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QUALIFICATION and CONSOLIDATION RULING

In the matter of Virginia State University
Ruling Number 2023-5450
November 17, 2022

The grievant seeks a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) as to whether her January 5, 2022 grievance with Virginia State University (the "university" or "agency") qualifies for a hearing. For the reasons set forth below, EDR finds that the grievance is partially qualified for a hearing.

FACTS

On or about January 5, 2022, the grievant filed a grievance challenging her annual performance evaluation and overall rating of "Below Contributor," as well as a subsequent performance improvement plan. She also claimed that she had been experiencing "continued bullying and harassment" from her supervisor. The grievant requested that her performance evaluation be revised, that the performance improvement plan be rescinded, and that bullying and harassment should end. In response to the grievant's allegations, the university's human resources department produced a "summary report" finding that the grievant's overall performance rating was not consistent with DHRM policy and should be changed to "Contributor." However, the report also concluded that the performance improvement plan should remain active based on legitimate concerns about the grievant's performance. Finally, the report indicated that management had addressed all received complaints of harassment but should continue to monitor interactions between the grievant and her supervisor.

During the management resolution steps, each step respondent essentially confirmed the conclusions in the summary report produced by human resources, i.e., although the performance evaluation should be revised, the grievant should improve in certain areas. The step respondents indicated that the grievant should report any bullying or harassment to her chain of command, but otherwise did not address her allegations of ongoing harassment. The agency head declined to qualify the grievance for a hearing, and the grievant has appealed that determination.

As the January 5 grievance proceeded through the management steps, it appears that the grievant separately requested a disability accommodation of full-time telework, which university management denied "based on insufficient evidence." On May 23 and June 22, 2022, respectively, the agency issued to the grievant a Group I and then a Group II Written Notice with a 10-workday

suspension, both for teleworking without approval. At some point following her suspension, the grievant apparently began a period of medical leave. On September 21, 2022, during the grievant's leave period, the agency issued to the grievant a second Group II Written Notice with termination, citing the grievant's failure to work onsite as instructed and failure to substantiate "several leaves of absence."

On October 18, 2022, the grievant submitted a dismissal grievance to EDR, claiming that she was "dismissed wrongfully, in culmination of harassment and bullying that has been ongoing." She alleged that the university "used the disclosure of [her medical] condition as an opportunity to further harass, bully, suspend and eventually dismiss [her] from [] employment." She further challenged her earlier unpaid suspension, instances of pay docking that occurred prior to her separation, and the university's failure to apply and/or pay out her balance of accrued leave. Pursuant to section 4.1(a) of the *Grievance Procedure Manual*, EDR appointed the dismissal grievance to a hearing officer effective November 21, 2022. Accordingly, this ruling addresses whether the January 5 grievance also qualifies for a 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] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the 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] 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.

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."[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

[1] *See Grievance Procedure Manual* § 4.1.
[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).

severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[7]

As an initial matter, an overall rating of "Below Contributor" constitutes an adverse employment action. EDR has consistently recognized that unsatisfactory annual performance evaluations amount to tangible actions affecting the terms, benefits, or conditions of employment.[8] In this case, the grievant's original evaluation with a "Below Contributor" overall rating was clearly an unsatisfactory annual performance evaluation. In addition, although university management continually expressed an intention to amend and re-issue the performance evaluation, the grievance record contains no evidence that this correction actually occurred, and the grievant has represented to EDR that she never received an amended version. Therefore, the grievance arguably presents a qualifiable misapplication of policy resulting in an adverse employment action on this basis alone.

The record presents less clarity regarding the grievant's claims of "continued bullying and harassment" by her supervisor. Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment[9] and bullying,[10] 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.[11] 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.[12]

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[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] According to state policy, receiving a "Below Contributor" overall rating on an annual performance evaluation triggers a mandatory re-evaluation process that can potentially conclude with the employee's termination if their performance does not improve within three months. *See* DHRM Policy 1.40, *Performance Planning and Evaluation*; *see*, *e.g.*, EDR Ruling No. 2017-4413; EDR Ruling No. 2017-4389.

[9] 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."

[10] 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."

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

[12] 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 compgany 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).

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.[13] 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.

