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**QUALIFICATION RULING**

In the matter of the Department of Corrections  
Ruling Number 2022-5405  
July 8, 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 February 15, 2022 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

On or about February 15, 2022, the grievant initiated a grievance alleging that he had been “harassed and unfairly criticized” by a program chief at his facility. Supported by statements from his co-workers,<sup>1</sup> the grievant recounts several examples of the chief allegedly targeting him for unfounded accusations of work deficiency and misconduct.<sup>2</sup> The grievant claims these examples, and more, resulted in reassignment to a different post and, ultimately, a hostile work environment based on the chief’s dislike for the grievant. As relief, the grievant requested to work without harassment and to return to his prior post.

In response, the agency denied that the post change was due to the chief’s personal feelings about the grievant and claimed the change was “necessary to ensure appropriate facility coverage.” Further, the agency stated that the chief had authority to express concern about the grievant’s performance of the grievant’s job duties. The agency concluded that the grievant’s request to work “without fear of harassment ha[d] been adequately addressed.” Following the management resolution steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

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<sup>1</sup> Included in the grievance packet are four statements from the grievant’s coworkers corroborating his allegations of targeted harassment by the chief, including incidents they witnessed first-hand.

<sup>2</sup> For example, the chief allegedly accused the grievant of not completing paperwork that the grievant had in fact finished, not overseeing inmates’ meals correctly, and not completing other employees’ responsibilities.

## 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.<sup>3</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>4</sup> 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.<sup>5</sup>

Further, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."<sup>6</sup> 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."<sup>7</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>8</sup> 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."<sup>9</sup>

In this case, the grievant essentially asserts that the chief has engaged in harassing conduct that has created a hostile work environment. Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment<sup>10</sup> and bullying,<sup>11</sup> 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 as to whether the conduct was (1) unwelcome; (2) sufficiently severe or pervasive that it alters the conditions of employment and creates an abusive

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<sup>3</sup> See *Grievance Procedure Manual* § 4.1.

<sup>4</sup> Va. Code § 2.2-3004(B).

<sup>5</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>6</sup> Va. Code § 2.2-3004(A); see *Grievance Procedure Manual* § 4.1(b).

<sup>7</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>8</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>9</sup> *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)).

<sup>10</sup> 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."

<sup>11</sup> 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."

or hostile work environment; and (3) imputable on some factual basis to the agency.<sup>12</sup> 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.<sup>13</sup>

Upon a thorough review of the grievance, record, EDR cannot conclude that the grievance sufficiently alleges an adverse employment action. In essence, the grievant's concerns center on the chief's behavior towards him. The grievant claims the chief has never come to him directly with any criticisms, yet brings them to the grievant's direct supervisor, subordinates, and peers. The grievant states the chief has wrongly accused him of stealing and/or damaging inmate property, not completing his assigned work, and putting off job duties to others on multiple occasions. According to the grievant, the accumulation of these accusations, along with the chief's suspected dislike of him, led to his reassignment from one housing unit to another.<sup>14</sup> In response, the agency determined that the chief is allowed to oversee the grievant's work as a member of the management team in order to ensure the facility is operating efficiently – including by reassigning employees based on operational needs. Agency management observed that the grievant has “not received any counseling statements, substandards nor formal disciplinary actions” from the chief. Having carefully reviewed the grievance record and considering the grievant's claims as a whole, EDR cannot find that the chief's alleged conduct, even if prohibited by Policy 2.35, was so severe or pervasive as to amount to a hostile work environment that meets the threshold standard to qualify for a hearing.<sup>15</sup>

Although the evidence does not raise a sufficient question of an adverse employment action at this time, the grievant's allegations of managerial mistreatment are concerning. 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,

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<sup>12</sup> See *Gilliam v. S.C. Dep't of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

<sup>13</sup> *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 421 (4th Cir. 2014) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993)); see DHRM Policy Guide – Civility in the Workplace (“A ‘reasonable person’ standard is applied when assessing if behaviors should be considered offensive or inappropriate.”). “[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.” *Harris*, 510 U.S. at 23 (1993); see, e.g., *Parker v. Reema Consulting Servs.*, 915 F.3d 297, 304-05 (4th Cir. 2019) (finding that a false rumor that an employee was promoted for sleeping with a manager altered the conditions of her employment because the employee was blamed for the rumor and told she could not advance in the company because of it); *Strothers*, 895 F.3d at 331-32 (holding that a hostile work environment could exist where a supervisor overruled the employee's bargained-for work hours, humiliated the employee for purportedly violating the dress code, required her to report every use of the restroom, and negatively evaluated her based on perceived slights).

<sup>14</sup> In general, a lateral transfer 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. See *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)); see, e.g., *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375-77 (4th Cir. 2004); *Jones v. D.C. Dep't of Corr.*, 429 F.3d 276, 284 (D.C. Cir. 2005). Here, the grievant has indicated to EDR that he has been reassigned back to his prior post while the grievance was pending.

<sup>15</sup> See, e.g., EDR Ruling No. 2014-3836; cf. *Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.

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. Agency management has the authority to determine, among other things, the grievant's performance expectations, the substance and scope of the grievant's work assignments, the level of communication and information necessary to complete those assignments, and the appropriate manner of substantive feedback to address identified performance deficiencies. However, we have previously recognized that a supervisor who disparages a subordinate's performance to their colleagues, or to the subordinate's own direct reports, may be engaging in conduct that is unprofessional or otherwise prohibited by DHRM policies.<sup>16</sup>

Of additional concern is that, as part of his grievance, the grievant submitted multiple statements from colleagues corroborating his allegations of targeted harassment by the chief. 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.<sup>17</sup> Yet in this case, it is unclear whether the agency has fully addressed the grievant's complaints and corroborating evidence.<sup>18</sup> To the extent that the grievant alleges additional prohibited conduct that goes unaddressed by management, such allegations could potentially qualify for a hearing as pervasive mistreatment imputable to the agency under Policy 2.35. Accordingly, if the grievant continues to experience incidents of alleged harassing conduct, he should report the information to the agency's human resources department or another appropriate authority. This ruling concludes only that the February 15, 2022 grievance does not qualify for a hearing, and it in no way prevents the grievant from raising such matters again in a future grievance if the alleged conduct continues or worsens.

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<sup>16</sup> See, e.g., EDR Ruling No. 2020-4950. For example, Policy 2.35 explicitly prohibits "behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety."

<sup>17</sup> 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 . . . ."

<sup>18</sup> In its grievance responses, agency management characterized the chief's conduct as "verbal feedback" that would be appropriate from a member of management. While this characterization may reasonably encompass the chief's statements to the grievant's superiors, it does not appear to account for the grievant's allegations that the chief (1) disparages the grievant to peers and subordinates, and (2) targets the grievant for scrutiny and performance management not applied to other employees – both of which could constitute misconduct under DHRM Policy 2.35. The grievance record is silent as to whether and how the agency has addressed these allegations.

CONCLUSION

For the reasons expressed above, the facts presented do not raise claims that qualify for a hearing under the grievance procedure.<sup>19</sup> EDR's qualification rulings are final and nonappealable.<sup>20</sup>

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<sup>19</sup> See *Grievance Procedure Manual* § 4.1.

<sup>20</sup> See Va. Code § 2.2-1202.1(5).