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QUALIFICATION RULING

In the matter of the Department of Motor Vehicles
Ruling Numbers 2022-5326, 2022-5372
March 25, 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 grievances with the Department of Motor Vehicles (the "agency"), filed respectively on September 14 and November 19, 2021, qualify for a hearing. For the reasons set forth below, the grievances are not qualified for a hearing.

FACTS

The grievant works as an agent for one of the agency's service call centers. On or about September 14, 2021, she initiated a grievance ("First Grievance") alleging "[c]ontinual harassment." Citing a due process memorandum she had received on September 13, the grievant claimed that her managers singled her out for excessive scrutiny of her call responses and unfairly criticized her response to technical problems that sometimes affected caller connections. The grievant requested relief to include rescission of "any written notices, write ups, etc. that have occurred due to these actions," and that "the unnecessary harassment stop and that [she] be treated just like every other employee." During the management steps, the grievant's supervisors maintained that she was required to report technical problems to management as they occurred but had not done so, and therefore "performance coaching" on these issues was not "outside of established office standards and practices" or otherwise inappropriate. Management further expressed that, despite such coaching, the grievant was still failing "to immediately report communication problems" that arise during calls. The agency head declined to qualify the First Grievance for a hearing.

On October 29, 2021, the agency issued a second due process memorandum to the grievant, alleging that, despite counseling on the requirements for reporting technical issues, the grievant had failed to timely report problems on October 4 and 5. In response, the grievant initiated a second grievance ("Second Grievance") on November 19, 2021, alleging that agency management was "misus[ing] . . . policies, procedures, and guidelines with the intent to cause harm," including retaliation for the First Grievance. As relief, she requested among other things that the agency compensate her for "additional job functions" she had been performing; change her job description or reassign her; discontinue several of its existing performance measures for call center workers;

hold managers accountable for "attempting to build a case" against the grievant; and change other agency policies and practices.

As the Second Grievance proceeded through the management steps, the agency presented the grievant with a Performance Improvement Plan. The Plan directed the grievant to "[i]mmediately . . . report any disruption in service to [technical support services]" and then begin a prescribed troubleshooting process, and also to "[f]ollow any direction provided by email and respond immediately with the outcome." The agency head[1] ultimately declined to qualify the Second Grievance for a hearing, noting that the agency had opted not to take any formal disciplinary action following either of the two due process memoranda. The grievant has now appealed the qualification determinations as to both grievances.

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 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]

Finally, qualification may not be appropriate even if a grievance challenges a management action that might ordinarily qualify for a hearing. For example, an issue may have become moot during the management resolution steps, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant

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[1] While the Second Grievance was proceeding through the management resolution steps, the head of the agency changed. The former head had determined that that the First Grievance was not qualified for a hearing; the current (acting) head made the same determination as to the Second Grievance.
[2] *See* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).
[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)).

any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.[9]

Due Process Memoranda

The grievant disputes whether her performance has merited the written feedback and allegations she has received, most notably in the due process memoranda issued on September 13 and October 29, 2021. According to DHRM Policy 1.60, *Standards of Conduct*, a due process memorandum serves to inform employees of the potential for formal discipline. However, the memorandum itself is not a form of discipline. In addition, written counseling, such as a memorandum or performance improvement plan (in the form presented here), is an example of informal supervisory action. It is not equivalent to a written notice of formal discipline.[10] Neither a due process memorandum nor other written counseling would generally constitute an adverse employment action because those management actions, in and of themselves, do not have a significant detrimental effect on the terms, conditions, or benefits of employment. Therefore, the due process memoranda issued to the grievant do not independently establish a basis for the First or Second Grievances to qualify for a hearing.

Hostile Work Environment/Retaliation

Nevertheless, the grievant has characterized her management's repeated written performance feedback and scrutiny as a pattern of "constant harassment." According to the grievant, her previous management subjected her to excessive and intrusive inquiries, scrutiny, and criticism, including questioning her use of the restroom and counseling her demeanor on calls.[11] The grievant alleges these events created a "toxic work environment" and caused "constant anxiety" and related health issues. In July 2021, management initiated disciplinary action against the grievant, alleging that she was not timely reporting technical problems and not properly greeting callers.[12] During or around August 2021, it appears that the agency reassigned the grievant to a different supervisor. However, the grievant alleges that her new management continues to monitor and scrutinize her excessively, counseling her for "insignificant" or "frivolous" infractions. She claims this scrutiny is a continuation of treatment she received under her former supervisor.

