

Issue: Qualification/grievant claims unfair management practices and hostile work environment; Ruling Date: February 2, 2005; Ruling #2004-922; Agency: Virginia Commonwealth University; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Commonwealth University
Ruling Number 2004-922
February 2, 2005

The grievant has requested a ruling on whether her October 4, 2004 grievance with Virginia Commonwealth University (VCU or the agency) qualifies for a hearing. The grievant claims unfair management practices and hostile work environment. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a housekeeping supervisor with VCU (Supervisor 1). On October 7, 2003, the grievant was issued a Group II Written Notice for failure to follow a supervisor's instructions and unsatisfactory work performance. Specifically, on several occasions the grievant allegedly failed to make sure that entryway mats were properly aligned as instructed. The grievant challenged the Group II Written Notice in an October 27, 2003 grievance. The Group II Written Notice was reduced to a Group I during the management resolution steps, which was subsequently upheld by the hearing officer at hearing.

On September 16, 2004, the grievant was informed by VCU building services management that both day and evening/night shift employees would need to fill out a USCA Custodial Condition Report (the report) at the beginning of their shift. This report seeks the (1) shift of the person filling out the form (i.e. day or evening/night shift); (2) date the form is filled out; (3) location and description of the problem; (4) time the observation was made; and (5) name and signature of the staff member who made the discovery. According to VCU, the report is intended to identify and record major problems found in the normal course of employees checking their areas at the beginning of their respective shift. The agency further claims that the report is shared only with the shift supervisor and not with individual custodial staff members.

The grievant claims that requiring the shift she supervises to fill out this report is, in essence, requiring them to "tell on other employees" which has created conflict among the employees. She also asserts that the shift she supervises has suffered a workload increase as a result of the previous shift employees not thoroughly doing their job. Finally, the grievant claims that she and the other shift supervisor (Supervisor 2) are

treated differently in that Supervisor 2 is not being held accountable for the work not getting done during his shift, while she was previously disciplined for unsatisfactory work performance. According to the agency, Supervisor 2 is new to the agency and state government and is still in training. As such, the agency believes disciplinary action against Supervisor 2 would be inappropriate at this time.

DISCUSSION

Unfair Management Practices

Although all complaints initiated in compliance with the grievance process may proceed through the three resolution steps set forth in the grievance statute, thereby allowing employees to bring their concerns to management's attention, only certain issues qualify for a hearing.¹ Claims relating to issues such as the methods, means and personnel by which work activities are carried on (including management's determination whether to counsel or discipline another employee and to what extent) 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 has been unfairly applied or misapplied.

In addition, to advance to a hearing, the grievant must demonstrate that the action being grieved constitutes an "adverse employment action."² 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."³ Thus, for a grievance to qualify for a hearing, the action taken against the grievant must result in an adverse effect on the terms, conditions, or benefits of one's employment.⁴

In the present case, the grievant has failed to show that she has suffered an adverse employment action within the 30 calendar days preceding the initiation of her October 4, 2004 grievance.⁵ It appears that the only adverse employment action taken against the grievant is the discipline that occurred in 2003, which was grieved and fully adjudicated on the merits.

¹ Va. Code § 2.2-3004 (A).

² Va. Code § 2.2-3004(A).

³ Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

⁴ 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)). See also EDR Ruling 2004-596, 2004-597. We note however, that in harassment cases, it is not necessary for a grievant to establish the existence of a tangible employment action to state a claim. Instead, a showing of a hostile work environment is sufficient to satisfy the requirement that a grievant demonstrate that he or she has been subjected to an adverse employment action.

⁵ Under the grievance procedure, an employee must initiate a written grievance within 30 calendar days of the date he knew or should have known of the event or action that is the basis of the grievance. Va. Code § 2.2-3003(C); *Grievance Procedure Manual*, §2.4.

Accordingly, because the grievant has failed to show that she suffered an adverse employment action within 30 calendar days prior to the initiation of her October 4, 2004 grievance this issue does not qualify for hearing.

Hostile Work Environment

While grievable through the management resolution steps, claims of hostile work environment qualify for a hearing only if an employee presents sufficient evidence showing that the challenged actions are based on race, color, national origin, age, sex, religion, political affiliation, disability, marital status or pregnancy.⁶ Here, the grievant has not alleged that management's actions were based on any of these factors. Accordingly, this issue does not qualify for hearing.

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 this 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

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⁶ *Grievance Procedure Manual* § 4.1(b)(2); see also DHRM Policy 2.30 Workplace Harassment (effective 05/01/02).