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Department Of Human Resource Management
Office of Employment Dispute Resolution

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QUALIFICATION RULING

In the matter of the Virginia Department of Motor Vehicles
Ruling Numbers 2022-5345, 2022-5346, 2022-5401
June 10, 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 his three grievances filed respectively on October 29, 2021 and February 18, 2022 with the Virginia Department of Motor Vehicles (the "agency") qualify for a hearing. For the reasons discussed below, the grievances are qualified and consolidated for a hearing.

FACTS

On October 29, 2021, the grievant initiated two grievances (the "First Grievance" and "Second Grievance") alleging ongoing "mistreatment, yelling, disrespect, retaliation, and unprofessionalism" by his immediate Supervisor. The grievances cited two specific incidents in which the Supervisor allegedly denigrated the grievant's competence with others present and later threatened to retaliate against him for reporting her conduct to upper management. The grievant also claimed that the Supervisor engaged in discrimination against Black employees. In his grievance documentation, the grievant expressed to agency management that "[t]he treatment I have suffered from [the Supervisor] is so bad that I do not feel safe or comfortable when she is in the office due to constant fear of retaliation for no apparent reason." In response, agency management began an investigation into his allegations and instructed the grievant to report directly to his department's Director for the time being. In the meantime, the former agency head[1] declined to qualify either the First or Second Grievance for a hearing, reasoning that hearing qualification would be "premature" because the agency's "investigation [wa]s incomplete and the agency ha[d] not yet had an opportunity to consider what corrective measures may be appropriate."

While the agency's investigation was underway, the Supervisor was on (unrelated) extended leave. During this time, the agency apparently provided her with copies of the two grievances. The Supervisor ultimately returned to work on or about January 5, 2022. The grievant claims he was never made aware of the Supervisor's planned return or any limitations

[1] The head of the agency changed while the First and Second Grievances were pending for a ruling from EDR.

on their interactions while the investigation was in progress. In subsequent days, the Supervisor allegedly escalated harassing behavior toward the grievant.[2]

On or about January 13, 2022, the agency's investigator submitted a report to agency management to the effect that the investigation did not sustain any allegations of policy violations by the Supervisor. However, agency management concluded that the investigation had not fully addressed the scope of the grievant's ongoing allegations and, thus, initiated a second investigation. While the second investigation was pending, agency management permanently reassigned both the grievant and the Supervisor in order to reduce their interactions.

On February 18, 2022, the grievant filed another grievance (the "Third Grievance"), alleging that agency management had condoned and perpetuated a hostile and retaliatory work environment, including effectively demoting him because of his complaints. While the Third Grievance was pending, the agency's expanded investigation concluded that most of the grievant's allegations could not be sustained or were not factual. Upon a review of the investigation report, the agency head maintained that the agency would continue to take any necessary corrective actions to prevent harassment, but declined to qualify the Third Grievance for a hearing. The grievant now appeals the agency's qualification determination as to each of his three grievances.

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.[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, or whether state policy may have been misapplied or unfairly applied.[5] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action in its totality was so unfair as to amount to a disregard of the applicable policy's intent.[6]

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."[7] 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

[2] The grievance record reflects that the Supervisor herself repeatedly reported to management since mid-October 2021 that the grievant was treating her disrespectfully.
[3] *See Grievance Procedure Manual* § 4.1.
[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. 2020-4956.
[7] Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).

responsibilities, or a decision causing a significant change in benefits."[8] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9] 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."[10]

Misapplication/Unfair Application of Policy

Although DHRM Policy 2.35 prohibits workplace harassment[11] and bullying,[12] alleged violations must meet certain requirements to qualify for a hearing. Harassment, bullying, or other prohibited conduct 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;[13] and (3) imputable on some factual basis to the agency.[14]

DHRM 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. While these terms must be read together with agencies' broader authority to manage the means, methods, and personnel by which agency work is performed, management's discretion is not without limit. Policy 2.35 also 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. Specifically, "[a]gency managers and supervisors are required to: [s]top any prohibited conduct of which they are aware, whether or not a complaint has been made; [e]xpress strong disapproval of all forms of prohibited conduct; [i]ntervene when they observe any acts that may be considered prohibited conduct; [t]ake immediate action to prevent retaliation towards the reporting party or any

[8] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[9] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[10] 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)).
[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] The grievant must show that he or she perceived, and an objective reasonable person would perceive, the environment to be abusive or hostile. 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)). "[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).
[14] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

participant in an investigation; [and t]ake immediate action to eliminate any hostile work environment when there has been a complaint of workplace harassment . . . ."[15] When an agency fails to meet these obligations, such failure may constitute a misapplication or unfair application of Policy 2.35 such that the harassing or bullying behavior is imputable to the agency.

