



EMILY S. ELLIOTT  
DIRECTOR

**COMMONWEALTH OF VIRGINIA**  
*Department Of Human Resource Management*  
*Office of Employment Dispute Resolution*

James Monroe Building  
101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, Virginia 23219

Tel: (804) 225-2131  
(TTY) 711

## QUALIFICATION RULING

In the matter of the Department of Juvenile Justice  
Ruling Number 2022-5312  
December 1, 2021

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether his February 17, 2021 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

On or about February 17, 2021, the grievant filed a grievance challenging his two most recent annual performance evaluations.<sup>1</sup> The grievant takes issue with certain alleged “false and misleading” statements in his 2019 performance evaluation, and he claims that “[i]t appears that the same inaccurate facts and rumors were used to write [his] 2020 evaluation.” He asserts that the performance evaluations were part of an ongoing pattern of harassment and discrimination against him. According to the grievant, past harassment also included formal disciplinary actions taken against him in 2020 and improper assignments leading to a demotion. As relief, the grievant requested that his 2019 and 2020 performance evaluations be amended to remove the disputed statements, that all documentation not previously reviewed with him be removed from his “fact file,” and that his claims be investigated by EDR.<sup>2</sup> During the management steps, the agency reissued the grievant’s 2020 performance evaluation, which the grievant signed on August 3, 2021, and indicated that “all documents in your fact file not related to any active formal discipline in your personnel record will be destroyed.” However, the agency determined that challenges related

---

<sup>1</sup> The grievant alleges that he received both evaluations on January 22, 2021. According to the agency’s records, the grievant received his 2019 performance evaluation on January 15, 2020, but refused to sign it at that time because he “wanted to write a rebuttal.”

<sup>2</sup> EDR has authority to “investigate allegations of retaliation as the result of the use of or participation in the grievance procedure or for reporting, in good faith, an allegation of fraud, waste or abuse to the State Employee Fraud, Waste and Abuse Hotline.” *Grievance Procedure Manual* § 1.5. However, “[a]n employee may not pursue both a retaliation investigation and a grievance on the same management action or omission alleged to be retaliatory.” *Id.* Even if the grievant’s claims fairly alleged retaliation in this case, we conclude that the grievant has elected to pursue such claims by filing a grievance, and accordingly we must decline to exercise our limited investigation authority with respect to the same issues grieved. However, EDR has undertaken fact-gathering as part of its review, including an interview with the grievant, necessary for the determinations in this ruling.

to the grievant's 2019 performance evaluation were not timely. In addition, each step respondent expressed that they could identify no evidence that the grievant's performance evaluations or other personnel actions were based on false information. The agency head declined to qualify the grievance for a hearing, and the grievant now appeals that determination to EDR.

### 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, 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."<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>

#### *Performance Evaluations*

In this case, the grievant challenges certain feedback included in his last two annual performance evaluations. In general, a satisfactory performance evaluation is not an adverse employment action.<sup>10</sup> When the grievant presents no evidence of an adverse action relating to the evaluation, such a grievance does not qualify for a hearing. Even if a single "Below Contributor" sub-rating on an overall satisfactory evaluation could be an adverse employment action, "a poor

---

<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> *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).

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."<sup>11</sup>

As an initial matter, the record supports the agency's view that issues related to the 2019 performance evaluation were not timely raised under the grievance procedure.<sup>12</sup> Although the grievant has indicated he first reviewed the 2019 evaluation on January 22, 2021, a notation on the evaluation indicates that, on January 15, 2020, the grievant stated he disagreed with the evaluation and refused to sign it on that basis.

Even assuming that the 2019 performance evaluation is within the proper scope of the grievance, the record does not raise a sufficient question whether the evaluation could constitute an adverse employment action. The grievant's overall rating in 2019 was "Marginal Contributor," with performance "characterized by marginal job accomplishments and not quite at the 'Contributor' level, but demonstrating the capability to improve with additional training." Although this rating may fall short of satisfactory by its terms, it triggers no 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 ultimate termination of employment.<sup>13</sup> Similarly, the grievant's 2020 evaluation does not independently present a qualifiable issue. The overall rating indicated on the 2020 evaluation is "Contributor," with performance "characterized by work that is at or above the performance standards . . . . Employees at this level are achieving the core responsibilities and performance measures as outlined by the supervisor." Accordingly, neither performance evaluation in itself appears to present an adverse employment action.

