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**QUALIFICATION RULING**

In the matter of the Virginia Department of Health  
Ruling Number 2020-4959  
August 28, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”)<sup>1</sup> at the Virginia Department of Human Resource Management (“DHRM”) on whether his May 23, 2019 grievance with the Virginia Department of Health (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

In March 2019, the agency received a complaint from a Citizen alleging that an employee without the appropriate professional license had performed work that required a professional license issued by the state’s Licensing Agency. The agency conducted an internal investigation, found that the grievant had in fact performed the work in question, and concluded that the Citizen’s complaint had no merit. However, the agency also determined that the paperwork given to the property owners where the work was performed did not include professional license information, and that the Licensing Agency potentially requires the inclusion of such information. On April 16, 2019, the agency notified the Licensing Agency of its investigation and findings and indicated that it would provide revised paperwork to the property owners containing professional license information. The grievant and the Citizen were both copied on the agency’s communication to the Licensing Agency.

On or about May 23, 2019, the grievant filed a grievance alleging that agency management had “allowed an administrative oversight to escalate to a [Licensing Agency] notification against [his] license”; “singled [him] out” because another employee referenced in the Citizen’s complaint was not discussed in the agency’s communication with the Licensing Agency; and “defamed” him to the Citizen. As relief, the grievant requested that the agency send a written retraction to the Licensing Agency and the Citizen, reprimand the employees involved in the investigation of the complaint and report to the Licensing Agency, provide the grievant with a written apology, and establish “written guidance concerning complaints” made to

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<sup>1</sup> The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

the Licensing Agency. Following the management resolution steps, the agency head declined to qualify the grievance for a hearing. 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.<sup>2</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>3</sup> 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.<sup>4</sup>

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

Generally, an internal agency investigation is not an action that would be considered adverse.<sup>8</sup> Indeed, an agency would ordinarily have a duty to review a complaint that an employee has potentially engaged in misconduct or other improper behavior and, if warranted, take appropriate corrective action. Likewise, when an agency determines that an employee who holds a professional license that is related to their job has engaged in activity that may violate the requirements of that license, it is not unreasonable to report those findings to the appropriate licensing authority for further action.

In this case, the grievant argues that the agency improperly escalated an "administrative oversight" into a complaint to the Licensing Agency, which he believes has jeopardized his professional license. Based on a review of the information in the grievance record, however, it is

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<sup>2</sup> See *Grievance Procedure Manual* § 4.1.

<sup>3</sup> Va. Code § 2.2-3004(B).

<sup>4</sup> *Id.* at § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

<sup>5</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>6</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>7</sup> *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>8</sup> See, e.g., EDR Ruling No. 2014-3655; see also *Lyle v. County of Fairfax Va.*, No. 05-1134, 2006 U.S. App. LEXIS 6025, \*19-20 (4th Cir. Mar. 10, 2006) (holding that an allegedly discriminatory investigation, "conducted pursuant to routine practice and procedure," was not an adverse employment action); *Blakes v. City of Hyattsville*, 909 F. Supp. 2d 431, 436-37 (D. Md. 2012) ("Although an investigation of an employee may constitute an adverse employment action in certain circumstances, disciplinary investigations 'reasonably rooted in articulable facts justifying such an investigation' typically do not rise to the level of adverse employment actions." (citing *Settle v. Baltimore County*, 34 F. Supp. 2d 969, 992 (D. Md. 1999)); *Dawson v. Rumsfeld*, No. 1:05cv1270, 2006 U.S. Dist. LEXIS 17305 at \*19-20 (E.D. Va. Feb. 8, 2006) (stating that "the mere decision to initiate an investigation is not an adverse employment action").

apparent that the agency's communication with the Licensing Agency was not a formal complaint and that the agency's action has not had an impact on the grievant's professional license. On the contrary, the evidence demonstrates that the agency received a complaint from the Citizen, conducted an internal investigation, and determined that nothing improper had occurred. As a part of its investigation, the agency identified an administrative error that potentially conflicted with regulatory requirements promulgated by the Licensing Agency. The agency corrected the error and notified the Licensing Agency. The report to the Licensing Agency was not a complaint, but rather an attempt to share information with the Licensing Agency about the events that had occurred. Neither the agency nor the Licensing Agency has taken further action against the grievant based on the Citizen's complaint, the agency's investigation, or the agency's report to the Licensing Agency.<sup>9</sup>

EDR has also reviewed the evidence relied upon by the grievant in support of his allegation that the agency "defamed" him to the Citizen. The document cited by the grievant appears to consist of handwritten notes taken by a Manager during a phone call with the Citizen, and contains the following notation: "dishonest + fra[u]d[u]lent." The grievant appears to have interpreted these notes to mean that the Manager described his behavior to the Citizen as such. During the management steps, the agency explained to the grievant that it understood these notes to reflect the Citizen's comments to the Manager about the complaint, and that, although it could not determine the precise meaning of the notes, they did not name or directly refer to the grievant at any point. While the grievant's concern is understandable, the agency's interpretation of the notes, taking into account the context in which they were written, does not appear to be unreasonable here. Furthermore, EDR has not reviewed anything to indicate that the agency found that the grievant had engaged in any improper conduct, as demonstrated by its decision to take no further action in response to the complaint other than notifying the Licensing Agency of the administrative error. Finally, and most importantly, claims such as false accusations, defamation, and slander are not among the issues identified by the General Assembly as qualifying for a grievance hearing.<sup>10</sup> Consequently, even if the Manager engaged in the behavior alleged by the grievant, this issue is not appropriate for resolution through the grievance procedure and cannot be qualified for a hearing.

In conclusion, EDR notes that the agency has taken no corrective action, such as formal discipline, demotion, or transfer, as a result of its investigation or the report the Licensing Agency. Even though he has raised potentially legitimate concerns about the Citizen's complaint and the agency's investigation of and response to that complaint, he has not presented any evidence to suggest that the agency's actions in this case have had an effect on the terms, conditions, or benefits of his employment. As such, EDR must conclude that the agency's report to the Licensing Agency was not an adverse employment action.<sup>11</sup> Accordingly, the grievance does not qualify for a hearing.


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<sup>9</sup> During the management steps, the second step-respondent did acknowledge that communication with the grievant throughout this process could have been more effective and recommended improvements for handling complaints of this nature going forward.

<sup>10</sup> Va. Code § 2.2-3004 (A); *Grievance Procedure Manual* § 4.1.

<sup>11</sup> While the agency's action has not had an adverse impact on the grievant's employment at this time, it could be used later to support an adverse employment action against the grievant. Should the grievant later experience an adverse employment action based on the agency's report to the Licensing Agency, such as a formal Written Notice, a transfer or demotion, or a "Below Contributor" annual performance rating, he may contest the underlying agency actions addressed in this ruling through a subsequent grievance challenging the related adverse employment action.

EDR's qualification rulings are final and nonappealable.<sup>12</sup>



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<sup>12</sup> See Va. Code § 2.2-1202.1(5).