JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2023-5466
October 13, 2022

This ruling addresses the partial qualification of a grievance initiated with the Virginia Department of Transportation (the "agency") on or about August 30, 2022. The grievant has appealed the agency head's partial qualification to the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM).

FACTS

On or about March 21, 2022, the agency issued to the grievant a Notice of Improvement Needed, noting five areas for improvement by June 19, 2022. On July 8, 2022, the grievant's managers completed an interim evaluation in reference to the Notice of Improvement Needed and concluded that the grievant's performance in some areas remained unsatisfactory. On August 1, 2022, the agency issued to the grievant a Group I Written Notice citing continued unsatisfactory performance during the improvement period. According to the grievant, the agency also extended the active period of the Notice of Improvement Needed. On August 30, 2022, the grievant initiated a grievance challenging the Group I Written Notice and the Notice of Improvement Needed, claiming that the disciplinary actions were motivated by retaliation. As relief, she requested "revocation" of the Group I Written Notice and the active Notice of Improvement Needed, an end to retaliation and "negativity and targeting" of the grievant, and "fairly distributed resources" including staffing and training.

After the grievance progressed through the management resolution phase, the agency head determined that the grievance was qualified for a hearing to the extent it challenged the Group I Written Notice. However, the agency head determined that the grievance was not qualified as to the issue of the Notice of Improvement Needed or any other issue presented by the grievance. The grievant has appealed the agency head's decision that some issues are not qualified.

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] The grievance procedure limits grievances that qualify for a hearing to those that involve "adverse employment actions."[2] An adverse employment action is defined as a "tangible employment action" constituting "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."[3] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[4]

Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[5] Thus, claims relating to issues such as the means, methods, 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.[6]

In this case, the agency has specifically declined to qualify the grievance issues of (1) the continuation of the Notice of Improvement Needed, and (2) retaliation by agency management. As to the Notice of Improvement Needed, DHRM Policy 1.60, *Standards of Conduct*, contemplates such actions as examples of "written counseling" and, more broadly, "corrective action" – as opposed to "disciplinary actions," which include formal Written Notices.[7] While formal disciplinary actions – such as the Written Notice the grievant received in this case – automatically qualify for a hearing,[8] informal discipline does not typically rise to the level of an adverse employment action because it does not, in and of itself, have a significant detrimental effect on the terms, conditions, or benefits of employment.[9] Although the agency's initial Notice of Improvement Needed apparently gave rise to the Group I Written Notice, the causal connection does not change the informal nature of the Notice of Improvement Needed and/or its continuation. Because the Notice of Needs Improvement is not an adverse employment action in itself, it does not meet the threshold standard to be qualified for hearing as an independent issue.

As to the issue of retaliation, EDR reads the grievance to assert retaliation not only as an independent issue but as an affirmative defense to the Written Notice (among other agency actions). Because the grievant's challenge to the Written Notice is qualified for hearing, the grievant will have the opportunity at the hearing to prove affirmative defenses against the Written Notice, including a claim that it was issued for retaliatory reasons.[10] Therefore, while we agree

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[1] *See* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.
[2] *See id.* § 4.1(b).
[3] Ray v. Int'l Paper Co. 909 F.3d 661, 667 (4th Cir. 2018) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).
[4] Laird v. Fairfax County, 978 F.3d 887, 893 (4th Cir. 2020) (citing Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007)) (an adverse employment action requires more than a change that the employee finds "less appealing").
[5] Va. Code § 2.2-3004(B).
[6] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[7] DHRM Policy 1.60, *Standards of Conduct*, at 6-9.
[8] *Grievance Procedure Manual* § 4.1(a).
[9] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999); *see generally* DHRM Policy 1.60, *Standards of Conduct*.
[10] *Rules for Conducting Grievance Hearings* § VI(B)(1).

with the agency that the grievant's retaliation claim is not qualified for hearing as an issue independent of the Written Notice,[11] nothing in this ruling should be interpreted to limit the grievant's ability to present evidence in support of any affirmative defense to the Written Notice, including retaliation. We note that such evidence may include documents and/or testimony relating to any Notice(s) of Improvement Needed or other informal evaluations she has received, if relevant.

In sum, we affirm the agency head's determination that the grievance is only partially qualified for hearing. However, this determination constrains only the independent issues to be decided by the hearing officer, not the evidence that may be offered in support of the parties' respective burdens of proof. Should the hearing officer determine that the grievant has met her burden to prove retaliation, they may order the agency to provide a work environment free from retaliation and "to take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence."[12]

If it has not already done so, the agency is directed to submit a completed Form B to EDR **within five workdays** of this ruling. A hearing officer will be appointed in a forthcoming letter.

EDR's qualification rulings are final and nonappealable.[13]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[11] To illustrate, if the hearing officer were to find that the agency had met its burden to prove the Written Notice was warranted and appropriate (*i.e.* not retaliatory), the decision need not make separate findings as to other, non-adverse employment actions and whether they might have been retaliatory.
[12] *Rules for Conducting Grievance Hearings* § VI(C)(3).
[13] *See* Va. Code § 2.2-1202.1(5).