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QUALIFICATION RULING

In the matter of the Department of Motor Vehicles
Ruling Number 2022-5386
July 21, 2022

The grievant seeks a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management as to whether her January 7, 2022 grievance with the Department of Motor Vehicles (the "agency") qualifies for a hearing. For the reasons set forth below, EDR finds that the grievance is not qualified for a hearing.

FACTS

On or about January 7, 2022, the grievant submitted a grievance alleging that she was "not being treated equally, retaliation, bullying, trying to intimidate [her], intentionally trying to force [her] to lose [her] job with indirect retaliation." The circumstances of this grievance appear to be related to a recent lateral move between agency departments, which the grievant appeared to view as retaliation.[1] While the agency declined to qualify the grievance, the agency head expressed that the grievant's "*Reassignment Within the Pay Band* was designed not as punishment but to simply remove [her] from a work environment [she] claim[ed] has been difficult and others claimed [she had] made difficult." Furthermore, the agency head added that her "hope is that in the new environment [the grievant] will thrive and find the work and people with whom [she] work[s] enjoyable." As a result, the grievant now appeals that determination.

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

[1] Despite a lack of detail in the January 7 grievance, the allegations mentioned appeared similar to the issues raised in previous grievances the grievant filed on March 4, 2020 and March 12, 2021.
[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).

discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[4]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7] 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."[8]

Reassignment

In general, a lateral transfer will not rise to the level of an adverse employment action.[9] Subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.[10] A transfer or reassignment to a different position 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 his/her employment.[11] For example, a reassignment or transfer with significantly different responsibilities, or one providing reduced opportunities for promotion, may, depending on all the facts and circumstances, be considered an adverse employment action.[12] In this case, the grievant has indicated that her reassignment to another facility has had an effect on her ability "to go to [her] doctors appointments, get [her] allergy shots or continue [other medical appointments]."

The grievant has indicated to EDR that the basis of her grievance revolved around her former manager, district manager, and former coworker – prior to her transfer.[13] The grievant alleged that the agency's goal of her transfer from the agency's Customer Service Center to its Call Center was so she would be fired. The grievant stated that on December 9, 2021, she was notified of the transfer while on a call with the district manager and three other managers. They told her that she was being transferred to the Call Center where she would work remotely and

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[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[5] *See Grievance Procedure Manual* § 4.1(b).
[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[8] 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)).
[9] *See*, *e.g.*, Madlock v. WEC Energy Grp., Inc., 885 F.3d 465, 470-71 (7th Cir. 2018) (citing Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996)).
[10] *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; Fitzgerald v. Ennis Bus. Forms, Inc., No. 7:05CV00782, 2007 U.S. Dist. LEXIS 875, at *14-15 (W.D. Va. Jan. 8, 2007); Stout v. Kimberly Clark Corp., 201 F. Supp. 2d 593, 602-03 (M.D.N.C. 2002).
[11] *See Holland*, 487 F.3d at 219 (citation omitted).
[12] *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).
[13] The grievant reiterated that she had "no complaints" about the management of the Call Center. See below for discussion of the grievant's current claims related to her prior work environment.

effective immediately the grievant was placed "on administrative leave with pay." The grievant was on administrative leave with pay for almost a month until the Call Center supervisors contacted her to "work out logistics" and she began work in or around "early January." She was apprehensive about being transferred because "no one makes it in the call center" and alleged that "[her supervisors and human resources] figured out a way to get [her] out of the office because [she is] honest."

In her new position in the Call Center, the grievant took issue with having to work from home, as it is best for her to work around other people.[14] Although the grievant had initially been working at an agency office location with the Call Center, the agency stated that around March 2022, the grievant requested to work from home due to "car troubles," which was allowed.[15] The grievant has also stated that when she asked human resources staff about letting her work onsite at the Call Center "where people are there who could help" her, they denied her request even though she is aware of one other person who works in the conference room. However, as of May 2022, the agency stated that the grievant had not requested to return to an office location.[16]

Furthermore, the grievant alleged that in her previous position at the Customer Service Center, she had more "flexibility" to attend her doctor's appointments. At the Call Center, by contrast, the grievant stated that she has "cancelled some doctor's appointments" because she is concerned about getting an "occurrence point."[17] However, according to the Call Center Attendance policy, "No occurrences will be recorded for pre-approved scheduled absences." The Attendance Policy also states: "Absences, tardiness, and early departures due to approved FMLA leave, Short-Term Disability leave, military leave, jury duty, workers' compensation, and other approved leave (such as reasonable accommodations as required by law) will not be counted as 'occurrences.'" The agency also stated that they "forgave an occurrence due to car troubles." As of May 2022, the grievant has "1.40 occurrences," all from April 2022.

Having considered the totality of the situation in light of the grievant's description of her position post-transfer, we are unable to identify a significant detrimental effect that rises to the level of an adverse employment action. An employee's unmet preference regarding work hours or job location, for example, is not enough to result in an adverse employment action.[18] Moreover, the record does not suggest that the grievant's new position prevents her from invoking applicable protections for medical absences, such as leave or other reasonable accommodations.[19] In the absence of an adverse employment action, the grievant's challenge to her reassignment does not qualify for a hearing.

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[14] EDR has not been presented with evidence that the agency has received a request for an accommodation in this regard. To the extent the grievant requires an accommodation such as under the Americans with Disabilities Act, she should present that information to the agency and begin the interactive process.

[15] While these allegations describe issues occurring after the grievant filed her grievance, such considerations are instructive as to whether the transfer itself was an adverse employment action that could qualify for a hearing.

[16] To the extent the grievant's work location or other matters arising with her new assignment continue to be issues, the grievant could file a new grievance to address those mattes with her current job.

[17] The agency uses a point system to track unplanned absences, or "occurrences," for call center employees.

[18] *See*, *e.g.*, EDR Ruling Nos. 2016-4203, 2016-4206; EDR Ruling No. 2016-4240; EDR Ruling No. 2015-3946.

[19] *See, e.g.*, DHRM Policy 2.05, *Equal Employment Opportunity*; DHRM Policy 4.20, *Family and Medical Leave*; DHRM Policy 4.57, *Virginia Sickness and Disability Program*.

Retaliation/Hostile Work Environment

In addition, the grievant also claims the agency has engaged in retaliation and/or harassment by her former supervisor and coworker that created an alleged hostile work environment.

Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment[20] and bullying,[21] 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 does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.[22]

Even assuming that the grievant's allegations regarding the management actions described in her grievance, viewed in their totality, sufficiently describe conduct pervasive enough to constitute an adverse employment action, EDR perceives no meaningful relief that a hearing officer could grant. If an issue of discrimination, retaliation, or workplace harassment is qualified for hearing and the hearing officer finds that it occurred, the hearing officer may order the agency to create an environment free from the behavior, and to take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence.[23] Since initiating her grievance, the grievant no longer works in the location where the alleged harassment occurred or with the managers who are alleged to have engaged in the harassment. EDR therefore finds that issues raised about her prior work environment are moot for purposes of this grievance. A hearing officer would be unable to provide any effective relief if this grievance were qualified for a hearing. EDR does not generally grant qualification of claims for which no effective relief is available.

EDR's qualification rulings are final and nonappealable.[24]

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[20] 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."

[21] 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."

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

[23] *Rules for Conducting Grievance Hearings* § VI(C)(3).

[24] Va. Code § 2.2-1202.1(5).