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## QUALIFICATION RULING

In the matter of the Department for the Blind and Vision Impaired
Ruling Numbers 2023-5486, 2023-5532
March 23, 2023

The grievant seeks a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) as to whether two grievances, which she initiated with the Department for the Blind and Vision Impaired (the "agency") on August 16, 2022 and March 2, 2023, respectively, qualify for a hearing. For the reasons set forth below, EDR finds that the grievances are not qualified for a hearing.

### FACTS

On or about July 28, 2022, the agency issued to the grievant a Group II Written Notice citing unsatisfactory performance in several areas. On or about August 16, 2022, the grievant initiated a grievance ("First Grievance") challenging the Written Notice. Specifically, the grievant asserted that the charges articulated in the Written Notice were "false and or grossly misleading," and she offered a detailed rebuttal to the allegations against her. Moreover, the grievant argued that the false accusations "create[d] a hostile and threatening environment." As relief, she requested rescission of any documents related to the disciplinary action. Following a meeting with the grievant, the first management resolution step granted the requested relief. Nevertheless, the grievant sought qualification for a hearing, on grounds that the disciplinary process itself perpetuated a pre-existing hostile work environment that caused her to need multiple periods of extended medical leave. Therefore, the grievant requested restoration of leave benefits that she exhausted during these periods. The agency head responded that the agency was unable to grant this request, and he declined to qualify the First Grievance for a hearing. The grievant appealed that determination to EDR.

Shortly after the grievant noted her appeal as to the First Grievance, the grievant's manager presented the grievant with her annual evaluation for the 2021-22 performance cycle. The evaluation rated the grievant's overall performance at the "Contributor" level; however, in two performance categories, the grievant received a sub-rating of "Below Contributor." The grievant objected to these sub-ratings and ultimately filed a grievance ("Second Grievance") asserting that the performance evaluation was "nefarious in nature," in part because it was completed by a manager who was implicated in the First Grievance. As relief, the grievant requested to "work in an environment free of harassment, intimidation and micro-aggressions." She also requested

"consistent feedback and communication" from management and revision of her performance evaluation to indicate that she was meeting expectations in all evaluation areas. The agency head declined to revise the performance evaluation or to qualify the grievance for a hearing. The grievant has now also appealed that determination to EDR. This ruling will address both appeals as to the issue of qualification for hearing.

## 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] For example, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[2] Thus, typically 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."[3] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[4] 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."[5]

Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government, including the establishment of performance expectations and the rating of employee performance against those expectations.[6] Accordingly, for a grievance challenging a performance evaluation to qualify for a hearing, there must be facts raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, whether state policy may have been misapplied or unfairly applied, or whether the performance evaluation was arbitrary and/or capricious.[7] 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.

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

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[1] *See Grievance Procedure Manual* § 4.1.
[2] *See Grievance Procedure Manual* § 4.1(b).
[3] Ray v. Int'l Paper Co., 909 F.3d 661, 667 (4th Cir. 2018) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).
[4] Laird v. Fairfax County, 978 F.3d 887, 893 (4th Cir. 2020) (citing Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007)) (an adverse employment action requires more than a change that the employee finds "less appealing"). For purposes of this ruling, we assume that the grievant's unsatisfactory performance review constituted an adverse employment action. *See, e.g.* EDR Ruling No. 2020-5101.
[5] 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)).
[6] Va. Code § 2.2-3004(B).
[7] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.[8]

As an initial matter, EDR cannot conclude that either the Group II Written Notice or the grievant's subsequent annual performance evaluation constitute qualifiable issues in and of themselves. Although a Written Notice would ordinarily be considered a formal disciplinary action that automatically qualifies for a hearing, in this case the Written Notice was rescinded at the first management step of the First Grievance. Accordingly, that issue would appear to be moot and not susceptible to further relief through a hearing.[9] As to the annual performance evaluation, a satisfactory performance evaluation is generally not considered an adverse employment action.[10] Although the evaluation indicated that the grievant's performance was not satisfactory in two areas, sub-ratings of "Below Contributor" do not trigger any resulting performance action under DHRM Policy 1.40, *Performance Planning and Evaluation* – in contrast with a "Below Contributor" overall rating, which can create a basis for termination of employment.[11] Accordingly, neither the rescinded formal discipline nor the overall satisfactory performance evaluation appear to have had a tangible effect on the terms, benefits, or conditions of the grievant's employment. As such, they do not meet the threshold standard to qualify for a hearing.