### *Harassment/Hostile Work Environment*

Nevertheless, the grievant claims that his two most recent performance evaluations are part of a pattern of ongoing harassment by agency management that has created a hostile work environment. Although DHRM Policy 2.35 prohibits workplace harassment,<sup>14</sup> bullying,<sup>15</sup> and violence, alleged violations must meet certain requirements to qualify for a hearing. Like discriminatory workplace harassment, a claim of 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 alleged prohibited conduct was (1) unwelcome; (2) sufficiently severe or pervasive that it alters the conditions of employment and creates an abusive or hostile

---

<sup>11</sup> *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.

<sup>12</sup> *Grievance Procedure Manual* § 2.2.

<sup>13</sup> DHRM Policy 1.40, *Performance Planning and Evaluation*; see *James*, 368 F.3d at 377.

<sup>14</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>15</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."

work environment; and (3) imputable on some factual basis to the agency.<sup>16</sup> As to the second element, the grievant must show that he or she perceived, and an objective reasonable person would perceive, the environment to be abusive or hostile.<sup>17</sup> “[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.”<sup>18</sup>

Here, the grievant claims that his managers have a history of making false claims against him, which allegedly appear in his annual evaluations, gave rise to two Written Notices he received during 2020, and have otherwise led to a breakdown in trust. The grievant also alleges that harassment has taken the form of requiring the grievant to report to his peers and ultimately to demoting him. However, while it is clear that the grievant strongly disagrees with the performance feedback he has received, we cannot conclude that the grievance record raises a sufficient question whether agency management has perpetrated or condoned conduct prohibited by DHRM Policy 2.35.

Regarding the 2019 evaluation, the grievant objects to its inclusion of staff allegations that the grievant bullied and/or harassed them. In a section addressing the grievant's management duties, the evaluation notes investigational findings that the allegations were unfounded but that the grievant could benefit from “coaching on his supervisory style as well as how he manages his staff.” The grievant maintains that he “should have been given credit for performing my duties according to policy.” He also disputes the agency's feedback in this section that he did not properly instruct his staff as to certain tasks. The grievant raises similar objections to the evaluation's section addressing operational management, which noted that the grievant “had deficits in the area of providing mentoring to his staff,” “had to be addressed . . . for not returning paperwork to his counselor in an appropriate time frame,” and exhibited “intimidating, unprofessional, oppositional, controlling and threatening” conduct during a team meeting. The grievant claims that he was never counseled as such and did not exhibit the behavior described. It appears that agency management used the grievant's 2019 performance evaluation to document concerns about the grievant's interactions with staff he managed – which typically would be an appropriate subject for performance feedback whether or not the interactions rose to the level of a policy violation. Although the grievant disagrees with the agency's feedback in this regard, such disagreement alone does not suggest that the concerns were manufactured, malicious, or otherwise harassing.

As to the 2020 evaluation, the grievant takes issue with the agency's continued feedback regarding his supervisory duties. The evaluation notes that the grievant “failed to ensure oversight and supervision of his Counselor to ensure [documentation was] completed on time, accurately . . . .” Among primarily positive assessments, the evaluation indicates that the grievant's

---

<sup>16</sup> See *Gilliam v. S.C. Dep't of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

<sup>17</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)).

<sup>18</sup> *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).

recordkeeping was deficient in other areas as well. The grievant objects generally that this feedback was based on “false and misleading” allegations and was not preceded by discussion or opportunities for training. However, during the management resolution steps, the agency solicited more specific information from the grievant as to which statements in the evaluation were “false.” It appears that the grievant has not offered such additional details, either to the agency or to EDR. Accordingly, as above, we cannot say that the grievant’s disagreement with his management’s feedback on areas for improvement raise a sufficient question whether the contents of his 2020 performance evaluation might constitute harassment or other prohibited conduct that could contribute to a hostile work environment.

