Issue: Qualification – Work Conditions (supervisor conflict, co-worker conflict); Ruling Date: November 13, 2014; Ruling No. 2015-4029; 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 2015-4029
November 13, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether his August 9, 2014 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant is employed by the agency as a Utility Plant Specialist. On or about August 9, 2014, he initiated a grievance, alleging that a coworker and his supervisor had engaged in harassing behavior. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to 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, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] 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.[3]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] 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."[5] Adverse employment

[1] *See Grievance Procedure Manual* § 4.1.
[2] Va. Code § 2.2-3004(B).
[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[4] *See Grievance Procedure Manual* § 4.1(b).
[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6]

In this case, the grievant's claims, taken as a whole, amount to a claim of workplace harassment. For a claim of workplace 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.[7] 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.[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 humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[9]

The grievant has provided a description of the allegedly harassing behavior that is challenged in the grievance. Based on the information presented to EDR, it appears that the grievant asked a coworker for documents on July 16, 2014 to assist the grievant in completing some of his daily tasks. In response, the coworker gave the grievant a "harsh instruction" and told the grievant that he would not do the grievant's work for him. On July 18, the grievant went to his supervisor's office and asked the supervisor to check some of the grievant's paperwork. The grievant's supervisor told the grievant "not to bother him [that] morning" because the supervisor had work to do.

The grievant may be raising legitimate concerns about his employment and his coworker's and/or supervisor's conduct. After reviewing the facts presented by the grievant, however, EDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment. The alleged workplace harassment challenged by the grievant essentially involves unprofessional conduct by a coworker and his supervisor, which does not generally rise to the level of an adverse employment action or severe or pervasive conduct.[10] Prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[11] Because the grievant has not raised a sufficient question as to the existence of a severe or pervasive hostile work environment, the grievance does not qualify for a hearing on this basis.

This ruling does not mean that EDR deems the alleged behavior of the grievant's coworker and supervisor, if true, to be appropriate, only that the grievant's claims of workplace harassment and workplace violence do not qualify for a hearing. Moreover, this ruling in no way

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[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[8] *See generally id* at 142-43.
[9] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[10] *See, e.g.*, EDR Ruling No. 2014-3836.
[11] 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).

prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.

Mediation

Although this grievance does not qualify for a hearing, mediation may be a viable option for the parties to pursue. EDR's Workplace Mediation Program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. The parties may contact EDR at 888-232-3842 for more information about EDR's Workplace Mediation Program.

EDR's qualification rulings are final and nonappealable.[12]

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[12] *See* Va. Code §§ 2.2-1202.1(5).