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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2022-5354
February 25, 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 her August 12, 2021 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On or about August 12, 2021, the grievant, a corrections officer, initiated a grievance alleging that while she was in the process of loading her firearms for transportation, “[the Major] did enter the Armory unannounced and proceeded to approach and horseplay with [the grievant].”¹ In addition, the grievant felt “threatened that [her] career[] with the [agency] was on the line” as she alleged that the Major “personally requested and took possession [of] all covid test kits” that the transportation officers were required to take. The relief sought by the grievant was that the “[Major’s] unprofessional actions need[] to be corrected in accordance with DOC Standards of Conduct policy.” The agency head subsequently declined to qualify the grievance 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.² Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.³ 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

¹ Additional facts regarding the specifics of the situation are included in the Discussion section below.

² See *Grievance Procedure Manual* § 4.1.

³ 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.⁴

Further, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."⁵ 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."⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁷ 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."⁸

Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment⁹ 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

⁴ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁵ Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).

⁶ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁷ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁸ *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)).

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 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

In support of her claims regarding what took place in the Armory, the grievant's coworker and witness wrote a statement supporting her version of events. The coworker stated that while they "were in the armory to collect [their] gear for transportation [...] [the Major] entered and tapped [the grievant] on her shoulder and told her 'Don't mess up.'" Subsequently, on or around July 16, 2021, the Assistant Warden completed an investigation into the grievant's allegations. Upon review of the video footage of the alleged incident, the Assistant Warden observed that "[the Major] entered the Key Watch/Armory area on July 13, 2021 at 6:59 a.m. He spoke to [the Officers] as he entered the area to pick up his office keys from the Key Watch Box. . . . [The Major's] interaction with [the grievant] took about four to five seconds." Afterwards, "[the Major] then turned around and retrieved [h]is office keys ... and departed the area." When the Assistant Warden interviewed the Major, he recalled that "he spoke to both officers and asked them if they knew how to clear the weapons properly since they were preparing for a transportation run and they both responded yes and he stated that he told both of them to have a good trip." The Major added that "at no time did he make contact with [the grievant]" Despite the grievant's statement alleging that she was armed when the horseplay took place, the investigation determined that "she did not have a weapon or ammunition in either hand" and that "[the Major] kept both of [his] hands below his waist, palms down when talking to [the grievant]."

While the grievance was pending, the grievant had sought "camera evidence from [the facility] from 6:45 a.m. to 7:20 a.m. on date of July 13, 2021."¹³ The agency provided three minutes of the video footage that the grievant requested. The agency stated that "an investigation revealed the only interaction between [the grievant] and [the Major] occurred at 6:59:00-7:01:59." In seeking qualification of this grievance for a hearing, the grievant has raised the agency's failure to provide the full video requested, arguing that it should have been preserved before it became no longer available.¹⁴ While the grievant raises an understandable concern, the grievant has also not presented any information to suggest that the additional video footage not produced contains any evidence relevant to this case. The agency indicates that the only interaction between the grievant and the Major was depicted in the portion provided. The grievant has not indicated that there were further interactions not contained in the video footage produced. Nevertheless, for purposes of this ruling, EDR will assess the grievant's claims based on the descriptions of this event in the witness statements.

The grievant also alleged that "[the Major] personally requested and took possession [of all] covid test kits of transportation officers." She alleged that she heard this information when reporting to the main office for testing and was provided "a backup kit in order to complete [her] COVID testing." The grievant stated that both her and the other Officer "[felt] threatened that [their] careers with [the agency were] on the line from the actions that [the Major] portrayed against [them]." In a witness statement from a Manager, she stated that "[the grievant] entered looking from her COVID-19 test kit" because "she had been informed that [the Major] was in possession of her test kit." The Manager "informed her that [the Major] was at lunch ... and [she] would go ask him the location of her COVID-19 test kit." When the Manager asked the Major if he knew

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).

¹³ EDR Ruling No. 2022-5323, at 1.

¹⁴ See *id.* (addressing the grievant's allegations of the agency's noncompliance on this issue).

the location of the grievant's test kit, he responded "no, I do not have any test kits." The Manager "informed [the grievant] of [the Major's] reply" and "[t]hat was the end of the conversation with [the grievant]." In another witness statement, the Captain recalled that "[o]nce testing was complete, [the Major] asked [them] to verify the location of the staff that had not taken the test." He added that "[a]ll staff that had not taken the test [were] identified as being on leav[e], transportation or hospital duty" and that "[n]o staff was singled out during the process."

Having carefully reviewed the grievance record, and considering the grievant's claims as a whole, EDR cannot find that the grievance raises 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.¹⁵ In addition, the record does not present a sufficient question whether any inappropriate conduct occurred that might be imputable to the agency. 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.¹⁶ Here, the available information about the agency's investigation does not raise a sufficient question whether it might have failed to meet its affirmative obligations as to the grievant's complaint.

Accordingly, the grievance does not qualify for a hearing.¹⁷ However, if the grievant experiences future incidents of harassing or retaliatory conduct, she should report the information to the agency's human resources department or another appropriate authority. Lastly, this ruling in no way prevents the grievant from raising these matters in a later grievance if the alleged pattern of conduct continues or worsens.

CONCLUSION

For the reasons expressed above, the facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure at this time.¹⁸ EDR's qualification rulings are final and nonappealable.¹⁹

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

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"

¹⁷ To the extent this ruling does not address any specific issue raised in the grievance, 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.

¹⁸ See *Grievance Procedure Manual* § 4.1.

¹⁹ See Va. Code § 2.2-1202.1(5).