

Issue: Qualification/ grievant claims that divisional supervisor accused grievant of (1) covering up an alleged criminal offense and (2) failing to follow proper procedures. Grievant further claims that the supervisor invaded privacy and accused grievant of hiding information; Ruling Date: June 3, 2004; Ruling #2004-652; Agency: Virginia Community College Services; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Thomas Nelson Community College/ No. 2004-652
June 3, 2004

The grievant has requested a ruling on whether her December 23, 2003 grievance with Thomas Nelson Community College (TNCC) qualifies for a hearing. The grievant claims that her divisional supervisor accused her of (1) covering up an alleged criminal offense and (2) failing to follow proper procedures. She further claims that the supervisor invaded her privacy and accused her of hiding information. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is a program coordinator for TNCC. On December 2, 2003, a TNCC employee (Employee C) notified the grievant, her supervisor, that she had been sexually harassed by a Department of Rehabilitative Services (DRS) employee.¹ According to the grievant, Employee C did not want to file a report at that time, and the grievant suggested that she contact the DRS employee's supervisor, Manager R.²

On Friday, December 5, 2003, the manager of the VEC office notified the grievant's divisional supervisor that two TNCC employees, including Employee C, had been the subject of sexual harassment at the VEC office. During the course of her investigation, the divisional supervisor learned that the sexual harassment "appeared to be of a serious criminal nature."³ The divisional supervisor contacted the grievant by telephone late that afternoon. The grievant acknowledged that she advised Employee C

¹ Employee C is a TNCC employee who is permanently assigned to a Virginia Employment Commission (VEC) office. The DRS employee is also assigned to the VEC office. Employee C told the grievant that the DRS employee "rubbed up" against her and touched her inappropriately. *See* Grievant's Written Statement, "Per the request of Chief [H]," dated December 5, 2003.

² The grievant reported that she followed up with Employee C later in the week and Employee C had not yet contacted Manager R. *See* Grievant's Written Statement, "Per the request of Chief [H]," dated December 5, 2003.

³ Chronology of Events in Response to the Employee Grievance Procedure, page 2, dated February 22, 2004. Indeed, the DRS employee was later convicted of assault and battery as a result of the incident. *See* Response to Employee Grievance Filed By [Grievant] Against [Divisional Supervisor], dated February 24, 2004.

on December 2, 2003 to contact Manager R about the alleged incident. According to the divisional supervisor, she explained to the grievant that referring Employee C to Manager R did not comply with the college's sexual harassment policy. The grievant claims that she did follow policy because the employee was not interested in filing a formal complaint. Also during the December 5 conversation, the divisional supervisor requested telephone numbers for other staff, including Manager R.⁴

Later on December 5, the divisional supervisor learned that the grievant was "in a relationship" with Manager R. The supervisor was concerned that a possible conflict of interest could exist if the supervisors of the alleged victim and perpetrator of sexual harassment were, in fact, dating. The divisional supervisor contacted the grievant to ascertain whether the report was true. The grievant acknowledged that she was romantically involved with Manager R. According to the grievant, the divisional supervisor intimidated her and further accused the grievant of covering up other information. The divisional supervisor denies that she accused the grievant of anything but asked whether there was anything else she should know.

The grievant claims that during these conversations with her divisional supervisor, she was wrongfully accused of covering up an alleged criminal offense (sexual assault), not following TNCC's sexual harassment policies, and hiding information from her supervisor. She also claims that the supervisor's asking about her relationship with Manager R was an invasion of privacy.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. Inherent in this authority is the responsibility to investigate employee complaints and to advise employees of observed performance problems. The Department of Human Resource Management (DHRM) has sanctioned the use of counseling as an informal means for management to communicate to an employee concerns about his or her behavior, conduct, or performance. DHRM does not recognize such counseling as disciplinary action under the Standards of Conduct.⁵ Therefore, under the grievance procedure, informal supervisory actions, including verbal or written counseling, generally do not qualify for a hearing.⁶

Moreover, the General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."⁷ The threshold question then becomes whether or not the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment act constituting a

⁴ Because it was late Friday afternoon, the divisional supervisor wanted to contact employees at home for their statements in order to take measures to protect the employees prior to Monday morning.

⁵ DHRM Policy 1.60(VI)(C).

⁶ *Grievance Procedure Manual* § 4.1(c), page 11.

⁷ Va. Code § 2.2-3004(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.”⁸ Thus, the action taken against the grievant must result in an adverse effect on the terms, conditions, or benefits of one’s employment.⁹

In this case, the exchange between the grievant and the divisional supervisor on December 5, 2003 can best be characterized as an investigation of the sexual harassment claim and as verbal counseling regarding the grievant’s failure to follow proper procedures when she first learned of the alleged incident. The grievant has presented no evidence that she has suffered an adverse employment action, because neither the investigation nor the informal counseling had a significant detrimental effect on the grievant’s employment status.¹⁰ Rather, the grievant essentially challenges management’s conclusion that her failure to act on Employee C’s initial complaint warranted correction through verbal counseling. Accordingly, although the grievant disagrees with management’s perception of her performance, this grievance does not qualify for a hearing.

While informal counseling does not have an adverse impact on the grievant’s employment, it could be used later to support an adverse employment action against the grievant. According to DHRM Policy 1.60, Standards of Conduct, repeated misconduct may result in *formal* disciplinary action, which would have a detrimental effect on the grievant’s employment and automatically qualifies for a hearing under the grievance procedure.¹¹ Moreover, according to DHRM Policy 1.40, Performance Planning and Evaluation, a supervisor may consider informal documentation of perceived performance problems when completing an employee’s performance evaluation.¹² Therefore, should the counseling in this case 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 foreclose the grievant from attempting to challenge the merits of the counseling through a subsequent grievance contesting any related adverse employment action.

APPEAL RIGHTS AND OTHER INFORMATION

⁸ Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

⁹ Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

¹⁰ Assuming without deciding that an alleged invasion of privacy could be an adverse employment action, in this case, the supervisor’s inquiry into the relationship between the grievant and manager R did not have an adverse effect on the terms, conditions, or benefits of the grievant’s employment. Indeed, it does not appear that the supervisor intended to pry into the grievant’s personal matters, rather, it appears that the questioning related specifically to the investigation and to the supervisor’s goal of protecting TNCC employees from further harm.

¹¹ See generally DHRM Policy 1.60, Standards of Conduct; see also *Grievance Procedure Manual* § 4.1(a), page 10.

¹² DHRM Policy 1.40, Performance Planning and Evaluation, “Documentation During the Performance Cycle,” page 4 of 16.

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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