Issue: Qualification – Discipline (counseling memo); Ruling Date: August 28, 2014; Ruling No. 2015-3976; 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 Virginia Department of Social Services
Ruling Number 2015-3976
August 28, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") on whether her May 15, 2014 grievance with the Virginia Department of Social Services (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 Compliance Specialist Senior. On May 8, 2014, the grievant was issued a Group I Written Notice for directly contacting the building management regarding an issue with the air conditioning or heating units, without first consulting with agency management. On or about May 15, 2014, the grievant initiated a grievance challenging the disciplinary action and alleging a hostile work environment and retaliatory harassment by the agency.

During the management resolution steps, the agency rescinded the Group I Written Notice, concluding that written counseling would have been a more appropriate way of addressing an "initial instance of misconduct" of this nature. At the conclusion of the resolution steps, the grievant requested qualification of her grievance for hearing. The agency head denied the grievant's request and the grievant requests a qualification ruling from EDR.

DISCUSSION

Written Notice/Counseling Memorandum

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] The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[2] 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,

[1] *See Grievance Procedure Manual* § 4.1.
[2] *Id*. § 4.1(b).

firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[3] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[4]

In this case, the agency has rescinded the Group I Written Notice challenged by the May 15, 2014 grievance and, in its place, issued a "Counseling Memo" to the grievant. A Counseling Memo 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.[5] Therefore, the grievant's challenge to the Counseling Memo does not qualify for hearing.

Hostile Work Environment/Retaliatory Harassment

The May 15, 2014 grievance also alleges a claim of hostile work environment and harassment by agency managers. 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.[6] "[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."[7]

The grievant alleges that the agency's office space experiences excessive temperatures that aggravate her medical condition. She asserts that, as a result of bringing these concerns to management and the human resource personnel, agency managers have engaged in harassing behavior and created a hostile work environment.[8] She further indicates that she received a Group II Written Notice for an additional incident pertaining to the temperatures in her office space, which she challenged through a separate grievance. EDR has received the agency's request for an appointment of a hearing officer for that matter. We have carefully reviewed both grievances and it appears that the grievant raises identical arguments in each regarding the hostile work environment and harassment as it pertains to her complaints regarding the office temperature. Because she will have the opportunity to raise these issues at the hearing regarding the Group II Written Notice, to qualify such claims in the grievance here would be duplicative.[9] Thus, the May 15, 2014 grievance does not qualify for a hearing on this basis.

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[3] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[4] *See, e.g.*, Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[5] *See* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).
[6] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[7] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[8] The grievant asserts that the Group I 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.
[9] *See Grievance Procedure Manual* § 2.4 (stating that multiple grievances cannot be initiated to challenge the same management actions).

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.[10]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[10] Va. Code § 2.2-1202.1(5).