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[9] *See*, *e.g.*, EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.

[10] *See* DHRM Policy 1.60, *Standards of Conduct*, at 6-7 (June 1, 2011) (distinguishing between "counseling" such as written memoranda or notices of improvement needed and "disciplinary actions," typically via formal Written Notice). DHRM revised Policy 1.60 as of March 7, 2022, while this ruling was pending. All policy citations herein shall refer to the previous version of Policy 1.60 that was in effect during the events at issue in this matter.

[11] The agency maintains that management has merely counseled the grievant to speak more clearly based on recorded calls in which she was difficult to hear. The grievant asserts that, in the past, she also was advised to sound "peppier" and less "intimidating," although the record is not clear as to who gave the grievant this feedback or when. The grievant has characterized these instructions from the past as being told to sound more "feminine." She asserts that management's continuing feedback about speaking clearly is a way of "attacking the way [her] voice naturally sounds."

[12] The grievant claims the agency issued a Written Notice to her regarding not greeting callers appropriately but offered reduced discipline if she agreed not to grieve it, which she apparently accepted. According to the grievant, she also did not grieve alleged harassment she perceived at this time, believing that agency management was taking informal steps to resolve her concerns.

Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment,[13] bullying,[14] and violence, alleged violations must meet certain requirements to qualify for a hearing. A claim of workplace 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.[15] 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.[16] "[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."[17]

Here, the grievant argues that the agency has established unreasonable expectations with regard to her reporting of technical problems.[18] The agency uses a system that accounts for the status of customer-service employees like the grievant – *e.g.* whether they are currently on a call, available to answer a new call, performing other work-related tasks, or on a break. Agency management may also listen to calls, either while they are in progress or after the fact, and has staff dedicated to reviewing calls for quality control. Based on observations using this system, the agency presented the grievant with a due process memorandum alleging that she had "avoided" several calls on September 11, 2021 by connecting but not speaking, or by disconnecting the call while the caller was speaking. The memorandum also alleged that the grievant failed to greet some callers properly. On October 29, 2021, the agency presented a second due process notice alleging that the grievant had "consistently failed to follow established procedures for reporting system connection issues," citing the September allegations as well as the grievant's reporting of numerous technical problems only at the end of the workday on October 4 and 5.

The grievant denied avoiding calls in September and claimed that call clarity and disconnection issues were likely caused by technological and/or "system issues that are outside of [her] control." Citing recent changes that had made her unsure how to report such problems, she

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[13] 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."

[14] 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."

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

[16] 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)).

[17] *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] The agency has expressed that employees are to report such problems to IT staff immediately in order to address problems and monitor employees' service efficiency. The grievant's performance improvement plan specifices that "immediately" means after concluding a service call in which she noticed problems.

also argued that she could not always report issues right away when she is "busy taking calls back-to-back," and that "if [she] had to report every single phone issue/glitch, [she] would be sending multiple reports on a daily basis" and also reducing her call count for the day. As to the allegations in the second due process memorandum, the grievant responded that when agents "are busy and attempting to assist customers, answer/compose emails, create/respond to landing zones, call customer[s] back, and so on, it is easy to . . . forget to report at all and/or when you do remember, it is obviously not in a timely manner because you are busy assisting customers and completing tasks." The grievant maintained that she "was not hired to be a liaison between [the agency's phone service] and IT" and would prefer to troubleshoot problems on her own. The grievant further asserted that her managers' directives are inconsistent and create a "catch-22" where she will either be disciplined for not taking the time to report connection problems or for using too much time not on calls or for having too many connection problems.

