Issues: Qualification – Discipline (Counseling Memo), Discrimination (Disability and Sex); Ruling Date: November 3, 2009; Ruling #2010-2444; Agency: Department of Criminal Justice Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Criminal Justice Services
Ruling No. 2010-2444
November 3, 2009

The grievant has requested a ruling on whether his July 10, 2009 grievance with the Department of Criminal Justice Services (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In his July 10, 2009 grievance, the grievant raises concerns regarding an instruction and written counseling received by his former supervisor[1] regarding the preparation of draft minutes of public meetings. The grievant asserts that he is the only agency employee who had to abide by the deadline given by his former supervisor, which the grievant asserts is inconsistent with the time allotted under the Freedom of Information Act, and that he is the only agency employee who generally adheres to deadlines in the preparation of draft minutes. The grievant has also checked the box on the Form A for "Discrimination or Retaliation by Immediate Supervisor." It appears the grievant asserts that he has been "singled out" and harassed by this former supervisor. He alleges that his former supervisor pointed out issues with his performance on certain occasions, including at least one e-mail that involved a "condescending" remark. After receiving no relief during the management steps, the grievant now requests qualification of his grievance for hearing.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the method, 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

[1] During the time of this grievance, the agency undertook a reorganization. As a result, the supervisor against whom the grievant asserts his complaint is no longer his supervisor.
[2] Va. Code § 2.2-3004(B).

have influenced management's decision, or whether state policy may have been misapplied or unfairly applied. In this case, the grievant has asserted claims regarding discrimination (harassment).

Counseling Memo

The unmistakable focus of this grievance is the former supervisor's e-mail of June 11, 2009,[3] which, while providing instruction as to a performance standard, also notes what the supervisor viewed as unsatisfactory performance. This e-mail appears to be the equivalent of a counseling memo.

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

A counseling memo does not constitute an adverse employment action, because such a document, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[8] For this reason, the grievant's claim relating to the counseling memo does not qualify for a hearing.[9]

We note, however, that while this counseling memo 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. Therefore, should the counseling memo in this

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[3] The grievant cited this date as the date the grievance occurred on the Grievance Form A.
[4] *See Grievance Procedure Manual* § 4.1(b).
[5] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.
[6] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[8] *See, e.g.*, Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).
[9] 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 he wishes to challenge, correct or explain information contained in his 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 his 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. Va. Code § 2.2-3806(A)(5).

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 prevent the grievant from attempting to contest the merits of the counseling memo through a subsequent grievance challenging the related adverse employment action.

Discrimination – Harassment

For a claim of discrimination or hostile work environment (harassment) to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[10] "[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."[11]

In this case, it does not appear that the treatment of the grievant by his former supervisor rose to a "sufficiently severe or pervasive" level such that an unlawfully abusive or hostile work environment was created. As courts have noted, prohibitions against harassment, such as those in Title VII, do not provide a "general civility code"[12] or remedy all offensive or insensitive conduct in the workplace.[13] The few incidents cited by the grievant would again equate to informal counseling with which the grievant disagrees. Application of the stringent deadline to the grievant would not appear to be so significant or unreasonable that it altered the conditions of his employment. Further, the former supervisor did not begin supervising the grievant until March 23, 2009. Evidence of the relatively few minor incidents and limited duration of alleged harassing conduct in this case is insufficient to raise a question of a hostile work environment to qualify for hearing.[14]

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 and file a notice of appeal with the

[10] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[11] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).
[12] Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).
[13] *See, e.g.,* Beall v. Abbott Labs., 130 F.3d 614, 620-21 (4th Cir. 1997); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).
[14] This ruling does not mean that EDR deems the alleged workplace behavior, if true, to be appropriate, only that the claim of hostile work environment on the basis of a protected status does not qualify for a hearing. Moreover, this ruling in no way prevents the grievant from raising the matter again at a later time if the alleged conduct resumes or worsens.

circuit court pursuant to Va. Code § 2.2-3004(E). 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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Claudia T. Farr
Director