However, the grievant also claims that she has been subject to a hostile work environment by multiple members of management who engaged in or condoned "malicious" and "nefarious" actions against her. DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment[12] and bullying.[13] 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

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[8] *See*, *e.g.*, EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.

[9] The grievant claims that being subject to false accusations in the Written Notice caused her need for medical leave in mid-2022, and therefore she has requested that the agency restore her leave in addition to rescinding the Written Notice. EDR is not aware of any policy provision that would have required the agency to grant this request. Because we can identify no basis for a hearing officer to order such relief, denial of the grievant's request in this regard is not grounds to qualify the grievance for a hearing.

[10] *E.g.*, EDR Ruling No. 2013-3580; EDR Ruling No. 2010-2358; EDR Ruling No. 2008-1986; *see also* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377-378 (4th Cir. 2004) (holding that, while an employee's performance rating was lower than on his previous evaluation, there was no adverse employment action where he failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment). "[A] poor performance evaluation is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment." *James*, 368 F.3d at 377 (citation and internal quotation marks omitted). Although DHRM Policy 1.40, *Performance Planning and Evaluation*, establishes remedial procedures for substandard performance, these procedures do not apply unless an employee's *overall* performance rating is "Below Contributor." Policy 1.40 does not mandate any adverse results for a "Below Contributor" sub-rating where the overall rating is satisfactory.

[11] DHRM Policy 1.40, *Performance Planning and Evaluation*; *see James*, 368 F.3d at 377.

[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."

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]

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. Thus, 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.[16] Accordingly, where an employee reports that work interactions have taken on a harassing or bullying tone, Policy 2.35 requires agencies to determine in the first instance whether such perceptions are reasonably supported by the facts. Where 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 contends that she has been subject to hostile actions by managers since early 2022. At that time, she describes being required to provide face-to-face services to agency clients despite public health concerns. She alleges that this requirement caused disabling medical issues that necessitated a leave of absence. After her return, she received notice of disciplinary charges that she viewed as false. She asserts that these charges necessitated another medical leave of absence, which was then exacerbated by her managers' decision to mail the Group II Written Notice to her home while she was recovering. She argues that, even if ultimately rescinded, disciplinary action issued in bad faith based on false allegations is a form of harassment.[17] According to the grievant, hostile actions resumed after her return to work in October 2022; she alleges that her supervisors denied her requests to telework and to take leave as needed to manage her disability. Finally, she maintains that two substandard ratings in her annual

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[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 2.35, *Civility in the Workplace – Policy Guide* ("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).

[16] 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 . . . ."

[17] The grievant further suggests that the Written Notice, before it was rescinded, prevented her from being considered for a promotional opportunity for which she was qualified. However, the record does not indicate that she applied for any such opportunity.

evaluation were unfounded and retaliatory. She claims that these events have created a discriminatory[18] and hostile work environment.

Upon a thorough review of the information presented by the parties, EDR cannot conclude that the agency's performance management actions raise a sufficient question as to whether the grievant has experienced a hostile work environment. The Written Notice issued to the grievant on July 28, 2022, charged the grievant with refusing service to agency clients and/or questioning their care needs. As detailed in her due process response, the grievant offered a starkly different account of the events in question. While the grievant contends that the Written Notice as issued was "completely false," we are unable to identify facts to suggest that the charges were malicious, rather than a matter of active dispute between the grievant and the issuing manager, as often exists in disciplinary situations. The grievant understandably viewed management's decision to issue and deliver the Written Notice while she was out on medical leave as insensitive. However, in light of the agency's ultimate decision to rescind the disciplinary action in this case, we cannot conclude that the totality of the circumstances could reasonably support a hostile work environment claim in this case.

