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

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QUALIFICATION RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2022-5375
May 23, 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 November 29, 2021 grievance with the Virginia Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On or about November 19, 2021, the grievant returned to work from a medical leave of absence. Upon her return, the grievant claims that a manager at her facility made several comments about the grievant's absence, stating that the grievant should "do some work" and suggesting that the grievant would go out on medical leave again in the future. The supervisor subsequently notified the grievant on or about November 26 that the grievant was being reassigned from an 8-hour shift to at 12-hour shift as of December 1.

The grievant initiated a grievance on November 29, 2021, claiming that the supervisor and the assistant warden at her facility had retaliated against her for her use of medical leave by reassigning her to a 12-hour shift when 8-hour shifts were available. The grievant further alleges that the supervisor's comments about her medical leave constituted workplace harassment. As relief, the grievant requested an assignment to an 8-hour shift and corrective action for the managers involved. Following the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals 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] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the

[1] *See Grievance Procedure Manual* § 4.1.

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, while grievances that allege retaliation or other misapplication of policy may qualify for a hearing, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."[4] 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6] 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."[7]

Compliance Issues

During the management steps and in her request for qualification, the grievant argues that the agency failed to comply with the grievance procedure during the management steps. In particular, she alleges that the assistant warden at her facility responded to the grievance at the first step, even though they should not have done so because the grievant alleged that the assistant warden had retaliated against her by changing her shift assignment. It appears that the supervisor (whom the grievant claims has engaged in workplace harassment and retaliation) would have ordinarily responded at the first step, but the assistant warden (also the subject of the grievant's retaliation claim) addressed the grievance instead.

Section 2.4 of the *Grievance Procedure Manual* provides that "[a] grievance alleging discrimination or retaliation by the immediate supervisor may be initiated with the next level supervisor." It would therefore appear that the grievance could have proceeded directly to the second step based on to the grievant's allegations of workplace harassment and retaliation from the supervisor and the assistant warden. Nonetheless, and although the grievant's concern about this issue is understandable, the *Grievance Procedure Manual* also states that "[a]ll claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at

[2] Va. Code § 2.2-3004(B).
[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[4] Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).
[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] 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)).

a later time."[8] The grievant appears to have notified the agency during the management steps that she did not believe the assistant warden should have provided the first step response, but she did not request a ruling from EDR or otherwise halt the grievance process to correct the alleged noncompliance at the time it occurred.[9] Based on these facts, EDR finds that any alleged noncompliance has been waived at this point, based on the grievant's continuation of the grievance beyond the first step response.

Shift Assignment

In her grievance, the grievant primarily argues that the supervisor and assistant warden at her facility assigned her to a 12-hour shift as a form of retaliation based on her use of medical leave. As support for this assertion, the grievant alleges that the reassignment occurred shortly after her return to work from a medical absence in November 2021, that posts with 8-hour shifts to which she could have been assigned were available at the time, and that other employees were in fact assigned to posts with 8-hour shifts. A claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) they engaged in a protected activity; (2) they suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[10] 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 stated reason was a mere pretext or excuse for retaliation.[11] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[12]

The grievant arguably engaged in protected activity by using the leave benefits available to her as a state employee.[13] Further, given the timing of the reassignment[14] and the alleged comments by a supervisor at the time, the grievance raises a sufficient question of a causal link between the grievant's medical absence and the move. However, the grievance record does not reflect that she has suffered an adverse employment action. A transfer or reassignment to a different shift may constitute an adverse employment action if a grievant can show that the reassignment had some significant detrimental effect on the terms, conditions, or benefits of their

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[8] *Grievance Procedure Manual* § 6.3; *see also, e.g.*, EDR Ruling No. 2004-752; EDR Ruling No. 2003-042; EDR Ruling No. 2002-036.
[9] *See Grievance Procedure Manual* § 6.3.
[10] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).
[11] *See, e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[12] *Id.*
[13] *See* Va. Code § 2.2-3004(A) (stating that a grievance alleging "retaliation for exercising any right otherwise protected by law" may qualify for a hearing);*id.* § 51.1-1100 through 1140 (describing sick leave and disability benefits for eligible employees). The grievant has not alleged that the agency discriminated against her based on a disability or other protected status. As a result, we will not address the grievant's claims under a theory of discrimination.
[14] *See* Tinsley v. First Union Nat'l Bank, 155 F.3d 435, 443 (4th Cir. 1998) (stating that "merely the closeness in time between" an employee's exercise of protected activity and the adverse action is sufficient to support a causal connection for a claim of retaliation under Title VII (citing Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989))).

employment.[15] For example, a reassignment or transfer with significantly different responsibilities, or one providing reduced opportunities for promotion may constitute an adverse employment action, depending on all the facts and circumstances.[16] However, in general, a lateral transfer will not rise to the level of an adverse employment action.[17] Further, subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.[18]

Under the facts presented to EDR in this case, it does not appear that the grievant's reassignment to a different shift constitutes an adverse employment action. The grievant has not alleged or presented evidence that the reassignment has had an effect on her job title or responsibilities, and it does not appear that they were modified as a result of the reassignment. In general, an employee's unmet preference regarding work hours or job location is not enough to result in an adverse employment action.[19] In the absence of an adverse employment action, the grievant's challenge to her reassignment does not qualify for a hearing.

