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QUALIFICATION RULING

In the matter of the Department of Juvenile Justice
Ruling Numbers 2022-5333, 2022-5334
December 16, 2021

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 her two September 30, 2021 grievances with the Department of Juvenile Justice (the "agency") qualify for a hearing. For the reasons discussed below, these grievances are not qualified for a hearing.

FACTS

On September 28, 2021, the grievant received a Counseling Memorandum for alleged issues with her work performance related to approving timesheets for her direct reports. The following day, September 29, a manager approached the grievant while she was leading a meeting with her staff. The grievant alleges that the manager ended the meeting, told the grievant he understood she had been recording her supervisor, and told her that he needed her agency-issued cell phone. According to the grievant, she gave her agency-issued cell phone to the manager but initially refused to provide her passcode to unlock the phone, believing that agency policy prohibited her from sharing that information. The grievant states that the manager called one of the grievant's direct reports into the room and asked the direct report to sign a paper indicating the grievant refused to provide the passcode to her agency-issued cell phone. The grievant then provided the manager with a partial passcode and stated that she had shared what she could recall.

Later in the day on September 29, 2021, the agency accepted the grievant's resignation. As of the date of this ruling, the grievant no longer works for the agency. The grievant later initiated two grievances on September 30, prior to the effective date of her resignation.[1]

In the first grievance, the grievant disputes the content of the Counseling Memorandum, alleging that she attempted to approve timesheets but was unable to do so due to technical issues. The grievant also challenges her supervisor's delivery of the Counseling Memorandum at the end of a meeting, shortly before the grievant left work for the day, and the supervisor's alleged refusal to give the grievant a copy of the document at the meeting. Finally, the grievant claims that her

[1] Based on the information in the grievance record, the grievant's employment with the agency appears to have ended shortly after October 8, 2021.

supervisor referred to her as "sir" during the meeting. The grievant states that her supervisor refused to apologize after the grievant confirmed she identifies as female.

In the second grievance ("Grievance 2"), the grievant alleges that her interaction with the manager on September 29, 2021 involving her agency-issued cell phone and passcode was "unprofessional and unethical and lacked confidentiality." The grievant further explained that she believed the manager's conduct was retaliatory.

As relief for both grievances, the grievant sought "[a]ccountability for unprofessionalism and violation of the civility policy and due process of confidentiality being violated as my state equipment was seized from my possession." In Grievance 1, she also requested compensation for leave time she used to pursue treatment "due to continued acts of retaliation" and a "formal apology" from her supervisor for addressing her with the wrong title and refusing to apologize at the September 28, 2021 meeting.

During the management steps, the grievant appears to have admitted that she recorded at least one meeting with her supervisor on at least one occasion using her agency-issued cell phone. The third-step respondent found that the grievant and her supervisor had an "ongoing contentious relationship" and stated that concerns about the supervisor's conduct would be addressed with the supervisor. The respondent also explained that the grievant's supervisor did not agree to apologize for referring to the grievant using an incorrect title, and that the supervisor acknowledged she had made a mistake. The respondent further clarified that employees do not have an expectation of privacy in agency-issued devices or equipment, but acknowledged that the manager's conversation with the grievant about her phone could have taken place in a more private location. According to the respondent, the manager retrieved the grievant's agency-issued cell phone at the respondent's direction to determine whether the grievant had recorded the September 28, 2021 meeting and, if so, to review the recording to assist in addressing the conflict between the grievant and her supervisor.[2] The respondent was unable to listen to the recording because the grievant did not share her passcode for the phone.

The agency head subsequently declined to qualify both grievances for a hearing. 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.[3] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[4] 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

[2] The grievant sent an email to management on September 29, asking to temporarily report to another supervisor while she pursued a grievance concerning the Counseling Memorandum.
[3] *See Grievance Procedure Manual* § 4.1.
[4] 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.[5]

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."[6] 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8] 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."[9]

Counseling Memorandum

In her first grievance, the grievant challenges her receipt of a Counseling Memorandum on September 28, 2021. In addition to alleging that the Counseling Memorandum was unwarranted, the grievant also argues that her supervisor presented the document to her within the final few minutes of a meeting, immediately before the grievant left work for the day, without an opportunity to discuss the issues. The grievant also contends that her supervisor refused to give her a copy of the document at the meeting.

EDR has considered the grievant's allegations about the events that led to the issuance of the Counseling Memorandum, along with the events of the September 28, 2021 meeting where she received the document. The grievant reasonably disagrees with the supervisor's decision to issue the Counseling Memorandum in an apparently hurried fashion and without time for discussion. However, she ultimately received a copy of the Counseling Memorandum by email and had an opportunity to fully address her concerns about the document through the grievance process. Most significantly, written counseling is a type of informal corrective action;[10] it is not equivalent to a Written Notice of formal discipline. A 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.[11] Accordingly, EDR finds no basis to conclude that that those actions are "adverse" for purposes of hearing qualification, either

[5] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[6] Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).
[7] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[9] 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)).
[10] *See* DHRM Policy 1.60, *Standards of Conduct*, at 6.
[11] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

individually or collectively. For these reasons, the grievant's claims relating to the Counseling Memorandum do not qualify for a hearing.[12]

Agency-Issued Cell Phone

In addition, the grievant challenges the agency's decision on September 29, 2021 to search her agency-issued cell phone for audio recordings of the grievant's supervisor. The grievant alleges that she did not receive adequate "due process" or "confidentiality" during this interaction. According to the evidence in the grievance record, management learned that the grievant may have used her agency-issued cell phone to record the September 28 meeting where she received the Counseling Memorandum. As a result, management decided to review the phone as part of its investigation about the grievant's concerns regarding her supervisor and identify any recordings made by the grievant. It appears the agency was ultimately unable to do so because the grievant did not provide a passcode to unlock the phone.

