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QUALIFICATION RULING

In the matter of the Department of Professional and Occupational Regulation
Ruling Number 2022-5385
April 11, 2022

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) on whether her January 31, 2022 grievance with the Department of Professional and Occupational Regulation (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant worked for the agency as a deputy director, reporting to the agency director. In January 2022, the grievant began reporting to a newly-appointed director. The grievant met with the new director for the first time on January 19, 2022. The parties disagree about the details of what happened during the meeting, but it appears that the meeting became contentious. On January 21, the director informed the grievant that he was reassigning two functional areas that fell under her supervision to report to the director instead, and announced this change to the agency later in the day. The director delivered a counseling memo to the grievant on January 24, addressing alleged unprofessional conduct at the January 19 meeting. On January 28, the director notified the grievant that he was suspending for further evaluation a system replacement project for which she was responsible.

The grievant initiated a grievance with the agency on January 31, 2022, alleging that the director “removed half of [her] assigned responsibilities from [her] oversight,” “attempted to issue a counseling memo . . . regarding what he perceived as unprofessional conduct,” and suspended a “critical system replacement project” for which she was the “Project Sponsor and manager.” In an attachment to her grievance, the grievant clarified that she believed the director’s actions constituted discrimination based on her age and gender as well as retaliation for his “perception of [her] association with the previous Director.” The grievant further stated that the director had “harass[ed], bull[ied,] and degrade[d her] by transferring nearly every responsibility assigned to [her position] to less qualified individuals.”

An Equal Opportunity Employer

As relief, the grievant sought “full pay with all available increases [she] would receive until [she] reach[ed] full retirement age and service,” as well as “health insurance coverage . . . and contributions to fund [her] full retirement.” Following the management resolution steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

As of April 1, 2022, while this ruling was pending, the grievant retired from her position with the agency.

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 Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² 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.³

Further, the grievance procedure generally limits grievances that qualify to those that involve “adverse employment actions.” Typically, then, 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.”⁴ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁵ Workplace harassment rises to this level if it includes conduct that is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”⁶

Finally, qualification may not be appropriate even if a grievance challenges a management action that might ordinarily qualify for a hearing. For example, an issue may have become moot during the management resolution steps, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer

¹ See *Grievance Procedure Manual* § 4.1.

² Va. Code § 2.2-3004(B).

³ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁴ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁵ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁶ *Strothers v. City of Laurel*, 895 F.3d 317, 331 (4th Cir. 2018) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.⁷

Counseling Memorandum

The grievant first challenges her receipt of a Counseling Memorandum on January 24, 2022, alleging that it was unwarranted. However, written counseling is a type of informal corrective action;⁸ it is not equivalent to a Written Notice of formal discipline. A written counseling 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.⁹ Accordingly, EDR finds no basis to conclude that the Counseling Memorandum is “adverse” for purposes of hearing qualification. As such, the grievant’s claims relating to the Counseling Memorandum do not qualify for a hearing.¹⁰

Hostile Work Environment/Retaliation

In the remainder of her grievance, the grievant primarily alleges that the director engaged in harassing, discriminatory, and/or retaliatory conduct that created a hostile work environment. Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment¹¹ and bullying,¹² alleged violations must meet certain requirements to qualify for a hearing. Whether discriminatory or non-discriminatory, harassment or bullying may qualify for a hearing as an adverse employment action if the grievant presents evidence that raises a sufficient question whether the conduct was (1) unwelcome; (2) sufficiently severe or pervasive that it alters the conditions of employment and creates an abusive or hostile work environment; and (3) imputable on some factual basis to the agency.¹³ As to the second element, the grievant must show that they

⁷ See, e.g., EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.

⁸ See DHRM Policy 1.60, *Standards of Conduct*, at 6 (June 1, 2011) (distinguishing between “counseling” such as written memoranda or notices of improvement needed and “disciplinary actions,” typically via formal Written Notice). DHRM revised Policy 1.60 as of March 7, 2022, while this grievance was pending. All policy citations herein refer to the previous version of Policy 1.60 that was in effect during the events at issue in this matter.

⁹ See *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999).

¹⁰ This issue does not qualify for an administrative hearing under the grievance process, but 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 they wish to challenge, correct, or explain information contained in their 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 their 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. *Id.*

¹¹ Traditionally, workplace harassment claims were linked to a victim’s protected status or protected activity. However, DHRM Policy 2.35 also recognizes non-discriminatory workplace harassment, defined as “[a]ny targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion towards a person not predicated on the person’s protected class.”

