EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

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

QUALIFICATION RULING

In the matter of the Department for Aging and Rehabilitation Services
Ruling Number 2021-5144
October 15, 2020

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 May 19, 2020 grievance with the Department for Aging and Rehabilitative Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On or about May 19, 2020, the grievant filed an expedited grievance alleging that she has been experiencing "constant harassment and hostility" from an office manager in her work location for at least four years. Although the office manager was the grievant's supervisor until October 2019, the grievant claims that the office manager has continued to treat her in a "malicious, unprofessional, confrontational" manner even after the agency assigned the grievant to a different supervisor. As examples, the grievant alleges that the office manager gave her a defective work cell phone, called the grievant on a telework day to monitor whether she was working, excluded the grievant from at least one training email related to the grievant's work, accused the grievant of misappropriating the office's disinfectant spray, and accused the grievant of stealing change from an employee snack fund.[1] As relief, the grievant requests that "a more professional, caring person will be put in place, and stop allowing good employees to be mistreated." The agency head declined to qualify the grievance for a hearing, and the grievant now appeals that decision 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

[1] The grievant suggests that the accusations of thievery may be related to her race.
[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).

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, 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."[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 harassment[9] 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]

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[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

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.[13] 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.

Having reviewed the grievance record, EDR cannot find that the grievant has alleged facts raising a sufficient question whether she has experienced conduct by the office manager so severe or pervasive that it could rise to the level of a hostile work environment. The grievant claims the office manager gave her a work phone that did not function, called her work phone on a telework day with no reason to do so,[14] left her off an email that pertained to her, and insinuated that the grievant might have taken office supplies or small change for personal use. The grievant believes that these instances are subtle but deliberate attempts by the officer manager to undermine the grievant at work. While such allegations of intentional antagonism are concerning if true, EDR cannot find that these acts and omissions are so severe or pervasive as to suggest a hostile work environment that could qualify for a hearing as an adverse employment action.[15] Therefore, the grievance does not raise a sufficient question as to the elements of the harassment claim, and it accordingly does not qualify for a hearing on the grievant's allegations.[16]

That said, this ruling does not mean that EDR deems the grievant's allegations of ongoing harassment, if true, to be fully resolved; it finds only that the claims raised in this grievance do not

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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).

[13] 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 . . . ."

[14] The office manager reportedly said she dialed the grievant's number by mistake; the grievant disputes that explanation.

[15] Claiming that she has been experiencing similar conduct by the office manager for years, the grievant has represented that she could substantiate those claims with further examples and/or evidence. However, while EDR provided the grievant opportunities to provide such information, as of the date of this ruling, EDR has not received any additional information. Therefore, EDR assesses the grievant's claims based solely on the examples initially presented in the grievance record, rather than on any conclusory allegations.

[16] *See Grievance Procedure Manual* § 4.1. 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 her claim.

qualify for a hearing under the grievance statutes. Based on the grievant's allegations that the office manager has continued a years-long pattern of undermining her at work, EDR recommends that the agency remain vigilant regarding its obligations under Policy 2.35 to prevent future unprofessional treatment of the grievant by the office manager. Moreover, this ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens. A subsequent grievance presenting the same or substantially similar allegations could qualify for a hearing on the basis that the agency has misapplied and/or unfairly applied Policy 2.35 by failing to adequately address the grievant's complaints of ongoing conduct prohibited by the policy.

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. EDR's qualification rulings are final and nonappealable.[17]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[17] *See* Va. Code § 2.2-1202.1(5).