Issue: Qualification – Retaliation (grievance activity); Ruling Date: September 23, 2015; Ruling No. 2016-4205; Agency: Department of Juvenile Justice; 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 Juvenile Justice
Ruling Number 2016-4205
September 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 his May 18, 2015 grievance with the Department of Juvenile Justice (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 an Assistant Manager in one of its work units. On or about May 18, 2015, he filed a grievance alleging that the agency had engaged in retaliation because he "fil[ed] a prior grievance" in 2013. The 2013 grievance challenged the agency's decision to remove him from his position within a different work unit and his subsequent transfer to his current position.[1] In the current grievance, the grievant alleges that the agency has engaged in a variety of retaliatory actions since he was transferred and requests as relief for his "record to be cleared" and to "be reinstated to [his] previous job title and role . . . ." After proceeding through the management 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.[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]

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[1] Though the procedural background of the 2013 grievance is not relevant to this case, that grievance was qualified for an administrative hearing and an appeal of the hearing officer's decision in that case is currently being requested from the Supreme Court of Virginia.
[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[8] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[9] Ultimately, to support a finding of retaliation, EDR must find that the protected activity was a but-for cause of the alleged adverse action by the employer.[10]

Here, the grievant engaged in protected activity by filing a grievance in 2013, which involves currently active appeals.[11] However, the majority of the management actions challenged in this grievance cannot be considered adverse employment actions. The grievant appears to allege, for example, that he had meetings with a member of agency management, who then mischaracterized or misrepresented the grievant's conduct to others such that his reputation within the agency was damaged. The grievant also argues that he is not assigned job responsibilities consistent with his role within his work unit and that he does not have a current Employee Work Profile ("EWP") for his position. These issues, however, do not involve any allegation that the agency has taken a tangible action taken against the grievant.[12] In the absence of an adverse employment action with respect to these actions, we do not find that they can

[5] *See Grievance Procedure Manual* § 4.1(b).
[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) (citation omitted).
[8] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).
[9] *See, e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[10] *See id.* (citing Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013)).
[11] *See* Va. Code § 2.2-3004(A).
[12] The grievant also alleges that his transfer to his current work unit, which occurred in July 2013, was retaliatory. The grievance procedure provides that an employee must initiate a written grievance within thirty calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance. Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4. As the transfer occurred almost two years before the initiation of the grievance, we find that the grievance is not timely to challenge the grievant's transfer. Indeed, and perhaps more importantly, the grievant challenged the transfer in his earlier 2013 grievance. Thus, the transfer itself is not a proper subject for this grievance.

support the grievant's request for qualification on the theory that the agency engaged in retaliation.[13]

The grievant also asserts that the agency retaliated against him during the selection process for a Regional Manager position in which he competed unsuccessfully. Specifically, the grievant alleges that: (1) members of the selection panel had a conflict of interest because they played a role in the agency's decision to transfer him to his current position; (2) his interview was not conducted consistent with agency policy; (3) the panel did not consider his status as a veteran; and (4) the successful candidate was pre-selected by the agency. As it appears the position for which the grievant applied would have been a promotion, we will assume, for purposes of this ruling only, that the agency's failure to select him raises a sufficient question as to whether he has experienced an adverse employment action for purposes of this ruling only.[14] However, even if a causal connection between the grievant's protected activity and the agency's decision not to select him for the Regional Manager position is inferred, the agency has provided legitimate, nonretaliatory business reasons for its selection decision and the other actions complained of by the grievant as discussed below.

Conflict of Interest and Interview Practices

The grievant argues that "many things [] occurred during the interview" for the Regional Manager position that were inconsistent with agency policy regarding recruitment and selection, with the result that he believes retaliation occurred. Specifically, the grievant argues that two members of the selection panel were "directly involved and supported [his] removal" from his former position and subsequent transfer, that "interview practices" regarding the review of his application "were not followed," and that he "was asked to abbreviate [his] answers and to move the answering of questions along."

Having reviewed the relevant agency policy, Standard Operating Procedures ("SOP"), *Recruitment and Selection*, and the grievance record, we are unable to identify any specific policy requirements that may have been violated by the selection panel if the grievant's allegations are accepted as true. For example, the agency's SOP does not identify any specific procedure for verifying the information listed in a candidate's application during the interview, and the second step-respondent stated that a selection panel may allow a candidate to review his or her application at the interview at its discretion, but is not required to do so. Similarly, the SOP provides that the members of a selection panel should "represent a collective pool of expertise," be "knowledgeable of the position requirements," and work in a position "at the same role/pay band or higher than the position that is being interviewed for," among other things.[15] In the second step response, the agency indicated that, while the grievant asserts that two of the panel members in this case may have had some previous involvement with the grievant's employment with the agency, the panel members have "either supervisory or consultative roles with respect to Regional Manager positions."

[13] The question of whether these actions, taken as a whole, could be interpreted to support an argument that the agency engaged in retaliation that has created a hostile work environment is discussed below.
[14] *See, e.g.*, EDR Ruling No. 2015-4202.
[15] Department of Juvenile Justice ("DJJ") SOP, *Recruitment and Selection*, at 10.