In addition to disagreeing with management's directives, the grievant believes that the scrutiny she receives is not applied to other employees and therefore is harassing and retaliatory. According to the grievant, management has monitored her activity especially closely and invoked an immediate-reporting requirement to "build a false case" against her.[19] To support her contention that the agency is acting against her with improper motives, the grievant alleges that the agency's human resources staff ignored her earlier complaints about mistreatment by her former supervisor, that managers are quick to accuse her of misconduct before verifying facts,[20] and that management is undermining her work by denying her needed training and equipment.[21] She further claims that her history of reporting issues conscientiously and providing excellent customer service contradict the allegations in the agency's due process memoranda.

Having thoroughly reviewed the grievance record and the information provided by the parties, EDR cannot find that the facts as alleged raise a sufficient question whether the agency is creating or condoning a hostile work environment for the grievant. 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. However, these terms must be read together with agencies' broader

[19] The grievant has presented substantial evidence that she has regularly reported technical problems during her years of employment with the agency. However, the record indicates that agency management has asked her to report such problems *immediately* and has contemplated discipline against her for failing to do so. The grievant does not appear to dispute the agency's allegations about the timing of her reporting, other than to assert they are unreasonable and/or unfairly applied.

[20] According to the grievant, in mid-December 2021, her supervisor concluded that the grievant had kept a customer on hold for 20 minutes while talking to a man in her apartment; the supervisor expressed the intention to issue discipline related to this incident. When the grievant strongly denied the accusation, the supervisor reviewed the call in question again and apparently withdrew the allegation. More recently, the supervisor counseled the grievant for keeping a customer on the phone for an hour; the grievant responded that the customer wanted to stay connected until his problem was resolved. The grievant contends these are further examples of continued counseling for unfounded or unjustified accusations.

[21] The equipment the grievant refers to is that, in 2019, she was not offered an agency-issued mobile phone and was forced to use her personal phone; she now has an agency phone. She also states that over a year ago she was assigned a "newer" laptop that had already been used by another employee, and it was later discovered that the laptop did not have required software. However, the grievant's allegations do not indicate that she currently lacks equipment that allows her to perform her job. In terms of training, the grievant indicates she is not fully trained and should receive training in a particular service area (compliance). However, it does not appear that the grievant is currently assigned duties for such matters. Accordingly, it does not appear that the agency has denied the grievant training required for her for perform her assigned tasks.

authority to manage the means, methods, and personnel by which agency work is performed. Generally, then, an employee's managers have authority on the agency's behalf to determine, among other things, the scope and substance of the employee's work, the manner in which that work will be monitored and measured, and appropriate disciplinary action or other performance management of employees.

EDR agrees that some of the grievant's allegations – such as her former supervisor's scrutiny of her restroom use and allegedly gendered feedback regarding her tone of voice – are potentially concerning. As to the latter, however, the evidence in the record is that the agency has counseled the grievant to speak more clearly and to use a prescribed greeting script on calls; without more, this specific feedback (as described by the agency) would not appear to violate state anti-discrimination policies. In any event, it appears that management ultimately reassigned the grievant to a different supervisor to address her concerns. In her new reporting structure, the grievant has expressed that her performance is undervalued, and she clearly disagrees with management's approach in a number of areas. In particular, she believes that reporting all technological problems that arise while she is working is outside the scope of her position. Therefore, she indicated that she would comply with management's directives regarding immediate reporting of technological issues "when [she] remember[s] to," but in her opinion these concerns are "insignificant" and "trivial." EDR cannot conclude that the grievant's disapproval of management's efforts to enforce its priorities might constitute harassment or bullying under Policy 2.35. Although the record suggests that management does closely monitor the activity of its service agents, there is nothing to indicate that the agency applies this level of oversight for improper purposes. We also perceive nothing to suggest that reporting problems with the systems the grievant uses to perform her work might be inconsistent with her job duties.

