Issue: Qualification – Discrimination (disability) and Work Condition (supervisor/ employee conflict); Ruling Date: October 7, 2014; Ruling No. 2015-3988; Agency: University of Virginia; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of the University of Virginia
Ruling Number 2015-3988
October 7, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") on whether his February 28, 2014 grievance with the University of Virginia ("University") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant was employed by the University as an elevator mechanic.[1] In January 2013, the University determined that the mechanics working in Area X needed additional training, as the performance of the work unit was below the University's expectations, particularly in regard to preventative maintenance. As a result, the University decided to send the mechanics working in Area X for a six-to-eight week retraining period under a supervisor who is considered to have excellent skills in both performing preventative maintenance and in training other employees. Based on his work performance, the grievant was selected to be the first employee to be retrained in this manner.

During this period of retraining, the grievant was taken off the on-call rotation for Area X, due to the University's concerns that "it is not a best practice to have a mechanic on call who is not working day-to-day in that zone." As the grievant had not been working in the new area long and was not scheduled to remain there for very long, the University did not place him on the on call list for the new area. The University states that while the grievant was being retrained, "[his] performance was observed by his supervisor to be substandard, particularly with respect to troubleshooting, a key skill for responding effectively during an afterhours or weekend call-back." In light of these performance issues, the University "determined that [the grievant] needed more training and needed to show greater skill level before returning to either on call work or to [Area X], which contains the [University's] most critical elevator systems." On January 29, 2014, the grievant received a Written Letter of Counseling for unsatisfactory work performance and violation of a safety rule.

[1] Effective June 30, 2014, after the initiation of the present grievance, the grievant was transferred to the position of Electronic Door Mechanic. As claims may not be added to a grievance once it has been initiated, this ruling will not address any University actions or omissions occurring after February 28, 2014. *See Grievance Procedure Manual* § 2.4.

On February 28, 2014, the grievant initiated a grievance challenging alleged "[d]isability [d]iscrimination and [h]arassment" by the University.[2] After the parties failed to resolve the grievances during the management resolution steps, the grievant asked the University President to qualify the grievance for hearing. The University President denied the grievant's request, and the grievant now seeks 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.[3] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[4] 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.

Disability Discrimination

For a claim of disability discrimination to qualify for hearing, there must be more than a mere allegation that discrimination has occurred. Rather, there must be facts that raise a sufficient question as to whether any adverse employment actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[5]

The threshold determination in assessing the grievant's claim of discrimination is whether he has experienced 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7] In this case, the grievant apparently alleges that the University discriminated against him by issuing him a Written Letter of Counseling and by denying him "on call" pay.

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[2] The University had previously been advised of the grievant's disability status and had granted the grievant reasonable accommodations.
[3] *See Grievance Procedure Manual* § 4.1.
[4] *See* Va. Code § 2.2-3004(B).
[5] *See* Hutchinson v. INOVA Health System, Inc., Civil Action No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *4 (E.D. Va. Apr. 8, 1998).
[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

A written counseling is not formal discipline and does not have a significant detrimental effect on the terms, conditions, or benefits of employment. As such, the January 29, 2014 Written Letter of Counseling cannot be found to constitute an adverse employment action,[8] and the grievant's claims regarding the Letter do not qualify for hearing.[9]

Further, although the loss of on call pay could be an adverse employment action, there is a lack of evidence that the University's actions constituted actionable disability discrimination. The University states that the grievant's loss of on call pay was initially the result of its decision to provide the grievant, as well as his co-workers, with needed additional training. There is no evidence that would suggest this stated reason for the grievant's loss of on call pay was in fact a pretext for discrimination. Subsequently, in September 2013, the University agreed to provide the grievant with accommodations for his disability suggested by the grievant's health care provider. Those accommodations did not raise the grievant's work performance to the expected level, and therefore the University was not required to return the grievant to the on call list.[10] Given this evidence, EDR does not find that a sufficient question of disability discrimination exists to qualify the grievant's claims regarding on call pay for hearing.

Harassment

The grievant further asserts that his supervisor engaged in harassing conduct toward him because of his disability. 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.[11] 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.[12] "[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;

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[8] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

[9] While the written counseling has not had an adverse impact on the grievant's employment, if it is subsequently used to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below Contributor" annual performance rating, 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.

[10] *See* 29 C.F.R. §§ 1630.2(m), 1630.9 (explaining that the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, as amended by the Americans with Disabilities Amendments Act of 2008, does not require an employer to accommodate an individual who is not able to perform the essential functions of a position with or without reasonable accommodations.) EDR notes that after receiving additional information from the grievant's health care providers, the University formally determined that the grievant was unable to perform the essential functions of the elevator mechanic position and transferred the grievant, with his permission, to the position of Electronic Door Mechanic.

[11] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).

[12] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142-43 (4th Cir. 2007).

and whether it unreasonably interferes with an employee's work performance."[13] However, the grievant must raise more than a mere allegation of harassment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status.

In this case, the grievant challenges the allegedly hostile and demeaning manner in which his supervisor interacted with him. However, the conduct described by the grievant was not so severe or pervasive that it altered the conditions of his employment. Prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[14] Further, even if EDR were to assume that the supervisor's conduct rose to the required level, the grievant has now been reassigned to another supervisor and a hearing would not offer effectual relief. For these reasons, the grievant's claim of disability harassment does not qualify for a hearing.

CONCLUSION

For all the foregoing reasons, the grievant's February 28, 2014 grievance does not qualify for hearing. EDR's qualification rulings are final and nonappealable.[15]

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[13] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).
[14] 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).
[15] Va. Code § 2.2-1202.1(5).