Though we understand the grievant's concerns about the interview process, he has not presented evidence that raises a question as to whether the selection panel's actions failed to comply with agency policy or were otherwise biased. In the absence of such information, we must conclude that grievant's interview was conducted in a manner that was based on legitimate, nonretaliatory business reasons, and that there is nothing to demonstrate that those reasons were merely a pretext for retaliation.

Veteran Status

The grievant asserts that, at his interview for the Regional Manager position, the selection panel did not properly consider his status as a veteran or "explore[] the possibility of [his] having a service connected disability." DHRM Policy 2.10, *Hiring*, provides that: "[c]onsistent with the requirements of the [Virginia] Code [Sections] 2.2-2903 and 15.2-1509, the veteran's military service shall be taken into consideration by the Commonwealth during the selection process, provided that such veteran meets all of the knowledge, skill, and ability requirements for the available position. Additional consideration shall also be given to veterans who have a service-connected disability rating fixed by the United States Veterans Administration."[16] DHRM has provided policy guidance as to the application of this "veteran's preference." In pertinent part, the policy guide states:

> In accordance with the Code of Virginia, which requires that state agencies give preference in the hiring process to veterans . . . the following is provided to guide agencies' application of the Veterans Preference provision of the Commonwealth's Hiring Policy.
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> . . . .
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> **Initial screening:** Applicants are screened to identify those who meet the minimum requirements for the position – the equivalent of achieving a passing score on a test. No preference is given. Applicants must meet the required criteria at a minimum or better level on their own.
>
> **Preference applied after initial screening phase:** After the initial screening, veteran status is noted for the candidates. The state application provides preliminary notice of veteran status; the agency may need to follow up to identify the exact status of veteran applicants. At this stage, preference shall be given by treating veteran status as a preferred qualification. Further preference shall be given if the veteran applicant also has a service-connected disability rating by treating the veteran's disabled status as a second preferred qualification. Adding a preferred qualification criterion for veteran status and, if applicable, a second

[16] DHRM Policy 2.10, *Hiring*, § B(1)(b). The Glossary of DHRM Policy 2.10. *Hiring*, defines a "veteran" as "[a]ny person who has received an honorable discharge and has (i) provided more than 180 consecutive days of full-time, active-duty service in the armed forces of the United States or reserve components thereof, including the National Guard, or (ii) has a service-connected disability rating fixed by the United States Department of Veterans Affairs." In addition, Virginia Code Section 2.2-2903(B) states that, "[i]n a manner consistent with federal and state law, if any veteran . . . applies for employment with the Commonwealth that is not based on the passing of any examination, the veteran . . . shall be given preference by the Commonwealth during the selection process, provided that the veteran . . . meets all of the knowledge, skill, and ability requirements for the available position."

> preferred criterion for disabled veteran status will therefore result in the veteran applicant and the disabled veteran applicant receiving the additional preference required by Code.
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> The additional credit for veteran, or disabled veteran status, remains with the applicant throughout the hiring process, and ultimately becomes a part of the hiring manager's final decision. This process is comparable to how preference or credit is applied in situations where scored examinations are used. For example, applicants take a scored examination *one time*, and applicants who are veterans receive the additional points *one time*. Those points, like our credit for having a preferred qualification, remain with the applicants throughout the process.[17]

This policy language and guidance only require an agency to consider the preferred qualification of veteran status and/or a veteran's service-connected disability status during screening for interviews.[18] In this case, the grievant was interviewed for the Regional Manager position. DHRM Policy 2.10, *Hiring*, does not require the agency to have considered his veteran status at any point other than screening for interviews. As the grievant was screened in for an interview, we cannot conclude that the agency's consideration of the grievant's veteran status was inconsistent with the requirements of state policy. Accordingly, we find that the agency's application of policy relating to "veterans' preference" was based on legitimate, nonretaliatory business reasons, and there is nothing to demonstrate that those reasons were merely a pretext for retaliation.

Pre-selection

Finally, the grievant alleges that the successful candidate was pre-selected for the Regional Manager position. State hiring policy is designed to ascertain which candidate is best suited for the position, not just to determine who might be qualified to perform the duties of the position.[19] Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.[20] As such, an agency may not pre-select the successful candidate for a position, without regard to the candidate's merit or suitability, and then merely go through the motions of the selection process.

