

Issues: Qualification – Work Conditions (Supervisor/Employee Conflict) and Performance (Notice of Improvement Needed); Ruling Date: October 27, 2014; Ruling No. 2015-4007; Agency: Department for Aging and Rehabilitative Services; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the Department for Aging and Rehabilitative Services
Ruling Number 2015-4007
October 27, 2014

The grievant has requested a ruling on whether the two grievances he initiated on or about June 23, 2014 with the Department for Aging and Rehabilitative Services (the agency) qualify for a hearing.¹ For the reasons discussed below, neither grievance qualifies for a hearing.

FACTS

The first June 23, 2014 grievance challenges a Notice of Improvement Needed form received by the grievant in April 2014. On this form, the grievant's supervisor indicated that the grievant's performance was deficient in a number of areas, including several incidents of alleged disrespectful and negative behavior toward other employees. The grievant denies that his performance has been deficient and asserts that racial discrimination influenced his supervisor to issue the Notice of Improvement Needed form.

The second June 23, 2014 grievance cites as the issue his supervisor's "personal dislike" for him, as well as "rude eye contact and physical[ly] distancing himself" from the grievant. The grievant also cites to an allegedly racially offensive conversation that occurred in 2013 and asserts that he works in a hostile environment due to his supervisor's behavior.

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.² Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.³ 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.⁴

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁵ Thus, typically, a threshold question is

¹ It appears that the two grievances were treated by the agency in a joint manner.

² See *Grievance Procedure Manual* §§ 4.1 (a), (b).

³ See Va. Code § 2.2-3004(B).

⁴ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

⁵ See *Grievance Procedure Manual* § 4.1(b).

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.”⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁷

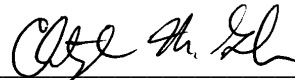
Notice of Improvement Needed

The management action challenged in the first June 23, 2014 grievance, a Notification of Improvement Needed, is a form of written counseling. Written counseling 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.⁸ Therefore, the grievant’s challenge to the Notice of Improvement Needed does not qualify for hearing. However, should the Notice of Improvement Needed grieved in this case later serve 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.

Unfair Treatment/Interaction with Supervisor

The grievant alleges that his supervisor treats him unfairly, improperly favoring other employees and engaging in frequent disrespectful treatment towards him, creating a hostile work environment. However, there is no indication that the grievant has experienced any significant effect as a result of these interactions that would rise to the level of an adverse employment action. To the extent that the grievant also argues that his supervisor engaged in a pattern of behavior that could constitute workplace harassment, based on a review of the facts as stated in his grievance, we cannot find that the grieved issues rose to a “sufficiently severe or pervasive” level such that an unlawfully abusive or hostile work environment was created.⁹ Thus, the grievance does not qualify for a hearing.

This ruling does not mean that EDR deems the alleged actions by the grievant’s supervisor, if true, to be appropriate, only that this grievance does not qualify for a hearing under the parameters established by the Code of Virginia based on the information presented to EDR. EDR’s qualification rulings are final and nonappealable.¹⁰



Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁶ Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

⁷ See, e.g., Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

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

⁹ See generally Gilliam v. S.C. Dep’t of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

¹⁰ Va. Code § 2.2-1202.1(5).