In this case, the grievant's initial grievance submissions to the agency included several allegations of conduct by his Supervisor that, if accurate, would likely have violated DHRM Policy 2.35 and, arguably, could have supported a finding that the grievant was experiencing a hostile work environment. For example, the grievant alleged that the Supervisor yelled at him and criticized his job performance in front of others during two meetings, engaged him in negative gossip about other employees, sent him excessive work-related text messages on his days off, frequently "slammed [the grievant's] office door, smacked her hands on [his] desk, and loudly stomped through the office." The grievant alleged that, on multiple occasions, the Supervisor had criticized him – sometimes in front of others – for following state policy and ethical practices, and she began to treat him disrespectfully after he defended his actions. In his initial submissions, the grievant also described a series of allegedly bullying and/or retaliatory incidents that occurred on October 27, 2021: the Supervisor demanded he cancel a meeting he had scheduled with others that morning, with little notice; reprimanded him on a group email and again later in a group meeting; and twice interrupted the grievant's meeting with his staff for no clear reason. Subsequently, the Supervisor allegedly came to the grievant's office and threatened to make a retaliatory complaint against him.[16]

After returning from leave, the Supervisor apparently continued to act in a managerial capacity over the grievant and his staff, almost immediately calling them for a staff meeting even though the Director had specifically instructed her not to do so while the grievant's allegations were still under investigation. In the subsequent days, the grievant alleges that the Supervisor subjected him to increasingly intimidating behavior. He reported to agency management that the Supervisor would stomp past his office and glare at him, went through his drawers and personal belongings when he was away from his desk, made excessive use of a loud hole-punch machine outside his office several times per day, and continued to reprimand both the grievant and his staff members on group emails.

Upon a thorough review of the combined grievance record, EDR concludes that a sufficient question exists whether the agency correctly and fairly applied DHRM Policy 2.35 with respect to the grievant's ongoing complaints about his Supervisor. After receiving the First and Second Grievances and supporting documentation, the agency appropriately initiated an investigation into the allegations and removed the grievant from the Supervisor's reporting chain. Upon concluding that its initial investigation had not rendered a complete analysis of the grievant's complaints, the agency then initiated a second, more comprehensive investigation with the goal of thoroughly addressing the full scope of the grievant's allegations. In addition, agency

[15] DHRM Policy 2.35, *Civility in the Workplace*.

[16] According to the grievant's initial complaint, the Supervisor came to his office to express that she was frustrated with him and wanted to get "on the same page." The grievant responded that, at that point, he wanted their Director to be involved in such discussions because he had already reported the Supervisor's treatment as inappropriate. The grievant claims that the Supervisor then said, "maybe I should . . . tell them you are creating a hostile work environment for me." The grievant interpreted this statement to mean that, if management were presented with conflicting accounts, the Supervisor's claims would prevail. The grievant has expressed that, as a Black man in conflict with a Caucasian woman, he felt the Supervisor was conveying a credible threat.

management apparently attempted to mitigate ongoing problems between the Supervisor and grievant by encouraging liberal use of telework to avoid in-office interactions. Nevertheless, the record also reflects a number of acts and omissions that arguably may not have been consistent with the agency's obligation to prevent retaliation and eliminate any hostile work environment – both of which were alleged in the grievant's initial complaint documents.

