Issues: Qualification – Retaliation (Other Protected Right), and Work Conditions (Employee/Supervisor Conflict); Ruling Date: August 10, 2016; Ruling No. 2017-4403; Agency: Virginia Community College System; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of the Virginia Community College System
Ruling Number 2016-4403
August 10, 2016

The grievant has requested a ruling on whether her June 27, 2016 grievance with the Virginia Community College System (the "agency") qualifies for a hearing. For the reasons discussed below, the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (DHRM) finds that this grievance does not qualify for a hearing.

FACTS

The grievant asserts that she has been subjected to workplace harassment and a hostile work environment. On June 27, 2016, the grievant initiated an expedited grievance challenging the agency's alleged conduct. After the grievance proceeded through the management steps, the agency head declined to qualify this grievance for a hearing. The grievant now appeals that determination.[1]

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, as well as the contents of statutes, ordinances, personnel policies, procedures, rules, and regulations, 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.[4]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] Thus, typically, a threshold question is

[1] Additional facts relevant to the grievant's claims are included in the Discussion below.
[2] *See Grievance Procedure Manual* § 4.1.
[3] *See* Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[5] *See Grievance Procedure Manual* § 4.1(b).

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]

In this case, the grievant asserts that she has been subjected to a hostile work environment since, in December 2014, she questioned the use of state travel cards by her supervisor and others.[8] Among other things, the grievant appears to allege that her performance has been unfairly criticized, that she has been subjected to "micromanagement," that she has been wrongfully written up, and that her job duties have been changed multiple times.[9] In addition, the grievant challenges the agency's stated intent to issue a Group II Written Notice with termination.[10] The grievant argues that she is "an exceptional employee in [her] opinion and past work experience" and is not being treated in a fair manner.

For a claim of hostile work environment or workplace 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 or conduct; (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.[11] In the analysis of such a claim, the "adverse employment action" requirement is satisfied if the facts raise 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.[12] "[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;

---

[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] *See, e.g.*, Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[8] Although the grievant references Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990 in the attachment to her grievance, it appears she does so only as a means of defining actionable harassment under policy, rather than as an assertion of any particular claim of harassment on the basis of any protected status in those laws or state policy. To the contrary, the grievant has repeatedly identified retaliation for her conduct in challenging her supervisor's use of a travel card as the basis of the alleged harassment.
[9] The agency notes that many of the actions alleged by the grievant occurred more than 30 calendar days prior to the initiation of her grievance and, as such, are time-barred. To the extent the grievant is seeking to challenge discrete adverse employment actions, such as past Written Notices, EDR agrees that, with respect to those adverse actions occurring on or before May 28, 2016, any direct challenge to those actions is untimely. However, those actions will be considered timely for purposes of determining whether the grievant has demonstrated a hostile work environment. *See* Guessous v. Fairview Prop. Invs., LLC, 2016 U.S. App. LEXIS 12448, at *32-37 (4th Cir. July 6, 2016).
[10] According to the agency, the proposed Group II Written Notice is for "unsatisfactory work performance and not following instructions." The grievant initiated the June 27, 2016 grievance the day she received notice of the proposed disciplinary action. The agency then postponed issuance of the Group II Written Notice, pending resolution of the June 27 grievance.
[11] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[12] *See generally id* at 142-43.

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."[13]

The grievant claims that she has been subjected to a hostile work environment in retaliation for her questioning of travel card use in 2014. The grievant's questioning of the use of travel cards would constitute protected activity.[14] However, from EDR's review of the information presented by the agency and the grievant, it appears that the alleged agency conduct has been related to its perception of the grievant's performance and workplace conduct, rather than based on any retaliatory motive. Although the grievant clearly disagrees with management's assessment of her performance and/or conduct, there is little, if any, information that is sufficient to raise a question that this assessment, even if wrong, was the result of retaliation. As such, the grievant has not raised a sufficient question as to the existence of a retaliatory hostile work environment for the June 27 grievance to qualify for hearing.

EDR notes, however, that this ruling in no way limits the grievant's ability to challenge future agency actions or omissions or to raise additional claims of retaliatory harassment. Further, to the extent the grievant subsequently challenges any disciplinary actions which she alleges are retaliatory, EDR's conclusions in this ruling shall in no way impact the hearing officer's weighing of the evidence *de novo* at hearing.[15]

EDR's qualification rulings are final and nonappealable.[16]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[13] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[14] *See* Va. Code § 2.2-3004(A).
[15] *Rules for Conducting Grievance Hearings* VI(B)(1).
[16] Va. Code § 2.2-1202.1(5).