The grievant's concern about the manner in which a manager approached her to retrieve her agency-issued cell phone during a meeting when other employees were present is understandable, but it does not appear that this issue amounts to an adverse employment action. As the agency explained during the management steps, employees do not have an expectation of privacy in state-owned devices or equipment.[13] The agency had the authority to search the contents of the phone issued to the grievant and has articulated a reasonable basis for doing so here. The grievant may not agree with the agency's decision, but she has not presented any evidence to suggest that its attempt to search her agency-issued cell phone had an effect on the terms, conditions, or benefits of her employment. As such, EDR finds that this issue does not qualify for a hearing.

Hostile Work Environment

In both grievances, the grievant further alleges that her supervisor has engaged in harassing and retaliatory conduct that created a hostile work environment. Although DHRM Policy 2.35,

[12] This issue does not qualify for an administrative hearing under the grievance process, but the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the "Act"). Under the Act, if the grievant gives notice that they wish to challenge, correct, or explain information contained in their personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth their position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

[13] *See* DHRM Policy 1.75, *Use of Electronic Communications and Social Media*, at 5 ("No user shall have any expectation of privacy in any message, file, image or data created, sent, retrieved, received, or posted in the use of the Commonwealth's equipment and/or access. Agencies have a right to monitor any and all aspects of electronic communications and social media usage. Such monitoring may occur at any time, without notice, and without the user's permission.")

Civility in the Workplace, prohibits workplace harassment[14] and bullying,[15] 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.[16] 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.[17]

In addition to her allegations regarding the Counseling Memorandum and the agency's search of her agency-issued cell phone discussed above, the grievant also claims that her supervisor incorrectly referred to her as "sir" during the September 28, 2021 meeting and refused to apologize when the grievant corrected her. During the management steps, the agency acknowledged the existence of an "ongoing contentious relationship" between the grievant and her supervisor, which the agency believed was "caused in part by [the supervisor's] supervisory and communication style, not by a deliberate intent to be uncivil." The supervisor also acknowledged mistakenly using the incorrect title to refer to the grievant at the meeting on September 28 but apparently declined to apologize to the grievant.

Having carefully reviewed the grievance record, and considering the grievant's claims as a whole, EDR cannot find that the facts as alleged raise a sufficient question whether the conduct at issue was so severe or pervasive as to alter the conditions of the grievant's employment such that the grievance qualifies for a hearing.[18] 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. These terms must be read together with agencies' broader authority to manage the means, methods,

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[14] 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."

[15] 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."

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

[17] 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).

[18] *See, e.g.,* EDR Ruling No. 2014-3836; *cf. Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.

and personnel by which agency work is performed, but management's discretion is not without limit. Although the grievant unquestionably found the management actions described in the grievances to be subjectively offensive, such actions were not so severe or pervasive that they could establish a hostile or abusive work environment or other agency violation of Policy 2.35.

The grievant further contends that the agency's search of her agency-issued cell phone was retaliatory, apparently because she raised concerns about her supervisor's conduct. A claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) they engaged in a protected activity; (2) they suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[19] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[20] The grievant arguably engaged in protected activity by reporting work-related concerns to management.[21] However, as explained above, the grievance record does not reflect that she has suffered an adverse employment action. Further, the grievant has not identified acts or omissions that could reasonably be viewed as exceeding managerial discretion or would not have occurred but for a retaliatory motive.[22]

Accordingly, because the grievant has not raised a sufficient question as to the existence of severe or pervasive harassment, bullying, or retaliatory conduct at this time, the grievances do not qualify for a hearing on any of these grounds.[23]

Grievant's Resignation

Finally, even assuming that the grievant's allegations regarding the management actions described in her grievances, 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.[24] Since initiating her grievances, the grievant has resigned from the agency. EDR therefore finds that the issue of the work environment that may have been created during the grievant's employment is moot. EDR does not generally grant qualification of claims for which no effective relief is available.

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[19] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).
[20] *Id.*
[21] *See* Va. Code § 2.2-3000(A).
[22] This ruling determines only that the grievant's claims do not qualify for an administrative hearing under the grievance procedure. It does not address whether there may be some other legal or equitable remedy available to the grievant in relation to these claims.
[23] To the extent this ruling does not address any specific issue raised in the grievances, EDR has thoroughly reviewed the grievance record and determined that the grievance does not raise a sufficient question as to whether the grievant experienced an adverse employment action, whether discrimination, retaliation, or discipline may have improperly influenced any management decision cited in the grievance, or whether the agency may have misapplied and/or unfairly applied state policy that would warrant qualification for a hearing.
[24] *Rules for Conducting Grievance Hearings* § VI(C)(3).

CONCLUSION

For the reasons expressed above, the facts presented in the grievant's two September 30, 2021 grievances do not raise claims that qualify for a hearing under the grievance procedure.[25] EDR's qualification rulings are final and nonappealable.[26]

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