For example, the record indicates that the agency disclosed the First and Second Grievances to the Supervisor in early December. Although the grievance procedure generally favors resolution at the lowest possible management level – that is, typically, by the grievant's supervisor – the procedure also provides an important exception for grievances alleging discrimination and/or retaliation by the supervisor herself.[17] This exception recognizes that an employee who has already experienced retaliation by a supervisor may be particularly vulnerable to escalations in retaliatory conduct in response to a complaint, which can be a significant deterrent to an employee's use of the grievance process. Here, the grievant apparently availed himself of the option to bypass his Supervisor, who he was accusing of harassment, bullying, and retaliation. Although the grievance procedure does not explicitly prohibit disclosure to the supervisor in such circumstances, we observe that grievances generally are to be treated as confidential personnel information.[18] As such, consistent with similar personnel records, their existence and contents generally should not be disclosed except to appropriate individuals and on a "need to know" basis. In this case, given that the grievant's allegations were being explored through a formal investigation, it is unclear what agency interest was served by the Supervisor's independent review of the First and Second Grievances in their entirety.[19]

Moreover, disclosure of the grievances to the Supervisor in this case apparently led to wider disclosure of at least a portion of the grievant's substantive complaint. It appears that, in a matter of days after reviewing the First and Second Grievances, the Supervisor submitted a request for records pertaining to the grievant's complaints through the agency's Freedom of Information Act ("FOIA") process. In her request, the Supervisor specifically sought documents from three of the grievant's direct reports (who were, by extension, her own subordinates as well) that would support the grievant's claim that the Supervisor "acted rudely or in an offensive manner" in the workplace. The agency's FOIA staff then apparently circulated the request verbatim to these individuals, identifying not only the grievant by name but also the crux of his complaint against their mutual Supervisor. We emphasize that among those who received this request were other employees who the grievant alleged could support his allegations, and who now could observe their Supervisor conducting her own investigation and looking for other employees who may have complained about her conduct. It also appears that the Supervisor subsequently used the FOIA process to request the grievant's personal notes of their meetings. Even assuming that FOIA required the agency to disclose documents related to the grievant's complaint to the complaint respondent (which is uncertain), we question whether the agency's means of identifying responsive documents was consistent with the imperative to keep grievance

[17] Although a grievant must typically submit their grievance to their immediate supervisor, the grievance procedure provides an exception where the grievance "alleg[es] discrimination or retaliation by the immediate supervisor." *Grievance Procedure Manual* § 2.4. In that case, the grievance "may be initiated with the next level supervisor." *Id.* It appears that the grievant here invoked this option for both grievances, submitting both directly to his department Director in order to bypass the Manager, who he accused of both discrimination and retaliation.

[18] *See* DHRM Policy 6.05, *Personnel Records Disclosure*.

[19] To illustrate this point, the relief sought by the grievant in his First and Second Grievances included termination of the Supervisor's employment. Evidence in the record suggests that it did inflame the situation.

records confidential and to prevent retaliation. In light of the grievant's allegations that the Supervisor had already engaged in retaliation and harassment of both himself and their subordinate employees, the lack of discretion around the First and Second Grievances is unusual.

Apart from these confidentiality issues, the record presents additional questions as to whether the agency took adequate and appropriate action to prevent a potential retaliatory and/or hostile work environment for the grievant while his claims were under investigation. It is unclear the extent to which management explained any limits on the Supervisor's managerial authority while the agency was investigating allegations of her misconduct. According to the grievant, the Supervisor engaged in a pattern of intimidating behavior in the office after her return from leave. On January 31, 2022, the grievant met with the Director and the agency's employee relations manager to discuss both his initial complaints and new allegations. During the meeting, the employee relations manager made a number of statements that arguably were dismissive of the grievant's allegations.[20] The employee relations manager also asserted that the agency would not act on these allegations because the first (apparently insufficient) investigation had not sustained them.

We acknowledge that the agency's first investigation yielded a substantial amount of information relating to the grievant's claims, such that the agency could have reasonably considered at least some of the grievant's allegations not sustained at that point.[21] The investigation also yielded numerous allegations from the Supervisor herself about how the grievant had treated her since his hire – primarily that he seemed not to respect or accept her supervisory authority and guidance, to the point of insubordination and deception. The record reflects that, by the end of January 2022, agency management was regularly receiving complaints from both the grievant and the Supervisor, both claiming the other was harassing and undermining them. We recognize the challenge that this situation posed to agency management in its efforts to determine the merits of the employees' respective complaints.

