Issues: Qualification – Discrimination (race), and Work Conditions (supervisor/ employee conflict); Ruling Date: December 15, 2016; Ruling No. 2016-4271; Agency: Virginia Community College System; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of the Virginia Community College System
Ruling Number 2016-4271
December 15, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") of the Department of Human Resource Management ("DHRM") on whether her August 21, 2015 grievance with the Virginia Community College System ("agency") qualifies for hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about August 21, 2015, the grievant initiated a grievance challenging "derogatory comments" and "menacing threats" by a supervisor. In particular, the grievant challenges a statement by a supervisor describing her as a "handyman" as being racially discriminatory, and she alleges that the supervisor has made "rude and reckless" comments and threatened to take disciplinary action against her and her coworkers if they did not comply with a campus program.[1] After the parties failed to resolve the grievance during the management resolution steps, the grievant asked that the agency qualify the grievance for hearing. The grievant's request was denied and she has requested a qualification ruling by 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, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] Thus, claims relating to issues such as to 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.

[1] In addition to challenging these comments, the grievant also challenges comments made about or to other employees, not involving the grievant. As these comments do not directly and personally pertain to the grievant's employment, she may not challenge the comments through the grievance procedure. *See Grievance Procedure Manual* § 2.4.
[2] *See Grievance Procedure Manual* §§ 4.1 (a), (b).
[3] *See* Va. Code § 2.2-3004(B).

Discrimination

The grievant argues that the agency has engaged in discrimination based on her race. In particular, the grievant asserts that during a meeting, a supervisor referred to her as his "handyman." Grievances that may be qualified for a hearing include adverse employment actions that occurred due to discrimination on the grounds of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, genetics, disability, or veteran status.[4] For a claim of discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[5]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] Thus, typically, a 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8] In this case, the grievant has not shown that she was subjected to an adverse employment action. It does not appear that conduct cited by the grievant rises to the level of a change in the terms, conditions or benefits of her employment.

Further, even assuming that an adverse employment action occurred, insufficient facts exist to raise a question as to whether the comment was made to the grievant out of a discriminatory reason. Although the grievant asserts that the comment singled her out on the basis of race, the agency states that the supervisor uses the term "handyman" to denote an employee with skill sets applicable to multiple needs. As stated, a grievance must present more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. There are not such facts here. Consequently, the grievance does not qualify for a hearing on this basis.

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[4] *See, e.g*., Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.
[5] *See* Hutchinson v. INOVA Health Sys., Inc., Civil Action No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *4 (E.D. Va. April 8, 1998).
[6] *See Grievance Procedure Manual* § 4.1(b).
[7] Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

Harassment/Hostile Work Environment

Read broadly, the grievant also appears to allege that she was subjected to a hostile work environment on the basis of her race. For a claim of a discriminatory 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; (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.[9] "[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."[10]

In this case, the grievant alleges that a supervisor made discriminatory, "rude and reckless" comments. While we appreciate the grievant's concerns regarding her supervisor's alleged actions, prohibitions against harassment do not provide a "general civility code"[11] or remedy all offensive or insensitive conduct in the workplace.[12] For workplace conduct to constitute an actionable hostile environment, the conduct must rise to a "sufficiently severe or pervasive" level such that an unlawfully abusive or hostile work environment was created.[13] In this case, the challenged conduct cannot be found to rise to this level.[14] In the absence of such evidence, this grievance cannot qualify for hearing.

Further, even if we were to assume that the grievant has demonstrated the existence of a substantially severe or pervasive hostile work environment, she has not presented sufficient evidence to show that her supervisor's conduct was based on race. To the contrary, with the exception of the "handyman" comment addressed previously, the comments cited by the grievant appear to have been made to many employees, not simply to employees of the grievant's race. The grievant's mere supposition that this conduct is discriminatory is not sufficient to demonstrate a causal relationship between the supervisor's actions and the grievant's race. Accordingly, for this reason as well, the grievant's harassment claims do not qualify for a hearing.

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

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[9] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).
[10] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).
[11] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).
[12] *See, e.g.,* Beall v. Abbott Labs, 130 F.3d 614, 620-21 (4th Cir. 1997); Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).
[13] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[14] *See generally* Gunten v. Maryland, 243 F.3d 858, 869 (4th Cir. 2001).
[15] Va. Code § 2.2-1202.1(5).