Issue: Qualification – Discipline (counseling memo); Ruling Date: November 15, 2016; Ruling No. 2017-4443; Agency: Department of Juvenile Justice; 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 Juvenile Justice
Ruling Number 2017-4443
November 15, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether her September 6, 2016 grievance with the Department of Juvenile Justice (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about August 8, 2016, the grievant was issued a Formal Written Counseling. The grievant initiated a grievance on September 6, 2016, alleging that the Formal Written Counseling contains "[f]alse statements" that are "intentionally deceptive" and is a form of retaliation. The grievant further claims that her supervisor made an "unprofessional statement" about her work performance in a meeting and seeks a "written apology." After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.[1]

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, 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]

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[1] The third step-respondent determined that the Formal Written Counseling should be amended to remove certain comments about the grievant's work performance. The grievant has indicated that she accepts this relief, but also wishes to appeal the agency head's decision that the grievance does not qualify for a hearing.
[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

In this case, the grievant claims that the Formal Written Counseling is not supported by the facts and was issued as a form of retaliation.[5] However, the grievance procedure generally limits grievances that qualify for hearing to those that involve "adverse employment actions."[6] 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8]

The management action challenged here, a Formal Written Counseling, is a form of written counseling. It is not equivalent to a Written Notice of formal discipline. A written counseling does not generally constitute an adverse employment action because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[9] Therefore, the grievant's claims relating to her receipt of the Formal Written Counseling do not qualify for a hearing.[10]

While the Formal Written Counseling has not had an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against the grievant. Should the Formal Written Counseling grieved in this instance later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.

Hostile Work Environment

Taken as a whole, the grievant's challenge to the issuance of the Formal Written Counseling and assertion that her supervisor made an "unprofessional statement" in a meeting amount to a claim of workplace harassment. In the analysis of such a claim, the "adverse employment action" requirement is satisfied if the facts raise a sufficient question as to whether

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[5] Although the grievant asserts that the Formal Written Counseling is retaliatory, she does not appear to have identified any protected activity on which the alleged retaliation is based. *See* Va. Code § 2.2-3004(A). Ultimately, the basis of the grievant's allegation of retaliation is not material in this case because the grievant has not raised a question as to whether she suffered an adverse employment action, as discussed below.

[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).

[9] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

[10] Although this 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.*

the conduct at issue was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment.[11] "[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."[12]

After reviewing the facts as presented by the grievant, EDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment. The alleged workplace harassment challenged by the grievant essentially involves allegedly unprofessional conduct by her supervisor and disagreements regarding her work duties and performance, which do not generally rise to the level of an adverse employment action or severe or pervasive conduct.[13] In this case, the facts alleged by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.[14] Though the grievant may reasonably disagree with the issuance of the Formal Written Counseling and her supervisor's allegedly unprofessional behavior, prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[15] Because the grievant has not raised a sufficient question as to the existence of a severe or pervasive hostile work environment, the grievance does not qualify for a hearing on this basis.

CONCLUSION

For the reasons set forth above, this grievance does not qualify for a hearing. EDR's qualification rulings are final and nonappealable.[16]

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[11] *See generally* Gillam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[12] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[13] *See, e.g.*, EDR Ruling No. 2014-3836.
[14] *See Grievance Procedure Manual* § 4.1.
[15] Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("[C]onduct must be extreme to amount to a change in the terms and conditions of employment . . . ."); *see* Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).
[16] *See* Va. Code § 2.2-1202.1(5).