On the other hand, the investigation did seem to confirm that, on multiple occasions, the Supervisor criticized the grievant's performance in the presence of others, which could constitute unprofessional supervisory conduct prohibited by DHRM Policy 2.35. Furthermore, the investigation appeared to ignore certain key allegations that could constitute misconduct under Policy 2.35. For example, the report did not address allegations that the Supervisor regularly displayed angry and intimidating behavior in the workplace (stomping, slamming, glaring), or that the Supervisor disparaged the grievant to other employees. It also did not address the significant question of whether the Supervisor went to the grievant's office on October 27, 2021, and threatened him in person with a retaliatory complaint. Accordingly, as of January 31, 2022,

[20] For example, as can be heard in an audio recording of the meeting, the employee relations manager questioned why the Supervisor would discriminate against Black employees like the grievant, since she had been the one to hire them. In response to the grievant's claim that the Supervisor had been rummaging through his desk, the employee relations manager emphasized that the grievant should have no expectation of privacy in his agency office, suggesting that such a complaint was not legitimate. The human resource representatives in the meeting also appeared unfamiliar with the grievant's earlier allegation that the Supervisor had specifically threatened to report him for creating a hostile work environment *because* the grievant had complained about her. In a subsequent meeting, the employee relations manager apparently told the grievant that the Supervisor had indeed presented a "counter complaint" against him.

[21] For example, the first investigator gathered evidence that was inconsistent with the grievant's account of what the Supervisor had said and her tone of voice in group meetings. The investigator also obtained text messages between the Supervisor and the grievant that did not match the grievant's account of the messages.

it would appear that these allegations against the Supervisor remained unresolved, as were new allegations of retaliatory intimidation since her return from leave. We conclude that these facts raise a sufficient question of whether the agency misapplied or unfairly applied DHRM Policy 2.35 and its affirmative obligations to respond to employee complaints.

Adverse Employment Action

On or about February 7, 2022, management permanently reassigned both the grievant and the Supervisor to new positions. The Supervisor, who had previously overseen the agency's employee personnel classification and recruitment functions, was reassigned to manage only the classification function. The grievant, who had previously served in the position of Recruitment Manager under the Supervisor, was reassigned to the position of Outreach and Student Programs Coordinator. In the Third Grievance, the grievant argues that this reassignment is effectively a retaliatory demotion undertaken by agency management.

In general, a lateral reassignment not motivated by disciplinary considerations will not rise to the level of an adverse employment action, and subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.[22] However, a transfer or reassignment may constitute an adverse employment action if a grievant can show that there was some significant detrimental effect on the terms, conditions, or benefits of their employment.[23] For example, a "decrease in compensation, job title, level of responsibility, or opportunity for promotion" could constitute an adverse employment action.[24]

At the time that he filed the First and Second Grievances, the grievant held the position of Recruitment Manager, in the Role of Human Resources Manager I. In that position, the grievant was "responsible for the supervision of the HR recruitment and selection function," including supervision of approximately eight recruitment staff (constituting 35 percent of his duties). Specific other duties included "implement[ing] best practices in the area of compliance" (25 percent of duties), "expanding outreach and candidate sourcing" (15 percent), and "developing and delivering staff and manager training" (15 percent). As Recruitment Manager, the grievant was also responsible for "partner[ing] with leadership across the agency to build . . . major change initiatives" and "improv[e] recruitment and selection outcomes that lead to increased talent, diversity and retention." Among the competencies required for the agency's Recruitment Manager position are "extensive knowledge" of federal compliance requirements, knowledge of state policies "related to recruitment and selection, compensation, benefits and payroll, and EEO compliance," supervisory experience, familiarity with records management requirements, experience in data analysis, and knowledge of administrative office practices, investigations, and data collection techniques. At the time he filed his grievances, the grievant reported to the Supervisor, who reported to the Director.

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[22] James v. Booz-Allen & Hamilton, 368 F.3d 371, 377 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999) (the "trivial discomforts endemic to employment" do not rise to the level of an adverse employment action).

[23] *See* Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007); *James*, 368 F.3d at 375-77; *Boone*, 178 F.3d at 255-256; *see also* Edmonson v. Potter, 118 Fed. Appx. 726, 729 (4th Cir. 2004) *Boone*, 178 F.3d at 256 ("a change in working conditions may be a factor to consider in assessing whether a reassignment qualifies as an adverse employment action").

[24] Cole v. Wake Cty. Bd. of Educ., 834 Fed. App'x 820, 821 (4th Cir. 2021) (quoting *James*, 368 F.3d at 376).