That said, an arbitrary or capricious performance rating could conceivably contribute to a broader hostile work environment as a misapplication or unfair application of policy. A performance rating is arbitrary or capricious if management determined the rating without regard to the facts, by pure will or whim. An arbitrary or capricious performance evaluation is one that no reasonable person could make after considering all available evidence. If an evaluation is fairly debatable such that reasonable people could draw different conclusions, it is not arbitrary or capricious. However, if the grievance raises a sufficient question whether a performance evaluation resulted merely from personal animosity or some other improper motive – rather than a reasonable basis – a further exploration of the facts by a hearing officer may be warranted.

Here, the record includes evidence consistent with the performance feedback and ratings the grievant has received. In particular, the grievant’s 2020 performance evaluation notes several deficits with regard to maintaining required paperwork and documentation. During the 2020 performance cycle, the grievant received two Group II Written Notices that involved failure to complete required documentation. The first Written Notice charged that the grievant failed to complete a documentation task assigned by his supervisor. Following a grievance hearing, a hearing officer found that the agency had proven that the discipline was warranted and appropriate.<sup>19</sup> The grievant’s supervisor discovered that “casework” for the grievant’s former unit was “severely out of compliance,” despite the grievant’s responsibility to audit the files periodically and make necessary updates and corrections. Therefore, management assigned the grievant to focus specially on bringing the files into compliance and, when not doing so, provide staffing support to other units. This assignment set forth a specific work schedule for these tasks. The second Written Notice, accompanied by a disciplinary demotion, charged that the grievant failed to follow his assigned work schedule and to document his work hours properly. The grievant opted to challenge this disciplinary action by filing a complaint of discrimination and/or retaliation with DHRM’s Office of Workforce Engagement (“OWE”). OWE concluded that the grievant’s complaint was unfounded, in part because the agency established legitimate, non-pretextual reasons for issuing the Written Notice. It appears that the grievant found his special assignment denigrating. However, nothing in the record suggests that the assignment was improper under the circumstances and considering the grievant’s responsibilities. We cannot conclude that the record presents a sufficient question whether the grievant’s performance ratings have been arbitrary or capricious.

Moreover, the grievant has not alleged other facts that could accumulate to demonstrate a hostile work environment. Throughout the grievance process, the grievant has expressed significant concern regarding one of his managers’ documentation of their discussion shortly after

---

<sup>19</sup> See Decision of Hearing Officer, Case No. 11555, Oct. 20, 2020.

the grievant reviewed his performance evaluations. The manager reportedly quoted the grievant as saying he wanted to believe that the agency would not take physical threats against him lightly. The grievant insists: “I have never made any statement accusing someone of physically threatening me. I am concern[ed] about [an] administrator misquoting me on something I did not say.” It appears that the agency investigated the grievant’s concern, inquired with the manager about it, and informed the grievant that the manager acknowledged that she “mistakenly took what [the grievant] said out of context.” Although the grievant may be understandably disturbed by this incident, we cannot find that it creates a sufficient question whether a hostile work environment may exist in this case.

In sum, while the grievant maintains that his performance has not been fairly evaluated, the grievance does not present an issue that qualifies for a hearing as an adverse employment action. Following a demotion during the summer of 2020, the grievant received a performance evaluation that referenced circumstances related to his demotion but was nevertheless satisfactory. The record does not indicate that the evaluation was influenced by a misapplication or unfair application of policy. Although the grievant cites past adverse employment actions (i.e. formal disciplinary actions) to support his claims, those actions have been separately reviewed with finality under the grievance procedure and upheld.<sup>20</sup> The grievant’s subsequent allegations do not suggest a basis to revisit those decisions.

EDR’s qualification rulings are final and nonappealable.<sup>21</sup>

*Christopher M. Grab*  
Director  
Office of Employment Dispute Resolution

---

<sup>20</sup> See *Grievance Procedure Manual* §§ 1.6, 7.2(d).

<sup>21</sup> See Va. Code § 2.2-1202.1(5).