Qualification – Work Conditions (Employee/Supervisor Conflict); Ruling Date: May 7, 2010; Ruling #2010-2625; Agency: Department of Social Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Social Services
Ruling Number 2010-2625
May 7, 2010

The grievant has requested a ruling on whether her December 30, 2009 grievance with the Department of Social Services (the agency) qualifies for a hearing.[1] For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

Following receipt of her 2009 performance evaluation, which rated her performance as "below contributor" on one factor, the grievant appealed within the agency. The result of her appeal was that her "below contributor" rating on the one factor was raised to "contributor." In conjunction with the performance evaluation, the grievant is now required to meet with her supervisor on a monthly basis to go over her performance and any other issues the grievant wishes to add to the agenda. The grievant initiated her December 30, 2009 grievance to challenge this meeting requirement and the way in which it has been carried out. For instance, the grievant does not feel she is able to provide a response to performance complaints or that she has a sufficient means to learn how to correct or what to correct in her performance. The grievant has requested various forms of relief to improve communications about her performance with her supervisors.

In early December 2009, the grievant's supervisor sought input about the grievant's performance from various local agency directors with whom the grievant interacts and provides services. The grievant's supervisor directed the grievant not to confront or question any of the local agency directors about the feedback they may have provided. The grievant has challenged this direction in her grievance as well.

[1] The grievant also appears to reference an issue regarding the agency's alleged noncompliance in not producing requested documents in a timely manner. However, because it appears the agency corrected its alleged noncompliance by providing the documents to the grievant, this issue is moot and will not be addressed in this ruling.

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, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] 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 have influenced management's decision, or whether state policy may have been misapplied or unfairly applied.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[5] An adverse employment action is defined as a "tangible employment act 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]

This Department has reviewed the materials submitted and finds that none of the grievant's allegations amount to an adverse employment action. Although the grievant has identified various issues of concern in her working relationship with her supervisors,[8] it does not appear that the agency has taken any action that has adversely affected the terms, conditions, or benefits of the grievant's employment.[9] Further, the imposed requirement that the grievant meet

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[2] *See Grievance Procedure Manual* § 4.1 (a) and (b).
[3] Va. Code § 2.2-3004(B).
[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. The grievant's retaliation allegations are discussed below.
[6] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[8] For instance, the grievant claims that she is not permitted to or has been prevented from discussing performance issues with her supervisors. The General Assembly has provided that employees "shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Va. Code § 2.2-3000. As such, while there is no requirement that the grievant be permitted to raise her performance issues with the local agency directors, she should be able to discuss such matters with her supervisors and management.
[9] In addition, the grievant's allegations do not amount to "severe or pervasive" harassment for a claim of hostile work environment to qualify for a hearing, to the extent the grievant has properly asserted this claim in her grievance. *See* Gilliam v. S.C. Dep't. of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007). As courts have noted, prohibitions against harassment, such as those in Title VII, do not provide a "general civility code," Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998), or remedy all offensive or insensitive conduct in the workplace. *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).

with her supervisor on a monthly basis does not constitute a "materially adverse action" required to establish a retaliation claim.[10] Consequently, this grievance does not qualify for a hearing.[11]

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 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

[10] As stated above, this Department applies the "materially adverse" standard in claims of retaliation. *See supra* note 5. It appears that the grievant only challenged the monthly meeting requirement as retaliatory.

[11] This ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.