Issue: Qualification – Management Actions (Assignment of Duties), Discrimination (Age), Retaliation (Grievance Activity Participation), Performance Evaluation (Arbitrary/Capricious); Ruling Date: December 7, 2012; Ruling No. 2013-3445; Agency: Department of Behavioral Health and Developmental Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Behavioral Health & Developmental Services
Ruling Number 2013-3445
December 7, 2012

The grievant has requested a ruling on whether her August 3, 2012 grievance with the Department of Behavioral Health & Developmental Services (the agency) qualifies for a hearing. For the reasons discussed below, the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management finds that this grievance does not qualify for a hearing.

FACTS

The grievant is an Assistant Commissioner with the agency. In July 2012, her position was restructured to remove certain duties and reassign others to her. She has initiated a grievance to challenge the restructuring and the events leading up to that action. In addition, in her August 3, 2012, grievance, the grievant has challenged 1) her performance evaluation, 2) discrimination and workplace harassment on the basis of age, gender, and/or ethnicity, 3) retaliation, and 4) the new Employee Work Profile (EWP) she received for her restructured position as too vague.[1] After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination.

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, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] 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, or whether a performance evaluation was arbitrary or capricious.[4]

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[1] Additional facts pertinent to each claim will be included in the Discussion section below as necessary to address the question of whether the grievance qualifies for a hearing.
[2] *See Grievance Procedure Manual* § 4.1 (a) and (b).
[3] *See* Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

Performance Evaluation and EWP

The grievant has challenged her performance evaluation and new EWP. The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action. 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]

A satisfactory performance evaluation is not an adverse employment action where the employee presents no evidence of an adverse action relating to the evaluation.[8] In this case, the overall rating of the grievant's performance evaluation was "Contributor" and generally satisfactory. Most importantly, the grievant has presented no evidence that the performance evaluation has detrimentally altered the terms or conditions of her employment. Similarly, there is no indication that the grievant's receipt of a draft EWP that she asserts is too vague constitutes an adverse employment action. Indeed, the agency has already expressed a willingness to work with the grievant on clarifying expectations. Consequently, this grievance does not qualify for a hearing on either of these bases.[9]

Reorganization

The grievant also challenges the agency's reorganization of her position. A transfer or reassignment may constitute an adverse employment action if a grievant can show that the transfer/reassignment had some significant detrimental effect on the terms, conditions, or benefits of her employment.[10] A reassignment or transfer with significantly different

[5] *See Grievance Procedure Manual* § 4.1(b).
[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] *E.g.*, EDR Ruling No. 2010-2358; EDR Ruling No. 2008-1986; EDR Ruling No. 2007-1612; *see also* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377-378 (4th Cir. 2004) (holding that although the plaintiff's performance rating was lower than the previous yearly evaluation, there was no adverse employment action as the plaintiff failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment, the evaluation was generally positive, and he received both a pay-raise and a bonus for the year.).
[9] 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).
[10] *See Holland*, 487 F.3d at 219.

responsibilities, or one providing reduced opportunities for promotion can constitute an adverse employment action, depending on all the facts and circumstances.[11]

The process that ultimately ended with the reorganization of the grievant's position appears to have begun in a different manner. According to the grievant, beginning in March 2012, she met with her supervisor to discuss issues he had with her performance. The supervisor reportedly gave three options for the grievant to consider: 1) finding another job and leaving the agency; 2) taking a demotion to a vacant position; or 3) transfer to another position within the agency that the supervisor would eliminate and allow the grievant to receive a severance package. The supervisor additionally provided the grievant with a draft exit agreement in May 2012 that would have ended in her departure from the agency. Ultimately, the grievant chose not to accept one of the supervisor's alternatives or sign the exit agreement. Consequently, the supervisor chose to reorganize the grievant's position.

