Issue: Qualification – Work Conditions (employee/supervisor conflict); Ruling Date: October 6, 2016; Ruling No. 2017-4417; Agency: Department for Aging and Rehabilitative Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Department for Aging and Rehabilitative Services
Ruling Number 2017-4417
October 6, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Aging and Rehabilitation Services regarding her August 1, 2016 grievance.

FACTS

On or about July 12, 2016, the grievant was issued a Group I Written Notice for engaging in conduct that was "combative, disruptive," "disrespectful[,] and unprofessional" towards her supervisor. On August 1, 2016, the grievant initiated a grievance challenging the Written Notice, as well as other alleged conduct by the agency. After the grievance proceeded through the management resolution steps, the agency head qualified that portion of the grievance addressing the Written Notice for hearing but denied qualification for the remaining matters grieved. The grievant now appeals the denial of qualification to EDR.

DISCUSSION

In this case, the grievant challenges the agency head's determination that certain matters raised in the August 1 grievance do not qualify for hearing. The grievant raises seven issues, which, as she has identified them, correlate to specific paragraphs of her grievance. These issues are: (1) matters directly related to the July 12, 2016, Written Notice, as described in Paragraph 1 of the grievance; (2) the content and use of the January 25, 2016, memorandum, as described in Paragraph 2 of her grievance; (3) allegations and statements regarding her work performance and conduct, as described in Paragraph 3; (4) the supervisor's involvement in the grievant's efforts to "obtain responses from Human Resources staff" and the supervisor's response to a request for written responses, as described in Paragraph 4; (5) the supervisor's lack of support in an incident with a web developer, as described in Paragraph 5; (6) the web developer's conduct and responses to the grievant's concerns, as described in Paragraph 6; and (7) the "verbal communication, work atmosphere, and working relationship" with her supervisor, as described in Paragraph 7.

Matters Related to the Written Notice

The first paragraph of the grievance relates directly to the Written Notice issued on July 12, 2016. In his response to the grievant's request for qualification, the agency head stated that "[the] grievance is qualified only in part that relates to the issuance of the [w]ritten [n]otice received on July 12, 2016." Therefore, EDR considers those matters set forth in Paragraph 1 to have been qualified by the agency head for hearing.[1] Similarly, although the scope of the grievant's claims in Paragraph 3 is unclear, to the extent the statements and allegations being challenged by the grievant in Paragraph 3 were made in conjunction with the conduct and actions challenged in Paragraph 1 (i.e., the Written Notice), those matters are also deemed to have been qualified for hearing.

Other Matters

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]

In addition, the grievance procedure generally limits grievances that qualify 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]

Based on EDR's review of the grievance record, it appears that none of the matters raised in Paragraphs 2, 4, 5, 6, and 7 of the August 1, 2016 grievance rises to the level of an adverse employment action, as the actions cited by the grievant do not appear to have had a

[1] *See also Grievance Procedure Manual* § 4.1(a) (describing Written Notices as actions which automatically qualify for hearing). Although this paragraph includes allegations regarding the Due Process Notice, the incident underlying the Written Notice, and the supervisor's characterizations regarding the conduct giving rise to the Written Notice, these matters are inextricably intertwined with the Written Notice and therefore cannot be divorced from the Written Notice for purposes of qualification.
[2] *See id.* § 4.1.
[3] Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[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).

significant detrimental effect on the terms, conditions, or benefits of employment.[8] Therefore, these claims do not qualify for a hearing. For the same reason, to the extent any of the claims set forth in Paragraph 3 are not directly related to matters raised in Paragraph 1 of the grievance, those allegations also do not qualify.

Further, even if these remaining matters are considered to be a claim of workplace harassment, qualification would not be warranted. For a claim of 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.[9] 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.[10] "[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."[11]

In this case, the grievant does not appear to allege that the alleged agency conduct was based on a protected status or activity. Even assuming, however, that such an allegation was made, there is insufficient evidence that the conduct was, in fact, causally related to a protected status or conduct. Further, EDR finds that the conduct challenged by the grievant is not sufficiently severe or pervasive to alter the conditions of her employment. While we appreciate the grievant's concerns, prohibitions against harassment do not provide a "general civility code"[12] or remedy all offensive or insensitive conduct in the workplace.[13] 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.[14] In this case, the challenged conduct cannot be found to rise to this level.[15] In the absence of such evidence, this issue cannot qualify for a hearing.

CONCLUSION

For the foregoing reasons, the claims set forth in Paragraphs 2, 4, 5, 6, and 7 of the grievance are not qualified for hearing. In addition, any claims included within Paragraph 3 which do not directly relate to those matters qualified in Paragraph 1 are not qualified for

[8] *See, e.g.,* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[9] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[10] *See generally id* at 142-43.
[11] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[12] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (citation omitted).
[13] *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).
[14] *See Gilliam*, 474 F.3d at 142.
[15] *See generally* Gunten v. Maryland, 243 F.3d 858, 869 (4th Cir. 2001).

hearing. However, while these additional management actions and/or omissions do not qualify for a hearing, some of the facts presented in relation to these claims may be relevant to the grievant's arguments regarding the Written Notice. To the extent this is the case, evidence related to the other issues cited in the grievance may be presented by the grievant as background information at the hearing as to why the Written Notice was improperly issued. 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.[16]

Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer for those claims qualified, using the Grievance Form B. EDR's qualification rulings are final and nonappealable.[17]

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Director
Office of Employment Dispute Resolution

[16] *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.").
[17] *See* Va. Code § 2.2-1202.1(5).