied the grievant's request, explaining that the Group II Written Notice had been rescinded and as such the grievance "no longer qualifies for a hearing." The grievant has now appealed the agency's decision to EDR.

DISCUSSION

Written Notice

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[2] Furthermore, EDR has recognized that even if a grievant's allegations are true there are still some cases when qualification is inappropriate, even if law and/or policy has been violated or misapplied. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event

[1] The grievant was apparently issued a previous Group II Written Notice on March 20, 2014 but this Written Notice was rescinded by the agency on or about March 25, 2014 as a result of alleged procedural deficiencies.
[2] *See Grievance Procedure Manual* § 4.1.

prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In this case, the agency has rescinded the Group II Written Notice challenged by the May 5, 2014 grievance. At hearing, the agency would be required to show that the grieved disciplinary action was warranted and appropriate under the circumstances;[3] and in the event the agency failed to carry its burden, the potential remedy would be for the hearing officer to order that the discipline be rescinded.[4] However, this relief has already been granted by the agency. Because a grievance hearing on this matter would be unable to provide the grievant any other relief beyond that which has already been granted, there is no reason for this issue to proceed to a hearing. It would be pointless to hold a grievance hearing to determine whether the Group II Written Notice was warranted and appropriate when, as here, the agency has rescinded the disciplinary action. The issue is therefore not qualified and will not proceed further.

Retaliatory Harassment

Fairly read, the grievance also appears to allege a claim of retaliatory harassment. For a claim of hostile work environment or workplace harassment to qualify for a hearing, the grievant must present evidence that raises a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or prior protected activity; (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.[5] "[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."[6]

The grievant alleges that as a result of her efforts to address procurement issues, her supervisor has "continually harassed her" by, among other actions, questioning, "belittling" and counseling her instead of attempting to resolve the issues and concerns she has raised.[7] After reviewing the facts, EDR cannot find that the alleged management actions rose to a sufficiently severe or pervasive level such that an unlawfully abusive or hostile work environment was created at this time,[8] as there is no indication that the terms, conditions, or benefits of the grievant's employment were detrimentally impacted.[9] Further, as courts have repeatedly noted, prohibitions against harassment do not provide a "general civility code"[10] or remedy all

[3] *See Rules for Conducting Grievance Hearings* § VI(B)(1).
[4] *Id.*
[5] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[6] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[7] The grievant further asserts that the Group II Written Notice was part of this pattern of retaliatory harassment. As we have addressed the rescinded Written Notice previously in this ruling, it will not be considered again here.
[8] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[9] *See* EDR Ruling No. 2014-3836; EDR Ruling No. 2012-3125; *see generally* Gunten v. Maryland, 243 F.3d 858, 869 (4th Cir. 2001) (discussing retaliatory harassment, for which EDR applies an identical qualification standard).
[10] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

offensive or insensitive conduct in the workplace.[11] For these reasons, the grievant's retaliatory harassment claim does not qualify for a hearing.[12]

CONCLUSION

For all the foregoing reasons, the grievant's request for qualification of her grievance for hearing is denied. EDR's qualification rulings are final and nonappealable.[13]

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[11] *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).

[12] However, this ruling does not preclude the grievant from presenting the issues raised here as background evidence, if relevant, in any future grievance about subsequent agency actions should the alleged conduct continue or worsen.

[13] Va. Code § 2.2-1202.1(5).