Issues: Qualification – Discipline (counseling memo), and Work Conditions (employee/ supervisor conflict); Ruling Date: October 22, 2015; Ruling No. 2016-4251; Agency: Virginia Employment Commission; Outcome: Not 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 2016-4251
October 22, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether her August 5, 2015 grievance with the Virginia Employment Commission (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about July 9, 2015, the grievant was issued a Notice of Improvement Needed/Substandard Performance. The grievant initiated a grievance on August 5, 2015, alleging that the Notice of Improvement Needed/Substandard Performance is "arbitrary and capricious in nature" and "seeking relief from continuous harassment and retaliation." 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]

Notice of Improvement Needed/Substandard Performance

In this case, the grievant claims that the Notice of Improvement Needed/Substandard Performance was issued as an "act of retaliation" because of her previous "attempt to address

[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).

matter [sic] of racial divides" in her office. While grievances that allege retaliation may qualify for a hearing, 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 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]

The management action challenged here, a Notice of Improvement Needed/Substandard Performance, is a form of written counseling. It is not equivalent to a Written Notice of formal discipline. A 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.[7] Therefore, the grievant's claims relating to her receipt of the Notice of Improvement Needed/Substandard Performance do not qualify for a hearing.[8]

While the Notice of Improvement Needed/Substandard Performance has not had an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against the grievant. Should the Notice of Improvement Needed/Substandard Performance grieved in this instance 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.

Hostile Work Environment

Fairly read, the grievance also alleges that agency management has engaged in harassment and retaliation that have created a hostile work environment. 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 an abusive or hostile work environment.[9] "[W]hether an

[4] *See Grievance Procedure Manual* § 4.1(b).
[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* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[8] Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the "Act"). Under the Act, if the grievant gives notice that she wishes to challenge, correct, or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*
[9] *See generally* Gillam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

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."[10]

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. The grievant's claim of workplace harassment appears to be based on disagreements with her supervisor regarding her work duties and performance, specifically the grievant's belief that the Notice of Improvement Needed/Substandard Performance was a form of harassment. In this case, the facts alleged by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.[11] Though the grievant may reasonably disagree with the issuance of the Notice of Improvement Needed/Substandard Performance and other supervisory actions, prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[12] Because the grievant has not raised a sufficient question as to the existence of severe or pervasive harassment reaching the level of an abusive or hostile work environment, the grievance does not qualify for a hearing on this basis.

CONCLUSION

For the reasons set forth above, this grievance does not qualify for a hearing. EDR's qualification rulings are final and nonappealable.[13]

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Office of Employment Dispute Resolution

[10] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[11] *See Grievance Procedure Manual* § 4.1.
[12] 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).
[13] *See* Va. Code § 2.2-1202.1(5).