Issue: Qualification – Retaliation (grievance activity); Ruling Date: November 3, 2016; Ruling No. 2017-4436; Agency: Department of Corrections; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2017-4436
November 3, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether her September 16, 2016 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons set forth below, the September 16 grievance does not qualify for hearing.

FACTS

The grievant was employed by the agency as an Operations Lieutenant. On or about September 14, 2016, the grievant was contacted and ordered to attend a due process meeting at a time when she was not working. The grievant attempted to reschedule the meeting to allow her to attend a previously scheduled class at a community college, but her request was denied. The grievant reported to work as ordered, missing her class. On or about September 16, 2016, the grievant initiated a grievance challenging the issuance of the due process notice, the denial of her request to reschedule the due process meeting, and being wrongfully forced to use 36 hours of leave time for a period of medical restriction.

During the second resolution step, while denying her claims otherwise, the agency indicated that it would restore the 36 hours of leave time taken by the grievant. The grievant subsequently requested qualification of the grievance for hearing by the agency head. The agency head denied the grievant's request, and 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,

[1] *See* Va. Code § 2.2-3004(B).

retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[2]

The grievant asserts that she has been "retaliated against and targeted" for previous protected activity, including past use of the grievance procedure, having initiated a charge of harassment with the EEOC, and raising concerns about orders and procedures to management. For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[3] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[4] Ultimately, to support a finding of retaliation, EDR must find that the protected activity was a but-for cause of the alleged adverse action by the employer.[5]

In this case, the grievant challenges the agency's decision to initiate the disciplinary process against her by giving her due process notice. Ultimately, after completing the due process procedure, the agency elected to issue Group I, Group II, and Group III Written Notices to the grievant, resulting in her termination. The grievant's challenges to these disciplinary actions have been qualified and will proceed to hearing.

In her September 16 grievance, the grievant asserts, in effect, that her actions did not warrant the initiation of the disciplinary process and were instead motivated by a retaliatory motive. These arguments are inextricably intertwined with issues that will be addressed by the hearing officer in relation to the Written Notices—specifically, whether the grievant engaged in misconduct and whether the disciplinary actions were appropriate and warranted under the circumstances. As the due process claims contained in the September 16 grievance will be able to be addressed through the hearing on the Written Notices, qualification of the September 16 grievance on this basis would be redundant and unnecessary. The grievant is permitted to raise any such claims asserted in the September 16 grievance regarding the Written Notices at hearing, including her claims of retaliation and any facts included in the September 16 grievance that may support such claims.

The grievant also challenges the agency's refusal to reschedule the due process meeting to allow her to attend a previouslyscheduled class. The grievant appears to allege that the refusal

---

[2] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[3] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).
[4] *See, e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[5] *See id.* (citing Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013)).

to reschedule evidences further retaliation by the agency. As there is no relief available to the hearing officer that could remedy the agency's past action, there is no basis, under the facts of this case, to qualify that portion of the grievance involving the scheduling of the due process meeting. The grievance record has few facts regarding the interactions of the scheduling of the meeting and why it was set for that particular time. While the agency could order the grievant to work for the meeting, doing so in the manner described in the grievance, if true, and specifically at a time that forced the grievant to miss her class could be seen by some factfinders as unnecessary and possibly indicative of improper animus. Thus, at the upcoming hearing on the Written Notices, the grievant may present evidence regarding the agency's refusal to reschedule the meeting, as such evidence could be relevant to the grievant's claims of retaliation.

Lastly, the grievant asserts that she was improperly required to use leave time during a period when she was authorized medically to work with restrictions. As the agency agreed during the management resolution steps to restore the grievant's leave time, this no longer appears to be an active matter for resolution through the hearing process. As such, qualification is not warranted. The grievant may, however, seek to use evidence of the agency's actions with respect to this issue at hearing, as further evidence of retaliation.

For all the foregoing reasons, the September 16 grievance is not qualified for hearing. EDR's qualification rulings are final and nonappealable.[6]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[6] *See* Va. Code §§ 2.2-1202.1(5).