

Issue: Qualification/Notice of Improvement needed, Retaliation, harassment/hostile work environment; Ruling Date: May 14, 2004; Ruling #2004-662; Agency: Department of Health; Outcome: Notice of Improvement needed not qualified, retaliation and harassment not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Health/ No. 2004-662
May 14, 2004

The grievant has requested a ruling on whether his challenge to a November 19, 2003 Notice of Improvement Needed, as raised in his December 31, 2003 grievance with the Virginia Department of Health (VDH or agency), qualifies for a hearing. For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The grievant is an Administrative Manager in a district office for the agency. On December 4, 2003, grievant was issued a Group I Written Notice for behavior that was "viewed by those present as verbally abusive, antagonistic and disruptive."¹ During the second resolution step meeting, the Group I Written Notice was rescinded by the Deputy Commissioner. The Second-Step Respondent indicated that while credible testimony seemed to confirm that the grievant's tone was apparently accusatory and that he needed to be more cooperative, his behavior warranted only a Notice of Improvement Needed. According to the agency, the purpose for the Notice of Improvement Needed was to reiterate the concept of the Business Manager serving as a role model for appropriate behavior, working collaboratively and constructively as a team player.

In addition, the grievant claims that his supervisor has harassed and retaliated against him on the basis of his voicing concerns about particular agency actions (and/or inaction).

DISCUSSION

Notice of Improvement Needed

Under the grievance procedure, Notices of Improvement Needed/Substandard Performance Forms do not qualify for hearing unless there is evidence raising a sufficient question as to whether, through the issuance of the Notice, management took an "adverse employment action" against the grievant affecting the terms, conditions, or benefits of his

¹ Written Notice dated December 4, 2003.

employment.² A Notice of Improvement Needed, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.³ Moreover, the General Assembly has limited issues that may be qualified for a hearing to those that involve adverse employment actions.⁴ Under the facts of this case, it does not appear that the Notice of Improvement Needed, by itself, constituted an adverse employment action. Therefore, it is not qualified for a hearing.

Retaliation

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;⁵ (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 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.⁶ As explained above in the previous section, the grievant has not suffered an adverse employment action and therefore the issue of retaliation is not qualified for hearing.

Harassment/Hostile Work Environment

A claim of hostile work environment qualifies for a grievance hearing only if an employee presents evidence raising a sufficient question as to whether the challenged actions are based on race, color, religion, political affiliation, age, disability, national origin, or sex.⁷ The grievant does not assert that the alleged harassment was based on any of these factors. Rather, his claim essentially describes conflict between the grievant and the District Director concerning "philosophical differences concerning public

² *Grievance Procedure Manual* § 4.1, pages 10-11. An adverse employment action is defined as a "tangible employment act constituting 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." *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998). An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. *Von Gunten v. Maryland Department of the Environment*, 243 F.3d 858, 866 (4th Cir. 2001)(citing *Munday v. Waste Mgmt. Of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997)). See EDR Rulings #2002-007.

³ See *Boone v. Golden*, 178 F.3d 253 (4th Cir. 1999).

⁴ Va. Code § 2.2-3004(A).

⁵ 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 Congress or the General Assembly, reporting an incidence of fraud, waste or gross mismanagement, or exercising any right otherwise protected by law.

⁶ See *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 656 (4th Cir. 1998).

⁷ Va. Code § 2.2-3004 (A)(iii). See also Department of Human Resource Management (DHRM) Policy 2.30, which defines workplace harassment as conduct that "denigrates or shows hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status or pregnancy."

administration and compliance with . . . policy and procedures.”⁸ Such claims of supervisory conflict are not among the issues identified by the General Assembly that may qualify for a hearing.⁹

APPEAL RIGHTS AND OTHER INFORMATION

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.

Claudia T. Farr
Director

William G. Anderson, Jr.
EDR Consultant, Sr.

⁸ Attachment to Grievance Form A, dated December 31, 2003.

⁹ As stated, the grievant’s description of his conflict with the District Director could be viewed as a retaliation claim. However, as discussed earlier, he has not suffered an adverse employment action. Accordingly, such claim cannot be qualified.