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QUALIFICATION RULING

In the matter of the Department of Juvenile Justice
Ruling Number 2024-5623
November 13, 2023

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) on whether her August 24, 2023 grievance with the Department of Juvenile Justice (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant works as a nurse for the agency. On August 11, 2023, she received a counseling memorandum relating to an interaction with her shift supervisor. According to the memorandum, the shift supervisor gave the grievant instructions, and the grievant's response was unprofessional and insubordinate. The memorandum also noted that the grievant had previously been counseled for insubordinate behavior. On or about August 24, 2023, the grievant initiated a grievance alleging workplace harassment and discrimination. She disputed the allegation that her response to supervisory instructions was unprofessional, maintaining that she had objected to being singled out for extra work and duties outside the scope of her Employee Work Profile. The grievant claimed more broadly that the distribution of work between nurses on her unit was unfair and discriminatory. During the management resolution steps, the second-step respondent wrote that she would follow up with staff on the grievant's unit "to reiterate the importance of demonstrating a civil workplace and providing effective supervision without discrimination." Ultimately, the agency head declined to grant the grievant's requested relief or to qualify the grievance for a hearing. The grievant now appeals the agency's head's 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.[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

[1] *See Grievance Procedure Manual* § 4.1.
[2] Va. Code § 2.2-3004(B).

a hearing, unless the grievant presents evidence raising a sufficient question whether discrimination, retaliation, or discipline may have improperly influenced management's decision, whether state policy may have been misapplied or unfairly applied, or whether a performance evaluation was arbitrary and/or capricious.[3]

Further, while grievances that allege retaliation or other misapplication of policy may qualify for a hearing, the grievance procedure generally limits grievances that qualify for a hearing 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 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]

As an initial matter, the grievant's challenge to the August 11 counseling memorandum does not, in and of itself, qualify for a hearing. Such written counseling is an example of informal supervisory action. It is not equivalent to a written notice of formal discipline.[8] Written 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]

However, the grievance also fairly describes claims of discrimination and a hostile work environment. DHRM Policy 2.05, *Equal Employment Opportunity*, requires that "all aspects of human resource management be conducted without regard to race . . . ."[10] For a claim of race discrimination to qualify for a grievance hearing, the grievance must present facts that raise a sufficient question as to whether the issues describe an adverse employment action that has resulted from prohibited discrimination. However, if the agency provides a legitimate, nondiscriminatory business reason for the acts or omissions grieved, the grievance will not be qualified for hearing absent sufficient evidence that the agency's proffered justification was a pretext for discrimination.[11]

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[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[4] *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] DHRM Policy 2.05, *Equal Employment Opportunity*, at 1.
[11] *See* Strothers v. City of Laurel, Md., 895 F.3d 317, 327-28 (4th Cir. 2018); *see*, *e.g.*, EDR Ruling No. 2017-4549.

In addition, although DHRM Policy 2.35 prohibits workplace harassment[12] and bullying,[13] alleged violations must still meet the threshold 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]

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 a harassing or bullying tone, Policy 2.35 requires agencies to determine in the first instance whether such perceptions are 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.

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[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 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(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 . . . ."

In this case, it is not clear whether the agency has satisfied its affirmative obligations. In her grievance, the grievant asserted that at least one shift supervisor "appear[s] to show favoritism to her subordinates who are her friends and of the same ethnic background as her." In additional information provided to EDR while this ruling was pending, the grievant has alleged that she and her colleagues are singled out for extra work and are held to different standards than other nurses on the basis of race. The grievant claims that she is assigned extra duties even when she is otherwise occupied with her regular tasks and nurses of other races are not as busy. The grievant further alleges that she has been reprimanded for her hair color and the way her clothing fits, while other nurses with the same hair color are not reprimanded. Such complaints would ordinarily trigger an agency's obligation under Policy 2.35 to ensure that no prohibited conduct is occurring. However, the record does not suggest that management has addressed the grievant's allegations regarding discrimination with any specificity.[17]

Although we strongly encourage the agency to appropriately investigate any claims of disparate treatment based on protected classes, we cannot conclude at this time that the grievance presents sufficient evidence of an adverse employment action that could qualify for a hearing. The grievant's allegations are focused on temporary, ad hoc work assignments and her perception that supervisory staff are singling her out for extra work during her shift. According to the grievant, these assignments sometimes include tasks that require supervisor-level authority, which the grievant does not have, and they interfere with her regular duties. Although the grievant's objection to such assignments may be understandable, management generally has authority to determine work assignments and workplace standards. EDR cannot conclude that the grievant's allegations, without more, are so severe or pervasive to exceed management's discretion and rise to the level of a hostile work environment or other tangible effect on the terms, benefits, or conditions of her employment.

That said, the grievant has also made EDR aware of concerning allegations regarding events that have transpired since she filed this grievance. Most notably, the grievant alleges that she has been notified that she is being reassigned to a shift with significantly different hours where she will work with another employee who had sexually harassed her in 2020. The grievant perceives this change as motivated by retaliation against her for filing a grievance. Although these more recent allegations are not within the scope of the grievance under review in this ruling, the agency is strongly encouraged to investigate any information it receives from the grievant on this issue, whether in the form of an additional grievance or otherwise. Although the present grievance does not qualify for a hearing, if the grievant experiences a future adverse employment action that she believes is a continuation of the pattern of events challenged in this grievance or that she feels is otherwise inappropriate, this ruling does not prevent her from raising that issue in a subsequent, timely grievance challenging the related adverse employment action. Should the grievant

[17] According to the management step respondents, the agency has responded by pursuing mediation and "reiterat[ing] the importance of . . . providing effective supervision without discrimination." However, we question whether these steps would adequately address a situation in which work assignments and professional standards vary by employee race or ethnic background, as the grievant has alleged. To the extent it has not done so already, the agency should determine whether the grievant's allegations in this regard are founded and respond to any sustained allegations as necessary to ensure such conduct does not continue.

experience any further allegedly discriminatory, retaliatory, and/or hostile behavior, she should file an appropriate complaint with her agency, DHRM, or other appropriate authority.

CONCLUSION

For the reasons described above, the grievance does not qualify for a hearing under the grievance procedure at this time.[18] This ruling only determines that the grievances do not qualify for a hearing and does not determine that any of the claims asserted were invalid. Further, nothing in this ruling is meant to prevent the grievant from utilizing another appropriate process to challenge the issues raised herein.

EDR's qualification rulings are final and nonappealable.[19]

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[18] *See Grievance Procedure Manual* § 4.1.
[19] *See* Va. Code § 2.2-1202.1(5).