

Issue: Qualification – Discipline (Counseling Memo); Ruling Date: September 27, 2011; Ruling No. 2012-3080; Agency: Virginia Employment Commission; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Virginia Employment Commission
Ruling Number 2012-3080
September 27, 2011

The grievant has requested a ruling on whether her June 10, 2011 grievance with the Virginia Employment Commission (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about May 16, 2011, the grievant received a Notice of Improvement Needed/Substandard Performance (NOIN) with an improvement plan. The grievant initiated a grievance to challenge this management action on or about June 10, 2011. The grievant also raises issues regarding the support she has allegedly not received and other issues affecting her performance. 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

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

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).

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

The management action primarily challenged in this grievance is the NOIN, or written counseling, received by the grievant. A written counseling 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, although the grievant has identified other issues of concern in her job, 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 Therefore, the grievance does not qualify for a hearing.¹⁰

We also 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.

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 *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 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 asserted such a 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).

¹⁰ 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 her 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).

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.

Claudia T. Farr
Director