As Outreach and Student Programs Coordinator, the agency has represented that the grievant will stay in the Role of Human Resources Manager I, with no change to his salary or Pay Band. The Director has described the position as "the face of [agency] recruitment" to the public, with key responsibilities to "interact with organizations, committees and schools to promote and attract candidates" and to "establish an intern program" for the entire agency. As such, he will be responsible for "establish[ing] and maintain[ing] business relationships," "ensur[ing] regular participation in various recruitment outreach events," and management of "marketing and advertising strategies" for agency job recruitments (55 percent of duties). The grievant will also "develop, implement and oversee an internship program," serving as the "point of contact" and developing "relationships with colleges, universities, and trade schools" (25 percent); and implement changes to the agency's current student-worker program (20 percent). Among the competencies required for this position are experience in establishing stakeholder relationships, project management, developing marketing communications, and managing social media recruiting tools. As the Outreach and Student Programs Coordinator, the grievant no longer supervises employees but, according to the Director, would ideally work closely with department leadership to identify and define specialized opportunities for interns and student workers. Meanwhile, the agency has indicated that it is actively recruiting to fill the grievant's former Recruitment Manager position, and the grievant will ultimately report to the individual selected for that position.

Upon a review of all available information about the grievant's former and current positions, we must conclude that the record presents a sufficient question whether the reassignment was an adverse employment action. The agency has emphasized that the grievant's Role and pay have not changed. However, a comparison of the two positions raises the possibility that, in his new position, the grievant will primarily focus on recruitment of younger workers for non-employee or entry-level positions, as opposed to general recruitment support for a variety of permanent positions across the agency. In addition, the grievant was previously responsible for significant supervisory oversight, with eight direct reports, accounting for 35 percent of his duties. However, as Outreach and Student Programs Coordinator, he no longer serves in a supervisory capacity.[25] Finally, the agency has explained that, after it hires a new Recruitment Manager, the grievant will ultimately report to that individual in his new position as a subordinate. The agency has clarified that it has restructured the Recruitment Manager position to some extent, now classifying it in the Role of Human Resources Manager II, reporting directly to the department Director. However, it is not clear how the new Recruitment Manager's duties and scope of responsibility will be appreciably different from the duties assigned to the grievant when he held the position. For all of these reasons, we conclude there is a sufficient question whether the agency's reassignment of the grievant constituted an effective demotion or other

[25] Considering all of the facts available at this time, the record appears to raise a question whether the position of Outreach and Student Programs Coordinator is appropriately classified as a Human Resource Manager I. According to the Role descriptions set forth in DHRM's job classification structure, a Human Resource Manager I would typically have "[d]iverse and extensive contact with all levels of government officials, employees, benefits providers and the general public to provide consultation and problem resolution services as well as to discuss matters of controversy and litigation." They would have a "major impact on the lawful, effective, compliant and successful implementation and/or management of an agency's human resource programs" and would provide "guidance and recommendations on diverse and/or complex issues, and ensure[] compliance based on accurate interpretation of federal and state policies and regulations." It is unclear whether the grievant's redirected focus on interns and younger workers, with no supervisory responsibilities, would be consistent with these guidelines. We further note that, when the agency previously recruited candidates for the position of Outreach and Student Programs Coordinator, the position was classified in the Role of Human Resource Analyst I.

significant, tangible change to the scope of his job responsibilities and authority. Accordingly, the grievances considered together meet the threshold requirement of presenting an adverse employment action that may qualify for a hearing.

Moreover, we must conclude that the record presents a sufficient question whether the grievant's reassignment could meet the standard for a claim of retaliation. A retaliation claim may qualify for a hearing if the grievant presents evidence raising a sufficient question whether the grievant's protected activity is causally connected to a subsequent adverse employment action against him.[26] Ultimately, a successful retaliation claim must raise a sufficient question as to whether, but for the grievant's protected activity, the adverse action would not have occurred.[27]

Here, it appears that the grievant engaged in protected activity when he initiated two grievances and then presented additional informal complaints to the agency alleging ongoing harassment by the Manager. As explained above, he then arguably experienced an adverse employment action in that he was reassigned to a position with significantly different and/or diminished responsibilities. The agency has consistently explained that the grievant was reassigned because it appeared from his statements (and the separate statements of the Supervisor) that he could not reasonably continue to work with the Supervisor due to her mistreatment of him. While we do not dispute the agency's judgment that the escalating circumstances called for workplace mitigations, we must conclude that the record raises a sufficient question whether the grievant would have been permanently reassigned in this manner but for his ongoing reports that his Supervisor was creating a hostile work environment for him.

