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QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2020-5000
October 30, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”)¹ at the Virginia Department of Human Resource Management on whether her July 22, 2019 grievance with the Virginia Department of Transportation (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

On or about June 28, 2019, the grievant received a Notice of Improvement Needed/Substandard Performance (“NOIN”). The grievant initiated a grievance on July 22, 2019, alleging that the NOIN was “punitive, retaliatory, arbitrary and capricious.” The grievant further contends that the “contents, investigations and evaluation of the situations surrounding” the NOIN did not comply with “policies or even best practices,” and that the NOIN “is not structured to assist in improvement or geared in the direction to promote success.” As relief, the grievant has requested revocation of the NOIN, removal of the document from her personnel file, and the opportunity to “move forward and . . . continue to perform and improve in [her] current role and job duties free of retaliation.” After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head because the NOIN did not cause a change in the grievant’s employment status or otherwise impact the terms, conditions, or benefits of her employment. 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.² Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the

¹ 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.

² See *Grievance Procedure Manual* § 4.1.

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

Notice of Improvement Needed/Substandard Performance

While grievances that allege retaliation may qualify for a hearing,⁵ the grievance procedure generally limits grievances that qualify 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 NOIN challenged here 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 NOIN do not qualify for a hearing.¹⁰ Nonetheless, while the NOIN 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 NOIN 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.

³ Va. Code § 2.2-3004(B).

⁴ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁵ In this case, the grievant claims that the NOIN was "issued . . . in direct retaliation for a [NOIN] that [she] was guided in issuing to one of [her] direct reports, for the discipline or threat of discipline that [her] supervisor is receiving[,] and for the behaviors and threat of complaints . . . that [her] direct reports are filing through various channels." These allegations do not demonstrate a retaliation claim that falls under the grievance procedure or related statutes. *See, e.g.*, Va. Code § 2.2-3004(A). To the extent the grievant has experienced or does experience retaliation for filing the current grievance, raising workplace concerns, *see* Va. Code § 2.2-3000(A), or other protected activity, her concerns could be raised as part of a future grievance.

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.*

Additional EDR Services

Although this grievance does not qualify for a hearing, the grievant may be raising legitimate concerns about her employment. For example, she essentially alleges that the agency has not provided her with adequate goals and/or resources to address the issues described in the NOIN. EDR offers additional services that may help to facilitate a fair and equitable resolution to some of the grievant's concerns about the NOIN and/or her employment. In particular, EDR provides mediation, coaching, and other consultation services to assist employees in developing skills that will empower them to resolve conflicts and other problematic issues on their own. These neutral, independent, informal, and confidential resources have the potential to effect positive, long-term changes of great benefit to the individuals and organization involved. The parties should contact EDR at 888-232-3842 for more information and guidance about options for addressing the specific concerns presented in this case.

EDR's qualification rulings are final and nonappealable.¹¹

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¹¹ See Va. Code § 2.2-1202.1(5).