Based on the information provided by the parties, it appears that the grievant's supervisor believed her performance needed improvement in several specific areas. Although the record suggests that the supervisor's communication of this feedback could be blunt at times, and the grievant strongly disagreed with it, we perceive nothing about the tone of feedback represented in the record that would reasonably rise to the level of bullying or harassment. In addition, it appears that management informally investigated and responded to the grievant's earliest complaints of unprofessional communications in March 2021. At that time, the grievant's supervisor's supervisor apparently counseled both her subordinates on the need for respectful and effective communications.

On the other hand, the grievance alleges that harassment continued after this point. Although the record contains few examples of this alleged harassment, it appears that the grievant's responsiveness continued to be a point of conflict between her and her supervisor, and evaluation documents from August 2021 to December 2021 identified communication as an area for improvement by the grievant. While prompt communication is typically a reasonable and even fundamental expectation of one's direct reports, in this case the grievant alleges that her supervisor expressed a general expectation for the grievant to respond to her "within one minute," yet the supervisor disregarded the grievant's requests for guidance. Similarly, the grievant presented evidence that when she failed to respond within minutes, the supervisor would escalate to their manager, accusing the grievant of not being reachable. The grievant also contends that the supervisor would blame the grievant for the supervisor's mistakes and oversights.

Although incidents subsequent to January 5 would not be within the scope of the grievance filed on that date, we further observe that it is not clear whether the university adequately responded to the grievance's allegations of "continued bullying and harassment" by the grievant's supervisor. The grievant has represented to EDR that denigrating and unprofessional behavior by her supervisor continued long after she filed her grievance. EDR further observes that these allegations overlap significantly with the claims raised in the grievant's subsequent dismissal grievance.

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[13] 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 . . . ."

Accordingly, we conclude that these allegations are sufficiently related to the claims raised in the dismissal grievance, and that it is most appropriate to consolidate these two grievances for factfinding by a hearing officer.[14] However, given the overlapping claims presented by the two grievances, we offer the following additional guidance to clarify issues that are and are not qualified for a hearing.

First, consistent with EDR's regular practice, all agency acts and omissions arising from the grievant's disciplinary dismissal are qualified for a hearing under section 4.1(a) of the *Grievance Procedure Manual*. These issues include the Group II Written Notice with termination issued on September 21, 2022 and any claims regarding associated leave payout or lack thereof. Second, the issue of whether the grievant's 2021 performance evaluation and overall rating was consistent with state policy is qualified for a hearing. The agency will have the burden to prove that its disciplinary action was warranted and appropriate; the grievant will have the burden to prove any alleged misapplications or unfair applications of policy by the university. Both parties will be entitled to present any relevant defenses to these claims. For example, the university may offer evidence that it corrected the contested performance evaluation, and the grievant will be entitled to present evidence that her separation was part of a continuing hostile work environment.

On the other hand, disciplinary actions prior to September 21, 2022 are not independently qualified for a hearing. The dismissal grievance appears to challenge the grievant's earlier disciplinary actions to some extent, *e.g.* by seeking backpay for the unpaid suspension associated with the June 22 Written Notice. However, the dismissal grievance is not timely to challenge those actions, and we are aware of no good cause to allow an untimely grievance to proceed as to those issues. That said, the grievant may nevertheless present evidence regarding prior disciplinary actions to support any *defenses* she presents at the hearing, such as claims regarding harassment and/or a hostile work environment. In other words, the agency will not bear the burden to prove that its prior disciplinary actions were warranted and appropriate, but the hearing officer would be able to make findings as to any claim by the grievant that those actions were part of a retaliatory or otherwise hostile work environment. Similarly, the grievant's harassment claims as of January 5 do not independently qualify for a hearing, but may be offered in support of the grievant's other qualified claims and defenses.

CONCLUSION

In sum, the January 5 grievance is hereby consolidated with the October 18 dismissal grievance, with both partially qualified for a single hearing as described above.[15] Pursuant to the agency's Form B submitted in response to the dismissal grievance, EDR will appoint a hearing officer via separate correspondence. The parties are advised that this ruling is not intended to prevent or discourage them from resolving the underlying issues outside the context of a hearing. Should the parties wish to pursue resolution of the issues herein prior to a hearing date, EDR is available to assist in such any efforts as desired and appropriate.

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[14] EDR may consolidate grievances for hearing without a request from either party. 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. *See Grievance Procedure Manual* § 8.5.

[15] 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 and an additional half fee for the second grievance. *See* EDR Policy 2.01, *Hearings Program Administration,* Attach. B.

EDR's qualification rulings are final and nonappealable.[16]

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[16] *See* Va. Code § 2.2-1202.1(5).