Issues: Qualification – Performance (Notice of Improvement Needed) and Discrimination (Age); Ruling Date: December 15, 2010; Ruling No. 2011-2834; 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 2011-2834
December 15, 2010

The grievant has requested a ruling on whether her September 24, 2010 grievance with the Department of Social Services (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about September 20, 2010, the grievant received a Notice of Improvement Needed/ Substandard Performance ("NOIN") and an accompanying memorandum for "Failure to Comply with EWP Measures." The grievant initiated a grievance to challenge this management action on or about September 24, 2010. In addition to challenging the NOIN, the grievant appears to allege that she has been subject to harassment on the basis of her age and "health." The grievant additionally states that because she is not part of a particular "clique" she has been harassed. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to this Department.

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.[1] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the methods, 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 improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[3]

Notice of Improvement Needed/Substandard Performance

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

[1] *See Grievance Procedure Manual* § 4.1 (a) and (b).
[2] *See* Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).
[4] *See Grievance Procedure Manual* § 4.1(b).

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]

The primary management action challenged in this grievance is a NOIN. A NOIN does not generally constitute an adverse employment action, because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[8] Further, this type of action does not constitute a "materially adverse action"[9] required to establish a retaliation claim.[10] Therefore, the grievant's claims relating to her receipt of the NOIN do not qualify for a hearing.[11]

Further, we note that while the NOIN has not had 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 NOIN grieved 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 prevent the grievant from attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.

Harassment

For a claim of hostile work environment or 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)

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[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. 2011-2740; EDR Ruling No. 2007-1538.

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

[9] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); *see, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

[10] *See, e.g.*, EDR Ruling No. 2009-2090, at n.6.

[11] 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 she wishes to challenge, correct or explain information contained in her 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).

imputable on some factual basis to the agency.[12] "[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."[13]

However, the grievant must raise more than a mere allegation of harassment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. Although the grievant asserts that the treatment she has experienced is based on her age and "health,"[14] there has been no evidence presented to support these allegations. For instance, when asked why she believed her "health" was an issue in the treatment she has experienced, the grievant indicated that management did not know that she had a particular health condition. Rather, it appears the grievant is saying that the treatment at work has caused added stress that has led to health-related issues. Such allegations do not raise a sufficient question of harassment based on a protected status to qualify for hearing.

During this Department's investigation for this ruling, the grievant was asked why she believes that her age has played a role in her treatment at work. The grievant states that a supervisor questioned her "mental capabilities" and stated that the grievant was not ready to move to the next level. There was also apparently a time in the past when the grievant, as with others in the office, was asked to provide the date of her birth to management. Based on these assertions and those contained in the grievance packet, this Department finds insufficient evidence to raise a sufficient question that any treatment the grievant has experienced was based on her age.[15] Because the grievant has not raised a sufficient question as to the elements of a claim of harassment based on a protected status, her claims regarding her work environment do not qualify for a hearing.

This ruling does not mean that EDR deems the alleged actions by the grievant's supervisors, if true, to be appropriate; only that the claim of harassment or hostile work environment on the basis of age and/or "health" does not qualify for a hearing based on the evidence presented to this Department. This ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.

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[12] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).

[13] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

[14] The grievant has also alleged that the harassment stems from the fact she is not part of a particular "clique." However, this allegation does not appear to be one that readily falls into harassment based on a protected status, such as those listed in DHRM Policy 2.30, *Workplace Harassment*. Further, there is no indication that the issues described by the grievant regarding her work environment and the stresses caused and/or involved are so extreme or arbitrary to rise to the level of a misapplication or unfair application of policy to qualify for a hearing. While the grievant's allegations, if true, describe a stressful environment, there has been no evidence presented that suggests a violation of applicable policy.

[15] An internal agency investigation came to a similar conclusion. The report of this investigation also notes that the grievant's supervisor and most of those in her chain of command are older than the grievant.

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