Issues: Qualification – Work Conditions (hours of work/shift), Retaliation (complying with any law), and Discipline (other); Ruling Date: September 12, 2014; Ruling No.2015-3984; Agency: Department of Corrections; 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 Corrections
Ruling Number 2015-3984
September 12, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") on whether her July 15, 2014 grievance with the Department of Corrections ("agency") qualifies for hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On July 15, 2014, the grievant initiated a grievance challenging the agency's denial of her request for an alternative work arrangement, harassment, and issuance of a "Notification of Code of Conduct Violation" (hereinafter referred to as the "Due Process Notice"). After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The grievant's request was denied and she requested a qualification ruling by 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, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as to 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.

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

Alternative Work Arrangement and Due Process Notice

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] 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."[4] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[5]

In her July 15, 2014 grievance, the grievant challenges her manager's refusal to approve her request for an alternative work arrangement that would allow her to work four days a week.[6] While the grievant's disappointment with not being allowed to work her preferred schedule is understandable, the denial of the requested alternative work arrangement does not constitute an adverse employment action, as it is not a significant change in employment status comparable with hiring, firing, or a failure to promote. The grievant also challenges the Due Process Notice issued to her on July 14, 2014. That document advises the grievant of several charges against her and of her right to respond. While the purpose of the document is to inform the grievant of the agency's possible intent to take disciplinary action, it does not in itself constitute a disciplinary action and does not change the terms, conditions or benefits of her employment. As such, the Due Process Notice was also not an adverse employment action. Accordingly, the grievant's claims regarding the denial of her request for an alternative work arrangement and the Due Process Notice do not qualify for hearing.[7]

Harassment

The grievant also asserts a claim of retaliatory harassment by her supervisor. For a claim of a discriminatory hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status; (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.[8] "[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

[3] *See Grievance Procedure Manual* § 4.1(b).
[4] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[5] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[6] The grievant had previously been granted approval to work the requested alternative schedule by another manager, who was not the appropriate manager to approve such arrangements.
[7] Although the Due Process Notice does not qualify for hearing in its own right, the subsequent related disciplinary action will proceed to hearing. Nothing in this ruling precludes the use of the Due Process Notice as evidence at the hearing on the subsequent disciplinary action.
[8] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).

humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[9]

In this case, the grievant argues that her supervisor has harassed her by calling her staff to question whether she is adhering to her work schedule and questioning her "production, patient referrals, and [her] clinical judgment, going so far as to call for an investigation." She appears to claim that this conduct is in retaliation for her request for the alternative work schedule. Even assuming, however, that her request for an alternative work schedule was a protected activity, there is insufficient evidence that the alleged conduct by the grievant's supervisor was motivated by her work schedule request or that it rose to a "sufficiently severe or pervasive" level such that an unlawfully abusive or hostile work environment was created. [10] Accordingly, the grievant's retaliatory harassment claims do not qualify for a hearing.

CONCLUSION

For all the foregoing reasons, the grievant's July 15, 2014 grievance is not qualified for hearing. EDR's qualification rulings are final and nonappealable.[11]

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[9] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[10] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007). As courts have noted, prohibitions against harassment do not provide a "general civility code," Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (citation and internal quotation marks omitted omitted), or remedy all offensive or insensitive conduct in the workplace. *See, e.g.*, Beall v. Abbott Labs., 130 F.3d 614, 619-20 (4th Cir. 1997); Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).
[11] Va. Code § 2.2-1202.1(5).