In reaching the foregoing conclusions, we do not discount the ultimate findings of the agency's second investigation, which addressed over 40 separate allegations by the grievant, spanning all three grievances, regarding the Supervisor's conduct and the agency's response. As in the first investigation, several allegations appear to have been adequately investigated and not sustained based on the available evidence. However, while the report reflects a thorough investigation in some respects, there are reasonable questions as to the extent to which essential principles of human resource management and employment law informed its conclusions. In addition, upon reviewing several of the allegations deemed "not sustained" by the second investigator, the basis for such a conclusion is not apparent from the investigator's explanation. As a result, we are unable to assess whether the agency adequately investigated these allegations – such as that the Supervisor told another employee on November 1, 2021 that the grievant would be demoted soon; that the Supervisor held a terse meeting with the grievant's staff on the day she returned from leave; and that in January 2022 the Supervisor began to use a loud electronic hole puncher near the grievant's office several times a day. Finally, similar to the first investigation, the second investigation does not appear to have made any findings as to a key allegation from the grievant's initial grievance documents: that the Supervisor came to the grievant's office on October 27, 2021 and threatened to make a retaliatory complaint against him.

[26] *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).
[27] *Id.*

We emphasize that this ruling draws no conclusions or inferences as to the ultimate issue of whether the grievant experienced a hostile work environment and/or other conduct prohibited by DHRM Policy 2.35. The record does suggest that dysfunction between the grievant and his Supervisor escalated quickly and continued to do so for some months, which would have triggered the agency's affirmative obligations to eliminate any hostile work environment and prevent retaliation against the complainant. While the agency in this case took important responsive steps, the grievant was ultimately reassigned to a new, non-supervisory position soon after he presented additional allegations of escalating hostility. Based on all the facts and circumstances, the record raises a sufficient question whether the agency's approach met the minimum policy requirements of DHRM Policy 2.35, and ultimately whether the grievant experienced an adverse employment action as a result of such a misapplication or unfair application of policy.

CONCLUSION

For the foregoing reasons, the facts presented by the grievant present claims that qualify for a hearing under the grievance procedure.[28] Because the grievant has raised a sufficient question as to whether the agency misapplied or unfairly applied policy in connection with his complaints of harassment and retaliation, the three grievances asserting a continuous pattern of such conduct qualify for a hearing on these grounds. The grievances are qualified in full, including any alternative and related theories raised by the grievant that the agency's acts or omissions were improperly motivated by discrimination or retaliation.

Approval by EDR in the form of a compliance ruling is required before two or more grievances may be consolidated in a single hearing. Moreover, EDR may consolidate grievances for hearing without a request from either party.[29] EDR strongly favors consolidation and will consolidate grievances when they involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.[30]

EDR finds that consolidation of the grievant's three grievances is appropriate. These grievances involve the same grievant and could share common themes, claims, and witnesses. Further, we find that consolidation is not impracticable in this instance. Therefore, the three grievances are consolidated for a single hearing.[31]

At the hearing, the grievant will have the burden of proof to establish his claims.[32] If the hearing officer finds that the grievant has met this burden, they may order corrective action as authorized by the grievance statutes and grievance procedure, including reinstating the grievant to his former position or an equivalent position and providing a work environment free from harassment and retaliation.[33] Within five workdays of receipt of this ruling, the agency shall

[28] *See Grievance Procedure Manual* § 4.1.
[29] *Grievance Procedure Manual* § 8.5.
[30] *See id.*
[31] Pursuant to the fee schedule established by EDR's Hearings Program Administration policy, consolidated hearings shall be assessed a full fee for the first grievance, an additional half fee for the second grievance, and an additional $400 for each additional grievance. *See* EDR Policy 2.01, *Hearings Program Administration*, Attach. B.
[32] *Rules for Conducting Grievance Hearings* § VI(C).
[33] Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* § VI(C).

request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

EDR's qualification rulings are final and nonappealable.[34]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[34] *See* Va. Code § 2.2-1202.1(5).