The agency has also provided legitimate, nonretaliatory business reasons for its decision. According to the agency, the grievant was assigned to a post with an 8-hour shift prior to her leave of absence in 2021. Another employee was reassigned to that 8-hour post while the grievant was out of work, and thus it was unavailable when she returned. The agency has indicated that the employee who was assigned the grievant's former 8-hour post while the grievant was on leave has continued to work that post since the grievant returned to work.[20] The agency further explained that, when the grievant returned to work in November 2021, it was experiencing a severe staffing shortage at her facility. As a result, management reassigned the grievant and other employees to 12-hour shifts to ensure adequate coverage, allowing some posts with 8-hour shifts to remain unfilled.[21]

As we have found that the grievance does not challenge an adverse employment action under the particular facts of this case, the grievance does not qualify for a hearing. Further, the grievant has not offered any evidence to suggest that the agency has violated a mandatory policy provision by assigning staff to shifts in the manner that has occurred here, nor has EDR identified such a policy. As stated above, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government, including the methods,

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[15] *See id.*

[16] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 375-77 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253, 255-256 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 Fed. Appx. 726, 729 (4th Cir. 2004).

[17] *See* Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996).

[18] *See, e.g.*, Jones v. D.C. Dep't of Corr., 429 F.3d 276, 284 (D.C. Cir. 2005); *James*, 368 F.3d at 377.

[19] *See, e.g.*, EDR Ruling Nos. 2016-4203, 2016-4206; EDR Ruling No. 2015-3946.

[20] The employee assigned to the grievant's former post appears to have worked as a property officer at another nearby facility. The property officer post at the other facility was made available to all staff and filled in January 2022, but there is no evidence to suggest the grievant requested an assignment to that post.

[21] The grievant herself seems to acknowledge that posts with 8-hour shifts were vacant at the time, but asserts that she should have been offered one of those available positions instead of a 12-hour shift. The grievant also contends that at least one other employee was also assigned to an 8-hour post after she returned to work. The agency has represented that the employee in question submitted a written request for a shift change prior the grievant's leave of absence and apparently received approval for a shift change at approximately the same time the grievant returned to work in November 2021.

means and personnel by which work activities are to be carried out.[22] Furthermore, as the agency noted during the management steps, the conditions of employment for the grievant's position indicate that she "must be willing to work any shift and any post." We have carefully considered the evidence in the grievance record and found nothing to suggest that the grievant had sought an 8-hour shift as an accommodation for a disability or other medical condition, or that her desire to work an 8-hour shift amounts to more than her preference.[23]

Workplace Harassment

The grievant further alleges that the supervisor has engaged in harassing conduct that created a hostile work environment. Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment[24] and bullying,[25] 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.[26] As to the second element, the grievant must show that they perceived, and an objective reasonable person would perceive, the environment to be abusive or hostile.[27]

In support of her claim of workplace harassment, the grievant argues that, when she returned to work in November 2021, the supervisor made several comments about her medical

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[22] Va. Code § 2.2-3004(B).

[23] The grievant appears to have submitted at least two written requests for an assignment to an 8-hour shift after she initiated the grievance, apparently at the suggestion of management. However, the agency has informed EDR that the grievant began an additional extended leave of absence in March 2022. When the grievant returns to work, the agency should consider the grievant's request and operational needs at the facility when determining an appropriate shift assignment.

[24] 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."

[25] 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."

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

[27] 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).

leave that offended her. During the management steps, the agency investigated the grievant's concern and addressed the matter with the supervisor. Although the grievant clearly disagrees with the manner in which agency management handled this issue, EDR has not reviewed information that supports a claim that the agency has failed to address the supervisor's behavior in violation of policy. More significantly, EDR has not identified any other specific examples in the grievance record of the supervisor or other members of management engaging in alleged harassing conduct since November 2021, nor has the grievant alleged that any such conduct has occurred recently.

Policy 2.35 and its associated guidance make clear that agencies must not tolerate workplace conduct that is disrespectful, demeaning, disparaging, denigrating, humiliating, dishonest, insensitive, rude, unprofessional, or unwelcome. These terms must be read together with agencies' broader authority to manage the means, methods, and personnel by which agency work is performed, but management's discretion is not without limit. However, having thoroughly reviewed the evidence in the grievance record and the information provided by the parties, EDR cannot find that the facts as alleged raise a sufficient question as to whether the grievant has experienced conduct that is so severe or pervasive such that the grievance qualifies for a hearing at this time.[28]

Accordingly, because the grievant has not raised a sufficient question as to the existence of severe or pervasive harassment, bullying, or other adverse employment action, the grievance does not qualify for a hearing on these grounds. If the grievant experiences any further incidents of harassing conduct, she should report the information to the agency's human resources department or another appropriate authority. Policy 2.35 places affirmative obligations on agency management to respond to credible complaints of prohibited conduct and take steps to ensure that such conduct does not continue.[29] Moreover, this ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.

CONCLUSION

For the reasons expressed above, the facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure at this time.[30] EDR's qualification rulings are final and nonappealable.[31]

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[28] *See, e.g.*, EDR Ruling No. 2014-3836; *cf. Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.
[29] Under Policy 2.35, "[a]gency managers and supervisors are required to: Stop any prohibited conduct of which they are aware, whether or not a complaint has been made; Express strong disapproval of all forms of prohibited conduct; Intervene when they observe any acts that may be considered prohibited conduct; Take immediate action to prevent retaliation towards the reporting party or any participant in an investigation; [and t]ake immediate action to eliminate any hostile work environment when there has been a complaint of workplace harassment . . . ."
[30] *See Grievance Procedure Manual* § 4.1.
[31] *See* Va. Code § 2.2-1202.1(5).