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QUALIFICATION RULING

In the matter of the College of William & Mary
Ruling Number 2020-5112
July 22, 2020

This ruling addresses the partial qualification of the grievant's January 14, 2020 grievance with the College of William and Mary (the "College"). The grievant asserts, in part, that she was improperly issued a Written Notice. The agency head qualified the grievant's challenge to the Written Notice for a hearing, but declined to qualify additional issues presented in the grievance. The grievant has appealed the agency head's partial qualification of her grievance to the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM"). For the reasons discussed below, the additional issues presented in the grievance do not qualify for a hearing except to the extent described below.

FACTS

The grievant received a due process notice on December 18, 2019, indicating that her supervisor was considering issuing disciplinary action for an incident with a colleague that allegedly occurred on December 16. The following day, December 19, the grievant received a memorandum with the subject line of "Written Notice" that describes alleged "inappropriate, threatening behavior towards a co-worker and insubordination for failing to leave the workplace when directed by [her] supervisor" on December 16. Also on December 19, the supervisor gave the grievant a second due process notice for allegedly contacting a student employee who witnessed the December 16 incident in violation of the supervisor's instruction not to contact the student employee. The grievant met with management on January 6, 2020, and received a memorandum stating that the College had elected not to issue further disciplinary action based on the alleged misconduct described in the December 19 due process notice.

The grievant initiated a grievance with the College on or about January 14, 2020, challenging the December 18 and 19, 2019, due process notices, the December 19 "Written Notice" memorandum, and the January 6, 2020, memorandum advising her that no further formal disciplinary action was being issued. As relief, the grievant seeks the removal of all four documents from her employment record and a transfer to a different work location at the College. Following the management resolution steps, the agency head qualified the grievant's challenge to the "Written Notice" memorandum but declined to qualify the additional issues relating to the

December 18 and 19 due process notices or the January 6 letter because they "are not disciplinary actions." The grievant now appeals that determination to EDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[1] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out and the reassignment or transfer of employees within the agency 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.[2]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] 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."[4] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[5]

Written Notice

Although the College qualified the grievant's challenge to the December 19 "Written Notice" memorandum, EDR has identified procedural abnormalities in the issuance of the document that must be addressed here. The College did not use the form provided by DHRM for issuing formal disciplinary action pursuant to DHRM Policy 1.60, *Standards of Conduct*. The memorandum does not identify a level of offense and inactive date or provide notice about the impact of the document on the grievant's employment and her right to file a grievance. All of this information is part of the DHRM Written Notice form typically used pursuant to DHRM Policy 1.60.[6] On the other hand, the College provided the grievant with a due process notice on December 18 explaining its intent to issue formal disciplinary action and allowed the grievant an opportunity to respond, which is consistent with the pre-disciplinary due process requirements of DHRM Policy 1.60.[7]

Based on the foregoing, the hearing officer in this case must assess the evidence presented at the hearing and determine whether the College issued the "Written Notice" memorandum consistent with the requirements of DHRM Policy 1.60. The hearing officer will also consider

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[1] *See* Va. Code § 2.2-3004(B).
[2] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[3] *See Grievance Procedure Manual* § 4.1(b).
[4] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[5] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[6] *See* DHRM Policy 1.60, *Standard of* Conduct, at 7-9, 15-17 (describing the levels of Written Notices that may be issued to correct conduct or performance problems, due process requirements prior to the issuance of a Written Notice, and employees' right to challenge a Written Notice using the grievance procedure).
[7] *Id.* at 15-16.

whether any procedural deficiencies in the issuance of the "Written Notice" memorandum have been or can be cured. If the evidence demonstrates that the College did not comply with DHRM Policy 1.60 and cannot cure any existing error(s), the hearing officer may order appropriate relief consistent with the grievance procedure.

Remaining Issues

The December 18 due process notice describes the alleged misconduct that is the subject of the December 19 "Written Notice" memorandum and is part of the disciplinary process that led to the issuance of that document. As a result, EDR finds that the grievant's claims relating to December 18 due process notice are inseparable from her challenge to the "Written Notice" memorandum itself. Accordingly, the grievant's claims about the December 18 due process notice may be raised at the hearing to support her position that the document should be rescinded.

The December 19 due process notice and the January 6 letter address the grievant's conduct following her receipt of the December 18 due process notice. The January 6 letter also describes the College's performance and behavioral expectations for the grievant going forward, and in that sense is comparable to a written counseling. On their own, documents such as due process notices (not resulting in disciplinary action), written counseling, and similar memoranda do not generally constitute adverse employment actions because, in and of themselves, they do not have a significant detrimental effect on the terms, conditions, or benefits of employment.[8]

Nonetheless, if an agency knowingly and arbitrarily issued an unsubstantiated notice of due process or similar document to an employee for conduct that would not properly be subject to corrective action under DHRM Policy 1.60, such a practice could raise a sufficient question warranting qualification for a hearing. This does not, however, appear to have occurred here. The December 19 due process notice and the January 6 letter reasonably describe management's concerns and expectations about the grievant's conduct surrounding the events that led to this grievance. The grievant may disagree with the College's decision to address those matters in this way, but such decisions are within management's discretion.[9] Therefore, EDR finds that the grievant's claims relating to her receipt of the December 19 due process notice and January 6 letter do not qualify for a hearing.[10]

Though the December 19 due process notice and January 6 letter have not had an adverse impact on the grievant's employment, they could be used later to support an adverse employment action against the grievant. Should they lead to the issuance of an additional formal Written Notice or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from

[8] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[9] *See* Va. Code § 2.2-3004(B).
[10] Although this portion of the 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.*

attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.

CONCLUSION

The grievant's challenge to the December 19 "Written Notice" memorandum (and associated due process notice) that was qualified by the agency head will proceed to a hearing as discussed above. The remaining issues presented in the grievance are not qualified and may not proceed further, but some of the facts presented in relation to these claims may be relevant to the grievant's arguments regarding the "Written Notice" memorandum. If the hearing officer finds that it is relevant, evidence related to these other issues may be presented as background information. The hearing officer will not, however, have the authority to order relief for any of the specific management actions challenged in the grievance other than the "Written Notice" memorandum.[11]

The College must submit a completed Form B for the qualified portions of the grievance to EDR **within five workdays of receipt of this ruling**. A hearing officer will be appointed for the grievant's qualified challenge to the December 19 "Written Notice" memorandum in a forthcoming letter.

EDR's qualification rulings are final and nonappealable.[12]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[11] *See Rules for Conducting Grievance Hearings* § V(C) ("Challenges to management actions or omissions that have not been qualified in the grievance assigned to the hearing officer are not before that hearing officer, and may not be resolved or remedied.").
[12] *See* Va. Code § 2.2-1202.1(5).