Issue: Qualification – Work Conditions (Supervisor/Employee Conflict); Ruling Date: July 23, 2015; Ruling No. 2015-4178; 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 2015-4178
July 23, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether her February 6, 2015 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a Corrections Officer. On or about February 6, 2015, she initiated a grievance alleging that she was "harassed" by her supervisor and management at her facility because she "was scheduled days off using [her] personal leave when [she] was not in jeopardy of losing leave" and she had not requested to have time off on those days. After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. 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

[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).

responsibilities, or a decision causing a significant change in benefits."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6]

In cases involving claims of workplace harassment, 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 or conduct; (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]

In support of her assertions that she has experienced workplace harassment, the grievant argues that, on several occasions, she was scheduled to use compensatory leave on days when she would ordinarily have worked. The grievant states that she did not want to use her compensatory leave so she could maintain her leave balances for future planned absences from work. On another occasion in December 2014, the grievant requested and received approval to take several days off work using her annual leave.[10] After she returned to work, the grievant asked to use a different type of leave to cover her absence. The agency declined to honor this request. Finally, the grievant claims that she "was constantly called to the Watch Office to discuss [her] leave" during this time and has been "yelled at" by her supervisor about issues related to her desired use of leave.

After reviewing the facts as presented by the grievant, EDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment. Indeed, the leave-related actions challenged by the grievant appear to be consistent with DHRM and agency policy. DHRM Policy 3.10, *Compensatory Leave*, for example, provides that, while "agencies should attempt to approve an employee's request to use compensatory leave," they may "schedule use of compensatory leave at a time convenient to agency operations."[11] In this case, it appears that the agency scheduled the grievant for several days of compensatory leave in accordance this provision of the policy. While the grievant may

[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[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] EDR attempted to contact the grievant and the agency to gather additional information about this issue. The Human Resource Officer at the grievant's facility was unavailable and the grievant did not respond to EDR's queries. Accordingly, we will address the grievant's concerns about her use of annual leave in December 2014 based on our understanding of the facts from the grievance record.
[11] DHRM Policy 3.10, *Compensatory Leave*; *see also* Department of Corrections Operating Procedure 110.1, *Hours of Work and Leaves of Absence*, § IV(H)(3) (stating that "[a]s far as practicable, compensatory leave shall be granted at the times requested by the employee" and that "Organizational Unit Heads should consider the needs of the unit prior to granting use of compensatory leave.").

have preferred otherwise, the agency has the discretion to schedule the grievant's use of compensatory leave under policy and there are no facts here to indicate that its decision was improper. Similarly, although allowing employees to substitute different types of leave for an approved absence may be a good management practice when feasible, there is nothing in DHRM policy that required the agency to retroactively authorize the grievant's request to change the type of leave used to cover her absence in December 2014. It appears that the grievant received approval for and entered her annual leave into the agency's leave management system in advance of the days she had requested off. Though the grievant's frustration is understandable, the agency was under no obligation to restore the grievant's annual leave balance and allow her to use a different type of leave after she had requested to use annual leave in advance, received approval, and actually used the leave time.

In short, the allegedly hostile work environment challenged by the grievant essentially involves management actions with which she disagrees and potentially unprofessional conduct by her supervisor, which do not rise to the level of adverse employment actions or severe or pervasive conduct in this case.[12] Prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[13] Because the grievant has not raised a sufficient question as to the existence of an abusive or hostile work environment, the grievance does not qualify for a hearing.[14]

EDR's qualification rulings are final and nonappealable.[15]

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Director
Office of Employment Dispute Resolution

[12] *See* EDR Ruling No. 2011-2891 (and authorities cited therein). This ruling does not mean that EDR deems the alleged behavior of the supervisor, if true, to be appropriate, only that the grievant's claim of workplace harassment does not qualify for a hearing. Moreover, this ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.

[13] 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. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).

[14] It also appears that the grievant was transferred to a different assignment at her facility after the events that gave rise to the grievance occurred. Though the grievant requested as relief that she "be allowed to return to work . . . in [her] original assign [sic] shift," the transfer was not challenged in the grievance and we will not address it in this ruling. *See Grievance Procedure Manual* § 2.4 ("Once the grievance is initiated, challenges to additional management actions or omissions cannot be added."). However, we do note that the agency's decision to transfer the grievant could be seen as an attempt to address her claim that that she was subjected to harassing behavior from her supervisor. Significantly, EDR has reviewed nothing that would suggest the grievant has experienced further harassment since the transfer took effect.

[15] *See* Va. Code § 2.2-1202.1(5).