Nevertheless, the grievant argues that the agency applies its policies inconsistently, such that other employees commit worse offenses and do not, to the grievant's knowledge, receive similar performance feedback. However, the available evidence does not present a sufficient question whether employees similarly situated to the grievant have committed misconduct of the same nature but did not receive due process memoranda. Even if the grievant reasonably disagrees with various management actions and negative feedback she has received, EDR cannot conclude that such objections might sufficiently allege violations of DHRM Policy 2.35 or conduct that would otherwise exceed managerial discretion.[22]

For similar reasons, the record does not create a sufficient question whether the grievant is experiencing retaliation for earlier complaints. 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.[23] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[24]

In this case, assuming that the grievant has engaged in protected activity by presenting concerns (including the First Grievance) to her management,[25] no adverse employment action is

[22] *See, e.g.,* EDR Ruling No. 2014-3836; *cf. Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.
[23] *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).
[24] *Id.*
[25] *See generally* Va. Code § 2.2-3000(A).

apparent from the record. The grievant does not dispute that, in early October, she reported technological problems near the end of the workday, rather than as soon as possible when they occurred as she had previously been counseled to do on multiple occasions. Although the agency was apparently considering issuing formal disciplinary action regarding the grievant's conduct in that regard,[26] management ultimately chose not to do so and instead instituted a performance improvement plan. While the grievant disputes the need for a performance improvement plan, the record does not create a sufficient question whether she has experienced an adverse employment action or other performance management that would not have occurred but for her past complaints.

Because the record does not present a sufficient question whether the grievant has experienced a hostile work environment or any other adverse employment action, neither the First nor Second Grievance qualifies for a hearing.

Although neither the due process memoranda nor other performance feedback has had a tangible adverse effect on the grievant's employment at this time, these events could be used to support a future adverse employment action against the grievant. Should the agency's performance management efforts as described herein later serve to support an adverse employment action, such as a formal Written Notice or an annual performance rating of "Below Contributor," this ruling does not prevent the grievant from contesting the merits of such issues through a subsequent grievance.

Requested Relief

Finally, EDR observes that the First and Second Grievances identify several requests for relief that would not be within a hearing officer's authority to grant. While a hearing officer may "order that the agency comply with applicable law and policy,"[27] they may not "[e]stablish[] or revis[e] policies, procedures, rules, or regulations," "[t]ak[e] any adverse action against an employee," or "[d]irect[] the methods, means or personnel by which work activities are to be carried out."[28]

In this case, in the First Grievance, the grievant asked that management "allow for anonymous surveys" to allow employees to evaluate managers, provide a "written statement acknowledging unfair treatment," take employee concerns seriously, reassure employees "that it is okay to discuss their issues," and create an "[e]asier process for discussing such issues." In the Second Grievance, the grievant's requested relief included: (1) "[p]olicies, procedures, and guidelines . . . need to be revised because they are ineffective and conflicting"; (2) "stricter policies on bullying and harassment"; (3) no longer evaluating employees based on "whether or not they used the greeting/script correctly," reached a set call count, or reported system issues in a timely manner; (4) receiving answers and explanations to questions the grievant has posed to management since filing the First Grievance; and (5) "discipline, demotion, and/or termination" of managers "involved with attempting to build a case" against the grievant. While these and similar requests are appropriate to seek during the management steps, they would fall outside the scope of available relief at a grievance hearing.

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[26] EDR notes that an employee's failure to follow instructions may typically merit formal disciplinary action in the form of a Group II Written Notice. DHRM Policy 1.60, *Standards of Conduct*, Att. A, "Examples of Offenses Grouped by Level."
[27] *Grievance Procedure Manual* § 5.9(a).
[28] *Id.* § 5.9(b).

That said, to the extent that either party's concerns would be ameliorated by additional discussions, nothing in this ruling should be read to discourage ongoing communications between the parties on the issues herein or other efforts to improve working relations. It appears that the grievant has outstanding questions and concerns about her work conditions and expectations, such as balancing customer service with internal administration, recognition of her contributions, completing training she deems necessary for her job, and obtaining up-to-date work equipment. Similarly, through its performance improvement plan, it appears that the agency has continuing concerns about the grievant's willingness to follow management instructions. We encourage the parties to continue dialogue on these issues as appropriate to maximize clarity regarding management's priorities and expectations. Should the parties wish to pursue such dialogue through services offered by EDR, they are encouraged to contact our office at 888-232-3842.

EDR's qualification rulings are final and nonappealable.[29]

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[29] *See* Va. Code § 2.2-1202.1(5).