Issue: Qualification – Work Conditions (Employee/Supervisor Conflict); Ruling Date: April 25, 2012; Ruling No. 2012-3296; Agency: Department of Labor and Industry; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Labor and Industry
Ruling Number 2012-3296
April 25, 2012

The grievant has requested a ruling on whether her December 29, 2011 grievance with the Department of Labor and Industry (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On November 18, 2011 and December 2, 2011, the grievant received e-mails from a supervisor, following correspondence regarding certain performance issues, indicating that the supervisor was going to recommend disciplinary action against the grievant. In her grievance, the grievant challenges these actions and others as harassing. 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] For example, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[2] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[3] 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."[4] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[5]

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[1] *See Grievance Procedure Manual* § 4.1 (a) and (b).
[2] *See Grievance Procedure Manual* § 4.1(b).
[3] 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.
[4] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[5] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

The primary management action challenged in this grievance is the supervisor's indication that disciplinary action was being recommended against the grievant. A statement regarding potential future disciplinary action 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. Indeed, the statement is nothing more than an intent to take disciplinary action, which, in this case, did not occur. Therefore, the grievant's claims relating to her receipt of these recent e-mails do not qualify for a hearing.[6]

To the extent the grievance also raises a claim of hostile work environment or harassment, the "adverse employment action" requirement can be met by the grievant presenting evidence raising a sufficient question as to whether the conduct at issue was sufficiently severe or pervasive so as to alter the conditions of employment and to create and abusive or hostile work environment.[7] "[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."[8]

Based upon a review of the additional documentation submitted by the grievant,[9] this Department cannot find that the grieved issues rose to a "sufficiently severe or pervasive" level such that an unlawfully abusive or hostile work environment was created. The allegedly hostile work environment challenged by the grievant can be generally summarized as a strained relationship between the grievant and her supervisor, with, for example, the grievant feeling singled out and wanting to be treated fairly. The challenged interactions seem to arise from the supervisor's attempts to address performance issues. While we understand that the grievant has perceived and interpreted these interactions over a long period of time to indicate harassment, from another perspective they also appear to be reasonable attempts by management to address work-related issues with an employee. In short, the allegations do not rise to the level of severe or pervasive conduct necessary to establish the elements of a hostile work environment or harassment.[10] As such, the grievance does not qualify for a hearing.

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[6] 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 his personnel file (to the extent an intent to take disciplinary action would be 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).

[7] *See* Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

[8] Id. at 23.

[9] The documentation submitted also includes events that occurred after the initiation of this grievance in December 2011. Consequently, those events have not been considered in this ruling to determine whether the allegations rise to the level of "severe or pervasive" harassment.

[10] *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

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

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).