Issues: Qualification – Discrimination (Race), Retaliation (Other protected right), misapplication of policy; Ruling Date: July 24, 2015; Ruling No. 2015-4182; Agency: Virginia Employment Commission; Outcome: Partially Qualified.

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

QUALIFICATION RULING

In the matter of the Virginia Employment Commission
Ruling Number 2015-4182
July 24, 2015

The grievant has requested a ruling on whether her May 1, 2015 grievance with the Virginia Employment Commission (the "agency") fully qualifies for a hearing. For the reasons set forth below, this grievance partially qualifies for hearing.

FACTS

In the grievant's May 1, 2015 grievance, she challenges her receipt of a Group I Written Notice for excessive tardiness. In addition, she appears to challenge what she alleges is an ongoing pattern of discrimination and retaliation, as well as the misapplication and/or unfair application of policy. After the grievance proceeded through the management resolution steps, the grievant requested qualification by the agency head. The agency head qualified the grievant's claim "on the issuance of the Group I written notice" but denied qualification for the grievant's remaining claims. The grievant has appealed that determination to the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management.

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 or agency policy may have been misapplied or unfairly applied.[3]

Further, the grievance procedure generally limits grievances that qualify 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

[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).

as hiring, firing, failing to promote, reassignment with significantly different 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]

Discrimination and Retaliation Claims

In this case, the grievant alleges that she has been subjected to a pattern of discrimination based on her race and retaliation for her past protected activity. She suggests that this pattern culminated in the issuance of the Group I Written Notice. For a claim of a 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 or activity; (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 Group I Written Notice challenged as a part of this alleged course of conduct has been qualified for hearing, as required under the grievance procedure.[10] It is a difficult determination whether the remainder of the grieved conduct, standing alone, could raise a sufficient question of a hostile work environment. However, because the grievant's allegations of discrimination and retaliation appear to be significantly intertwined with her challenges to the Group I Written Notice and reasons for its issuance, it simply makes sense to allow her claims related to discrimination and retaliation to proceed to hearing as well.[11] Further, to the extent the grievant's retaliation and discrimination claims are merely a theory[12] advanced by the grievant to support her challenge to the Written Notice, it cannot be severed from her qualified challenge to the Written Notice[13] and may be raised at hearing to support her challenge.[14]

Sending these potentially related claims to hearing will provide an opportunity for the fullest development of what may be interrelated facts and issues. We note, however, that this qualification ruling in no way determines that the actions challenged by the grievant were

[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 generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).
[8] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142-43 (4th Cir. 2007).
[9] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).
[10] *Grievance Procedure Manual* § 4.1(a); *see also* Va. Code § 2.2-3004(A).
[11] *See, e.g.*, EDR Ruling No. 2008-1955; EDR Ruling No. 2005-957.
[12] As EDR has ruled, the "claims" or "issues" raised by a grievance are the management actions being challenged. *See, e.g.*, EDR Ruling Nos. 2013-3480, 2013-3495; EDR Ruling Nos. 2007-1561, 2007-1587.
[13] *See* EDR Ruling Nos. 2011-2783, 2011-2784, 2011-2797; EDR Ruling Nos. 2009-2127, 2009-2129, 2009-2130.
[14] *See* EDR Ruling No. 2011-2796.

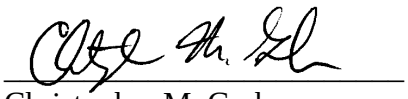
discriminatory, retaliatory or otherwise improper, but rather only determines that further exploration of the facts by a hearing officer is appropriate. We also note that under the grievance procedure, the relief available on these claims if the grievant were to prevail at hearing is limited to rescission or reduction of the Written Notice and an order directing the agency to comply with law and policy in the future.[15]

Misapplication and/or Unfair Application of Policy

The grievant also appears to assert that the agency has misapplied and/or unfairly applied policies by, among other things, failing to give her an extended time to respond to the due process notice, monitoring her time and attendance in a manner inconsistent with the way in which other employees are monitored, failing to enforce time and attendance policies against other employees, failing to provide her with documentation, and relying on documents from a previous supervisor. To the extent the grievant asserts these arguments as theories for why the Group I Written Notice should be rescinded or reduced, these theories cannot be severed from her qualified challenge to the Written Notice[16] and may be raised at hearing to support her challenge. However, to the extent the grievant seeks relief for other alleged misapplications and/or unfair applications of policy, the grievant's claims do not warrant qualification.

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. However, under the facts presented to EDR, it does not appear that the challenged actions other than the Group I Written Notice amount to an adverse employment action, as the grievant does not appear to have experienced an adverse effect on the terms, conditions or benefits of her employment. Accordingly, to the extent the grievance raises claims of misapplication of policy or unfair application or policy that do not involve the Group I Written Notice, those claims are not qualified for hearing.

EDR's rulings on qualification and compliance are final and nonappealable.[17]



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[15] *Grievance Procedure Manual* § 5.9(a).
[16] *See* EDR Ruling Nos. 2011-2783, 2011-2784, 2011-2797; EDR Ruling Nos. 2009-2127, 2009-2129, 2009-2130.
[17] Va. Code § 2.2-1202.1(5).