

Issues: Qualification – Discipline (Counseling Memo) and Performance Evaluation (Arbitrary/Capricious); Ruling Date: January 24, 2012; Ruling No. 2012-3225; 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 2012-3225
January 24, 2012

The grievant has requested a ruling on whether her October 20, 2011 grievance with Virginia Commonwealth University (the University) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about September 27, 2011, the grievant received her annual performance evaluation with an overall rating of "Fair Performer," which, according to the University, is the equivalent of a "Contributor" rating under Department of Human Resource Management (DHRM) policy.¹ In addition, on or about September 28, 2011, the grievant received a counseling memorandum. The grievant initiated a grievance to challenge these management actions on or about October 20, 2011. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing.² 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.³ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁴ 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

¹ See DHRM Policy 1.40, *Performance Planning and Evaluation*.

² The grievant's representative appears to assert that the agency has denied the grievant access to the grievance procedure under Section 2.3 of the *Grievance Procedure Manual*. This is not the case. This grievance was denied qualification for a hearing by the agency head pursuant to Section 4.

³ See *Grievance Procedure Manual* § 4.1 (a) and (b).

⁴ See Va. Code § 2.2-3004(B).

whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.⁵

Adverse Employment Action

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁶ Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.⁷ 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."⁸ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁹

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.¹⁰ Further, this type of action does not constitute a "materially adverse action"¹¹ required to establish a retaliation claim.¹² Therefore, the challenge to the counseling memo does not qualify for a hearing.¹³

The performance evaluation received by the grievant is also not an adverse employment action because the overall rating was essentially at a "Contributor" level. Although the "Fair Performer" rating under the University's scale identifies some deficiencies in performance,¹⁴ such a document, because it carries no other sanction, is the equivalent of a counseling memo,

⁵ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

⁶ See *Grievance Procedure Manual* § 4.1(b).

⁷ 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.

⁸ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁹ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

¹⁰ See *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999).

¹¹ *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.

¹² See, e.g., EDR Ruling No. 2009-2090, at n.6.

¹³ We also note that while the counseling memorandum 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 counseling memorandum 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.

¹⁴ It is also notable that the second step-respondent directed that the grievant's supervisor re-issue the performance evaluation after taking into account the multitude of issues she identified with the original.

which is not, additionally, materially adverse. Consequently, this grievant's challenges to these actions do not qualify for a hearing.¹⁵

Retaliatory Harassment

For a claim of retaliation, or retaliatory harassment, to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;¹⁶ (2) the employee suffered a materially adverse action;¹⁷ and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.¹⁸ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹⁹

The grievant's allegations, even taken together,²⁰ do not rise to the level of being materially adverse to raise a sufficient question of a claim of retaliatory harassment. As noted by the Supreme Court, "normally petty slights, minor annoyances, and simple lack of good manners" do not establish "materially adverse actions" that are necessary to establish a retaliation claim.²¹ Although the grievant has described difficulties in the work environment and incidents of performance counseling, it does not appear the conduct the grievant has experienced rises beyond this level to establish materially adverse action by the agency. Because the grievance does not raise a sufficient question as to the elements of a claim of retaliation, this grievance does not qualify for a hearing.

¹⁵ 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).

¹⁶ See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

¹⁷ *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.

¹⁸ See, e.g., *EEOC v. Navy Fed Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005).

¹⁹ See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

²⁰ See EDR Ruling Nos. 2007-1577, 2008-1957 (discussing retaliatory harassment claim in relation to materially adverse action standard).

²¹ *Burlington N.*, 548 U.S. at 68.

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