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Department Of Human Resource Management
Office of Employment Dispute Resolution

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QUALIFICATION RULING

In the matter of Norfolk State University
Ruling Number 2022-5412
June 7, 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 March 7, 2022 grievance with Norfolk State University (the "university" or the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

On February 18, 2022, the grievant received a verbal counseling (described in the documentation as a "verbal warning") for alleged insubordination arising out of an incident where she is described as having failed to follow her supervisor's instructions on February 17. The grievant initiated a grievance on March 7, arguing that she complied with her supervisor's instructions on February 17 and that her supervisor is "untrustworthy, dishonest and lacks integrity." The grievant also claims that "all reprimands/write-ups" she has received are "frivolous . . . and only serve as a set-up to create a paper trail to justify [her] termination." As relief, the grievant requested removal of the verbal counseling "and all other reprimand[s]" from her personnel file and an investigation of her department.

During the management steps, the university confirmed that the grievant has not received any formal disciplinary actions since she began working for the university and that there were "no official reprimands/write-ups in [her] human resources and personnel file." As the February 18, 2022 management action was only a verbal counseling, the agency head subsequently 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 discrimination, 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]

Verbal Counseling

The primary management action challenged in the grievance is the grievant's receipt of a verbal counseling on February 18, 2022. The grievant alleges that the verbal counseling was unwarranted because she complied with her supervisor's instructions, and that the university is attempting to "create a paper trail to justify [her] termination."

EDR has considered the grievant's allegations about the events that led to the issuance of the verbal counseling. Although the grievant reasonably disagrees with the university's decision to issue the verbal counseling, such counseling is an example of informal supervisory action. It is not equivalent to a written notice of formal discipline.[8] Verbal 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] Because the record does not raise a sufficient question as to whether the grievant has experienced an adverse employment action in relation to her receipt of the verbal counseling, this grievance does not qualify for a hearing on these grounds.[10]

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[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)).
[8] *See* DHRM Policy 1.60, *Standards of Conduct*.
[9] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[10] Because the issue before EDR is whether this grievance qualifies for a hearing, our ruling does not address the merits of the verbal counseling. In addition, while the grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and

The verbal counseling has not had a tangible adverse effect on the grievant's employment at this time, but it could be used to support a future adverse employment action against the grievant.[11] Should the verbal counseling grieved in this instance later serve to support an adverse employment action against the grievant, such as a formal Written Notice or an annual performance rating of "Below Contributor," this ruling does not prevent the grievant from contesting the merits of these issues through a subsequent grievance challenging such a future related adverse employment action.

Hostile Work Environment

In addition, the grievant appears to further alleges that university management has 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 harassment[12] and bullying,[13] 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.[14] 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.[15]

Dissemination Practices Act (the "Act"). Under the Act, if the grievant gives notice that she wishes to challenge, correct, or explain information contained in her 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 her 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] The verbal counseling advises the grievant that, "if these actions continue[] results could lead to formal disciplinary action."

[12] 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."

[13] 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."

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

[15] 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

In her response to the verbal counseling, the grievant states that her supervisor and others in management have "display[ed] unethical conduct and behavior" and "misuse[d] and abuse[d] their power and authority." In her request for qualification, the grievant claims that she has been "subjected to several actions which [she] consider[s] to be unfair, discriminatory, and retaliatory" based in part on her past attempts to use the grievance process. The grievant further explains that university management has displayed "[f]avoritism and nepotism combined with a lack of professionalism" that has created a hostile work environment intended to "cause [her] to quit or hasten and support reasons for [her] termination." The grievant asserts that she "filed a number of grievances in an attempt to stop the harassment . . . only to be completely ignored."

Other than her claims regarding the verbal counseling she received on February 18, 2022, the grievant has presented no evidence or other information to support the allegations described above. For example, EDR has not reviewed any evidence about the grievant's allegations of discrimination and the grievant has not identified any protected status on which such alleged discrimination may have been based. The grievant has also not described or provided information about any alleged acts of improper conduct by university management, except for her receipt of the verbal counseling.[16] In short, the grievant has not provided anything to support her claims of discrimination, retaliation, or workplace harassment beyond the allegations recounted above.

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. 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. Generally, then, the grievant's supervisor has authority to determine, among other things, the grievant's performance expectations and the appropriate manner of substantive feedback to address identified performance deficiencies. Having carefully reviewed the grievance record and considering the grievant's claims as a whole, EDR cannot find that the facts as alleged raise a sufficient question whether the grievant has described conduct that was so severe or pervasive as to alter the conditions of her employment such that the grievance qualifies for a hearing.[17] In this case, the evidence before EDR indicates that neither the circumstances giving rise to the verbal counseling nor the verbal counseling itself were so severe or pervasive that they could establish a hostile or abusive work environment or other agency violation of Policy 2.35. As noted above, the grievant has not provided any other evidence of alleged workplace harassment, whether based on a protected status or not, that could support qualification of the grievance for a hearing at this time.

As to the grievant's allegation of retaliation, such a claim 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

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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).

[16] To the extent the grievant has received other counseling in the past, it is likely to have been informal verbal or written counseling of the type she received on February 18 as university human resources has confirmed the grievant has received no formal disciplinary actions.

[17] *See, e.g.,* EDR Ruling No. 2014-3836; *cf. Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.

protected activity and the adverse action.[18] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[19] However, the grievance record does not reflect that the grievant has suffered an adverse employment action as explained above. Further, the grievant has not identified acts or omissions that could reasonably be viewed as exceeding managerial discretion or would not have occurred but for a retaliatory motive.[20]

Accordingly, because the grievant has not raised a sufficient question as to the existence of severe or pervasive harassment, bullying, or retaliatory conduct at this time, the grievance does not qualify for a hearing on any of these grounds. If the grievant experiences additional incidents of alleged harassing or retaliatory conduct, she should report the information to the university's human resources department or another appropriate authority. DHRM 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.[21] In addition, to the extent the grievant may wish to pursue a complaint of discrimination, she may consider filing a complaint about those matters through a different process, such as the federal Equal Employment Opportunity Commission or the Office of Civil Rights within the Virginia Attorney General's Office. Lastly, this ruling in no way prevents the grievant from raising these matters again in a future grievance if the alleged conduct continues or worsens.

CONCLUSION

For the reasons expressed above, the facts presented in the grievant's March 7, 2022 grievance do not raise claims that qualify for a hearing under the grievance procedure.[22] EDR's qualification rulings are final and nonappealable.[23]

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Office of Employment Dispute Resolution

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[18] *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).
[19] *Id.*
[20] This ruling determines only that the grievant's claims do not qualify for an administrative hearing under the grievance procedure. It does not address whether there may be some other legal or equitable remedy available to the grievant in relation to these claims.
[21] Under Policy 2.35(D)(4), "[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 . . . ."
[22] *See Grievance Procedure Manual* § 4.1.
[23] *See* Va. Code § 2.2-1202.1(5).