Similarly, we cannot find that the performance evaluation completed in November 2022 raises a sufficient question as to whether the grievant has experienced a hostile or retaliatory work environment. The evaluation noted that "the documentation on [the grievant's] calendar and telework logs were often incomplete or not submitted as required" and that the grievant did not provide "in-service trainings to individuals or groups regarding [agency] services during this performance cycle." In the Second Grievance, the grievant disputed the validity of these reviews and alleged that they were retaliatory in nature. However, the grievant does not appear to dispute that she "need[ed] reminders to submit telework logs" or that she did not complete in-service training during the performance cycle. The grievant's Employee Work Profile (EWP) describes duties including "[c]oordinat[ing] and present[ing] in-service training to various individuals/groups . . . on [agency] services," "[a]ssist[ing] with community awareness programs and other regional office committees/special assignments," and "plan[ning] group activities, as appropriate." The EWP specifies that the grievant should "[c]onduct[] three outreach programs during the evaluation period." It appears that the grievant's management changed during the performance cycle, and the grievant contends that she was meeting her previous manager's expectations in these areas. While the grievant clearly disagrees that her performance is below expectations in any area, that disagreement in itself does not suggest that the agency's feedback to the contrary constitutes harassment. EDR is not able to identify evidence in the record to support a claim that the grievant's performance evaluation was arbitrary, capricious, hostile, or retaliatory.[19]

[18] The grievant notes that, as a woman of color over the age of 40 with a documented disability, she is a member of multiple classes entitled to legal protections against discrimination.

[19] Ultimately, a successful retaliation claim must raise a sufficient question as to whether, but for the grievant's protected activity (such as filing a grievance), the adverse action would not have occurred. 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). The grievant asserts that she is aware of another employee who did not receive substandard feedback on their performance evaluation, even though they also have not completed in-service trainings. Without any information about that employee or their performance expectations, however, EDR is unable to evaluate the other employee as a potential comparator to show disparate treatment.

Apart from these performance actions, the grievant alleges that other behavior has contributed to a hostile work environment – specifically, managers' requirement for her to provide face-to-face services despite health concerns, and their denial of accommodations for the grievant's disability.[20] Although these allegations are concerning if true, EDR has not been provided with facts to suggest that agency management has misapplied applicable policies in this regard.[21] Accordingly, we find no grounds on which either grievance may qualify for a hearing.

## CONCLUSION

EDR emphasizes that this ruling concludes only that the First and Second Grievances do not qualify for a hearing, and nothing herein should be read to decide the issues presented in either grievance. In general, it appears that the parties could benefit from further discussion[22] to provide clarity on agency policies and expectations in light of management changes, to understand the grievant's perceptions of hostility from management, and to determine whether the grievant requires accommodations and whether the agency can reasonably grant them. Moreover, to the extent that the grievant experiences prohibited workplace conduct in the future or is denied specific disability accommodations, nothing in this ruling prevents her from claiming in a future grievance that such conduct is a continuation of the issues discussed herein.

EDR's qualification rulings are final and nonappealable.[23]

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[20] As to the alleged denial of accommodations, the grievant states she requested to telework and use leave when needed. The context of her request is not clear, but the grievant indicates her request was denied. The grievant says she then sought short-term disability. However, the grievant states that she discovered that her requests were "standard operating procedure," and so she withdrew her short-term disability claim. The details of the grievant's requested accommodation in this regard are unclear. Nevertheless, EDR has not been presented with information to indicate that the grievant continues to seek an accommodation that has been denied by the agency.

[21] For example, EDR is not aware of any workdays that the grievant requested to telework or use leave due to her disability and was denied. Instead, she asserts that granting such requests is standard procedure for the agency.

[22] The grievant alleges that, while the agency head met with her regarding the issues in the Second Grievance, he refused to discuss concerns arising more than 30 days before the grievance. As general guidance, EDR observes that the 30-calendar-day filing deadline set forth by the grievance procedure is not intended to curtail constructive discussions to resolve employee relations issues. Moreover, it does not limit an employee's ability to report behavior prohibited by DHRM Policy 2.35, *Civility in the Workplace*.

[23] *See* Va. Code § 2.2-1202.1(5).