A review of the panel's notes from the grievant's and the finalist's interviews shows that the panel's decision to not recommend the grievant was consistent with its assessment of his suitability for the position, that the successful candidate was not pre-selected, and that the panel's decision was based on legitimate, non-retaliatory business reasons. For example, the panel's Interview Evaluation Worksheet noted that the successful candidate had "extensive knowledge" of many agency programs as a result of his prior experience with the agency, that he had been involved in "collaborative processes" with other state and local entities that supported the

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[17] The Policy Guide on Veteran's Preference for hiring is available at http://www.dhrm.virginia.gov/docs/default-source/hrpolicy/policyguides/veteranpreferencepolicyguide.pdf?sfvrsn=2.
[18] *See, e.g.*, EDR Ruling Nos. 2010-2502, 2010-2553.
[19] *See* DHRM Policy No. 2.10, *Hiring*; DJJ SOP, *Recruitment and Selection*, at 2.
[20] Va. Code § 2.2-2901(A) (stating, in part, that "[i]n accordance with the provisions of this chapter all appointments and promotions to and tenure in positions in the service of the Commonwealth *shall be* based upon merit and fitness, to be ascertained, as far as possible, by the competitive rating of qualifications by the respective appointing authorities") (emphasis added).

agency's goals, and that he is "currently recognized as a leader among his peers . . . ." With regard to the grievant's interview, the panel noted that the grievant had "some experience" working in Court Services Units and that his response to one of the standardized questions "appeared to focus on institutional transformation . . . and not diversion/probationary services."

A candidate's suitability for a particular position is not always readily apparent by a plain reading of the comments recorded during an interview, and agency decision-makers deserve appropriate deference in making determinations regarding a candidate's knowledge, skills, and abilities. Although the grievant may reasonably disagree with the panel's decision not to recommend him for hiring, EDR's review of the grievance record shows that the selection decision was based on legitimate, nonretaliatory business reasons, and there is nothing to demonstrate that those reasons were merely a pretext for retaliation. Furthermore, there are no facts that would indicate the grievant's protected activity was the but-for cause of the agency's decision not to promote the grievant. In short, there is no basis for EDR to conclude that the panel's assessment of the candidates and subsequent recommendation to the appointing authority were motivated by anything other than a good faith assessment of the candidates based on their performance at the interviews. Accordingly, we conclude that the grievant's claims related to the selection process do not raise a sufficient question as to whether retaliation has occurred, and they do not qualify for a hearing on this basis.

Workplace Harassment

Taken as a whole, the grievant's assertions also appear to amount to a claim that the agency has engaged in retaliation and/or harassment that has created an alleged hostile work environment. For a claim of hostile work environment or 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 or prior protected 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.[21] 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.[22] "[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."[23]

The grievant has provided EDR with examples of the allegedly retaliatory and/or harassing behavior that he has experienced. For instance, the grievant argues that, despite his position as the Assistant Manager, he is only assigned minor tasks and is excluded from playing a role in the management of his work unit. He further claims that other "subordinate" employees direct his work tasks and will not talk to him about their own assignments. As an additional example, the grievant also states that decisions he makes must be reviewed by his supervisor for approval, and thus he possess little or no authority as a manager. In addition, while the grievant

[21] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[22] *See generally id.* at 142-43.
[23] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

received an EWP for the 2013-2014 evaluation cycle, it appears that he has not yet been given an EWP for the current evaluation cycle.

In response to the grievant's allegations, the agency agrees that the grievant's "managerial role" has been "significantly reduced" as a result of his transfer to the Assistant Manager position in 2013. The agency further states that the grievant "functions as a lead worker, as opposed to a working supervisor," and does not directly manage any employees. Instead, the grievant's position is intended to provide "guidance and oversight" to other employees within the work unit.

That the grievant's job significantly changed as a result of the transfer two years ago is without question. However, the adverse character of that action is largely not at issue in this grievance, but is rather the proper subject of the 2013 grievance and hearing process. Some of the facts and circumstances following the grievant's transfer, if true, are concerning to a degree, particularly the grievant's role within his work unit and the degree to which he may be ostracized from the core work of the unit. Upon considering the totality of the circumstances, however, EDR is unable to find that the conduct challenged by the grievant rises to a sufficiently severe or pervasive level such that the grievance raises a question as to the elements of a retaliatory harassment claim.

Although this grievance does not qualify for hearing, nothing in this ruling prevents the grievant from challenging these issues again should the conduct challenged continue and/or worsen. Indeed, to a certain extent, the allegations in this case are a close call. If the alleged conduct were more extensive such that, for example, it would appear the agency is attempting to create a work environment for the grievant that would force his resignation, the grievance might be one that could qualify for a hearing. Improper limitations on career prospects would be another potential area of concern. In this case, however, the specific selection process challenged by the grievant did not demonstrate indications of a retaliatory intent. If the grievant were to challenge a future selection process in a new grievance and present sufficient information to show a potential retaliatory animus tainting the selection decision, such a grievance could potentially qualify for a hearing.

With all this in mind, EDR is hopeful that the agency will provide the grievant opportunities to succeed on assignments appropriate to his role level and knowledge, skills, and abilities. Similarly, EDR is hopeful that the grievant will provide the agency with top-notch performance and work product on those assignments and duties he is given. Should the agency's actions worsen and/or continue such that the grievant is further ostracized from the unit and its work on an unlawfully retaliatory basis, and those actions are challenged in a future grievance, EDR will revisit these allegations in light of his protected activities.

EDR's qualification rulings are final and nonappealable.[24]

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Office of Employment Dispute Resolution

[24] *See* Va. Code § 2.2-1202.1(5).