While it is apparent some of the grievant's areas of oversight have been removed, principally those involving finance, the grievant also took on other areas of management through the reorganization. She remains at the same level of management, with an agency-wide scope of authority, and serves as a member of the executive team. Although the grievant no longer has authority over most issues involving finance, she appears to have significant high-level responsibilities, as she did prior to the reorganization. Thus, considering the entirety of her new position, we cannot say that this reorganization was truly a demotion as the grievant argues. The reorganization does not appear to have had a significant detrimental effect on the grievant or caused her a significant change in employment status or a decrease in salary or benefits. Therefore, the actions challenged by the grievant concerning her reconfigured position are not adverse employment actions and cannot qualify for a hearing.

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[12] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity;[13] in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's

[11] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 F. App'x 726 (4th Cir. 2004) (unpublished opinion).

[12] *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 the 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).

[13] Although for the past six years EDR has used the "materially adverse action" standard for retaliation claims, we are returning to the "adverse employment action" standard for the assessment of all claims, including retaliation, as to whether they qualify for hearing. *See* Va. Code § 2.2-3004(A).

stated reason was a mere pretext or excuse for retaliation.[14] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[15]

The grievant's retaliation claim stems from her involvement as a management step-respondent in an agency employee's grievance. The grievant asserts that her supervisor made statements about his disapproval with the grievant's handling of that grievance and "difficult" employees. While the grievant's conduct as a step-respondent concerns a grievance, the grievant's allegations do not state a typical claim of retaliation. Here, the allegation is not that the agency disapproves of the grievant's involvement in the grievance procedure. Rather, the grievant's allegations are that the agency disapproved of the grievant's performance as a step-respondent. Upon reviewing these allegations, we cannot find that there is a sufficient question raised as to the elements of a claim of retaliation. Simply performing the role of a step-respondent does not insulate a manager from supervisory oversight if the manager's job performance is perceived to be subpar in that role. The grievant's retaliation claim does not qualify for a hearing.

Discrimination/Harassment

The grievant asserts that she has been discriminated against and harassed on the basis of age, gender, and/or ethnicity. For a claim of a discriminatory 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) imputable on some factual basis to the agency.[16] "[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."[17]

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 may be able to suggest that she feels pushed aside or that she was not treated properly, based on the information reviewed for this ruling, we are unable to find any indication that any of the conduct challenged by her grievance was because of the grievant's gender or ethnicity. Although the grievant has described herself as an Asian woman, there is nothing to support an allegation that any of the perceived ill treatment she has received has been because of these factors. While the grievant asserts that an agency manager "has a preference for" a non-Asian

[14] *E.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).
[15] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).
[16] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).
[17] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

CFO of American origin, we can find nothing in the grievance paperwork to support this point beyond the grievant's bare allegation.

In addition, the grievant's claims of age discrimination and/or harassment on the basis of age do not raise a sufficient question that the agency's conduct was because of her age. The grievant points to certain statements made by an agency manager that in some way implicate age. For example, the grievant cites to a meeting in which the agency manager made comments about bald men at the agency and women coloring their hair. Taken out of context, the comments might suggest a poor choice of words, but in reviewing the totality of the circumstances, we are not able to find them supportive of a claim of age discrimination. Indeed, the comments appear to have surrounded a discussion about staffing given a number of agency employees apparently nearing retirement.

The grievant has raised the issue of succession planning, as well, as support of her age discrimination claim. She argues that by being asked to succession plan she is being discriminated against on the basis of age. However, as long as the employer's conduct is based on reasonable factors other than age, the conduct does not indicate unlawful discrimination.[18] Here, where comments about succession planning arguably implicate age, they are actually addressing concerns about future agency staffing, i.e., a reasonable factor other than age.

The grievant asserts that her supervisor stated that he wants a "young, aggressive CFO willing to take risks." However, the agency has submitted information regarding the hiring of a number of employees over the age of 40 at high levels of management. Further, the new CFO the agency decided to hire to take on those tasks removed from the grievant is more than 50 years old. In short, based on a review of all of the grievant's allegations, we cannot find that there is a sufficient question raised as to whether the grievant was discriminated against or harassed based on a protected status, such as age, gender, or ethnicity. The grievant's claims, therefore, do not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.[19]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[18] *E.g.*, Smith v. City of Jackson, 544 U.S. 228, 241-43 (2005).
[19] Va. Code § 2.2-1202.1(5).