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 Marine Resources Commission
Ruling Number 2025-5793
January 15, 2025

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) on whether her October 23, 2024 grievance with the Marine Resources Commission (the "commission" or "agency") qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

On or about October 23, 2024, the grievant filed a grievance alleging that she had been "subjected to discriminatory workplace harassment." As described in her grievance submission, she was "excluded . . . from the hiring process for two open positions that [she] directly supervise[s]." The grievant states that interviews were held without her knowledge and that she "was not allowed to review the applications and select candidates nor . . . serve on the interview panel." She alleges that she was excluded from the process "on the basis of sex." She also alleges that her exclusion followed from her "non-compliance with an indirect request" from the agency commissioner.

The commissioner served as the only management respondent to the grievance, providing a written response to the grievant's substantive allegations as well as determining that the grievance did not qualify for a hearing. The grievant has appealed that determination to EDR.

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 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 that could be remedied by a hearing officer. An adverse

[1] *See Grievance Procedure Manual* § 4.1.
[2] *See Grievance Procedure Manual* § 4.1(b); *see also* Va. Code § 2.2-3004(A).

employment action involves an act or omission by the employer that results in "harm" or "injury" to an "identifiable term or condition of employment."[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 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, whether state policy may have been misapplied or unfairly applied, or whether a performance evaluation was arbitrary and/or capricious.[5]

Finally, notwithstanding the above requirements, qualification also may not be appropriate if an issue has become moot during the management resolution steps or when the hearing officer lacks authority to grant effectual relief.[6]

Upon a thorough review of the record in this case, it does not appear that the grievance presents a sufficient question whether the grievant has experienced an adverse employment action – that is, harm to an identifiable term or condition of employment. Essentially, the management act at issue is that the agency did not include the grievant in the recruitment process for two positions that report to her. Assuming that the grievant's job responsibilities would ordinarily include recruitment as to her subordinate positions, the record does not suggest that the agency has removed such responsibilities beyond the particular selection process at issue in this grievance. Without more, we cannot conclude that exclusion from a selection process is tantamount to a reassignment or other adverse employment action. As such, the grievance has not met the threshold requirement to qualify for a hearing.

Moreover, even if the grievance arguably did present an adverse employment action, it is not clear what effectual remedy a hearing officer would have the authority to provide. In her grievance, the grievant has requested that she "and all direct supervisors be allowed to serve on interview panels," and also that the agency establish "a formal written [policy] for hiring . . . within DHRM standards." Among the types of relief that are specifically *not* available at a grievance hearing are "[d]irecting the methods, means, or personnel by which work activities are to be carried out" and "[e]stablishing or revising policies, procedures, rules, or regulations."[7] EDR interprets the grievant's requested relief to fall within these examples of remedies that would exceed the scope of a hearing officer's authority.

---

[3] *See* Muldrow v. City of St. Louis, 144 S. Ct. 967, 974 (2024) (addressing a required element of a Title VII discrimination claim); *see, e.g.*, Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998) (defining adverse employment actions under Title VII to include "tangible" acts "such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits").
[4] Va. Code § 2.2-3004(B).
[5] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[6] *See, e.g.*, EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.
[7] *Grievance Procedure Manual* § 5.9(b). Such matters can obviously be addressed as relief during the resolution steps by the agency step respondents, if appropriate.

Because we cannot find that the grievance presents a sufficient question whether the grievant has experienced an adverse employment action, we express no opinion on whether the agency's decision, in its discretion, to exclude the grievant from the hiring process at issue was motivated by legitimate, non-discriminatory reasons, as it asserts.[8] The grievant maintains that the agency's stated reason for excluding her was not applied consistently as to male employees. For a hearing officer to assess such an issue, the grievance must first meet the threshold requirements to qualify for a hearing, which has not occurred here.

CONCLUSION

For the reasons described above, the grievance does not qualify for a hearing under the grievance procedure at this time.[9] This ruling only determines that the grievance does not qualify for a hearing; it does not determine that any of the claims asserted were invalid. Further, nothing in this ruling is meant to prevent the grievant from utilizing another appropriate process to challenge the issues raised herein.

EDR's qualification rulings are final and nonappealable.[10]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[8] In the context of discrimination claims, if an employer shows that its decision "was made for a legitimate, non-discriminatory reason, . . . then the presumption of discrimination is rebutted and the burden returns to the [employee] to prove that [the employer's] proffered reason was pretext for discrimination." Washington v. Dominion Energy, Case No. 3:23-cv-00056, 2024 U.S. Dist. LEXIS 183772, at *9 (W.D. Va. Oct. 8, 2024) (internal quotations omitted).
[9] *See Grievance Procedure Manual* § 4.1.
[10] *See* Va. Code § 2.2-1202.1(5).