¹² DHRM Policy 2.35 defines bullying as “[d]isrespectful, intimidating, aggressive and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person.” The policy specifies that bullying behavior “typically is severe or pervasive and persistent, creating a hostile work environment.”

¹³ See *Gilliam v. S.C. Dep’t of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

perceived, and an objective reasonable person would perceive, the environment to be abusive or hostile.¹⁴

In addition to her receipt of the Counseling Memorandum discussed above, the grievant also claims that the director “removed and reassigned half of the areas that were assigned to her” position and suspended a system replacement project that fell under “the only area remaining under [her] supervision,” which “compromised” her role as a deputy director. The grievant contends that this reorganization of functions was a method of “intentionally embarrassing her” by appointing an acting manager with less experience than her to lead one of the reassigned areas and report to the director. The grievant has further identified a number of additional actions that she argues “indicate [the director’s] predisposition to harass and embarrass [her].” For example, the grievant alleges that the director prioritized communication with other employees before and on his first day, failed to provide her with adequate notice of his intention to reorganize the areas under her supervision, offered insufficiently detailed explanations of decisions and expectations, and otherwise interfered with her ability to carry out her responsibilities effectively. In essence, the grievant asserts that the director “single-handedly dismantled” the division she supervised by “targeting” her, which led her to retire “prematurely” due to her concern that the director would abolish her position or terminate her “on pretense or perceived slight.”

Even assuming that the grievant’s allegations regarding the management actions described in her grievance, viewed in their totality, sufficiently describe conduct pervasive enough to constitute an adverse employment action, EDR perceives no meaningful relief that a hearing officer could grant. If an issue of discrimination, retaliation, or workplace harassment is qualified for hearing and the hearing officer finds that it occurred, the hearing officer may order the agency to create an environment free from the behavior, and to take appropriate corrective actions necessary to cure the violation and/or minimize the potential for its reoccurrence.¹⁵ Since initiating her grievance, the grievant has retired. EDR therefore finds that the issue of the work environment that may have been created during the grievant’s employment is moot. EDR does not generally grant qualification of claims for which no effective relief is available.

¹⁴ *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 421 (4th Cir. 2014) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993)); *see* DHRM Policy Guide – Civility in the Workplace (“A ‘reasonable person’ standard is applied when assessing if behaviors should be considered offensive or inappropriate.”). “[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.” *Harris*, 510 U.S. at 23 (1993); *see, e.g.*, *Parker v. Reema Consulting Servs.*, 915 F.3d 297, 304-05 (4th Cir. 2019) (finding that a false rumor that an employee was promoted for sleeping with a manager altered the conditions of her employment because the employee was blamed for the rumor and told she could not advance in the company because of it); *Strothers*, 895 F.3d at 331-32 (holding that a hostile work environment could exist where a supervisor overruled the employee’s bargained-for work hours, humiliated the employee for purportedly violating the dress code, required her to report every use of the restroom, and negatively evaluated her based on perceived slights).

¹⁵ *Rules for Conducting Grievance Hearings* § VI(C)(3).

Requested Relief

Finally, EDR observes that the grievant has identified several requests for relief that would not be within a hearing officer's authority to grant. A hearing officer may "order that the agency comply with applicable law and policy,"¹⁶ but cannot "[e]stablish[] or revis[e] policies, procedures, rules, or regulations," "[t]ak[e] any adverse action against an employee," or "[d]irect[] the methods, means or personnel by which work activities are to be carried out."¹⁷ In this case, the grievant sought "full pay with all available increases [she] would receive until [she] reach[ed] full retirement age and service," as well as "health insurance coverage . . . and contributions to fund [her] full retirement." Although these and similar requests are appropriate to seek during the management steps, they would fall outside the scope of available relief at a grievance hearing.

CONCLUSION

For the reasons expressed above, the grievant's January 31, 2022 grievance does not qualify for a hearing under the grievance procedure.¹⁸ EDR's qualification rulings are final and nonappealable.¹⁹

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¹⁶ *Grievance Procedure Manual* § 5.9(a).

¹⁷ *Id.* § 5.9(b).

¹⁸ *See id.* § 4.1.

¹⁹ *See* Va. Code § 2.2-1202.1(5).