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QUALIFICATION RULING

In the matter of George Mason University
Ruling Number 2021-5131
November 4, 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 his May 19, 2020 grievance with George Mason University (the "university" or the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant works for the university's police department. On April 27, 2020, he received two written counseling memoranda arising out of a matter that occurred on March 17. The grievant initiated a grievance on or about May 19, 2020, challenging the alleged "retaliatory actions" of management in the police department "due to my honest and good-faith speech regarding inconsistencies, problems, and issues . . . ." The grievant further claims that the department's management had "created a hostile work environment against individuals . . . who report wrongdoing." The Grievance Form A identifies the date of the challenged management actions as "ongoing and April 27, 2020."

In support of his claims, the grievant described a number of previous management actions that he believes were improper, including alleged disability discrimination and irregularities with his performance evaluations and feedback, particularly a "performance improvement plan that violated general policy." The grievant attached documents to the grievance that date from June 2016 to February 2020 as examples of management actions that he asserts are part of the pattern of allegedly retaliatory and harassing behavior, in addition to the April 27, 2020 counseling memoranda. As relief, he sought the removal of all "improper and unwarranted formal disciplinary record[s]," revocation of the performance improvement plan, an order for the agency to comply with applicable law and policy, a fact-finding hearing with EDR, and an order for the agency to create an environment free from retaliation, discrimination, and defamation.

During the management steps, the university reviewed the April 27, 2020 counseling memoranda and rescinded one of the documents. The university further states that, with the grievant's involvement, management revised the performance improvement plan cited in the grievance.

In June 2020, also during the management steps, the university became aware that the grievant no longer satisfied the requirements for the position of Corporal, which he occupied at the time he initiated his grievance. The university's job description for the Corporal position requires an employee to maintain a General Instructor certification and a Field Trainer certification. The grievant's General Instructor certification expired in November 2019. As a result, the university demoted the grievant to the rank of Master Police Officer effective June 21, 2020. The demotion resulted in a two percent reduction in the grievant's salary and the removal of training duties from his job responsibilities.[1]

Following the management resolution steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR. In addition to the issues identified in the grievance itself, the grievant asserts ins his appeal to EDR that management has engaged in further retaliation since he initiated the grievance by providing alleged "false statements" in the step responses, opening an "Internal Affairs investigation . . . on a matter that was being grieved," and demoting him from Corporal to Master Police Officer.[2]

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 discrimination, retaliation, or discipline may have improperly influenced management's decision, whether state policy may have been misapplied or unfairly applied, or whether a performance evaluation was arbitrary and/or capricious.[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 for a hearing 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

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[1] According to the university, the primary distinctions between the Corporal and Master Police Officer ranks are the training credential qualifications, a two percent salary increase, and responsibility for providing training.

[2] In addition, the grievant asserts that the agency failed to respond to multiple requests for relevant documents as required by the grievance procedure. *See Grievance Procedure Manual* § 8.2 ("Absent just cause, all documents relating to the management actions or omissions grieved shall be made available, upon request from a party to the grievance, by the opposing party.") Because we find that the grievance does not qualify for a hearing and will not proceed, this ruling will not address further the grievant's arguments regarding the agency's alleged failure to produce documents.

[3] *See Grievance Procedure Manual* § 4.1.

[4] Va. Code § 2.2-3004(B).

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

[6] *See Grievance Procedure Manual* § 4.1(b).

responsibilities, or a decision causing a significant change in benefits."[7] Adverse employment actions include 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]

Hostile Work Environment and Retaliation

In this case, the grievant essentially alleges that, over the course of several years, management within the university's police department has engaged in workplace harassment that created a hostile work environment. Although DHRM Policy 2.35, *Civility in the Workplace* prohibits workplace harassment[10] and bullying,[11] 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 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.[12] 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.[13] "[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."[14]

The grievant's receipt of the two April 27, 2020 counseling memoranda are the only discrete management actions alleged to have occurred within the 30 calendar days preceding the filing of the grievance. During the management steps, the agency investigated and rescinded one

[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] 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."
[11] 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."
[12] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[13] 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)).
[14] *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).

of those documents, leaving a single counseling memorandum. The agency has further represented that it modified the grievant's performance improvement plan to address at least some of the concerns articulated in the grievance. The evidence in the grievance record further demonstrates the university's history of managing the grievant's performance through counseling memoranda, performance evaluations, and other similar informal actions, all of which he argues were improper and unwarranted. The grievant may reasonably object to the university's assessment of his work performance and decision to address those matters through informal corrective action, but such disagreement does not establish that those actions are "adverse" for purposes of hearing qualification, either individually or collectively.[15]

The grievant's allegation of disability discrimination stems from his request for a reasonable accommodation in 2019. He contends that, at that time, management shared his health information with other employees and made disparaging and denigrating comments about his medical condition. The grievant claims that he filed a complaint of disability discrimination with the federal government about the issue, though the status of the complaint is unclear from the evidence in the grievance record.[16] The grievant's allegations, if true, are concerning and arguably describe conduct that is inconsistent with DHRM Policy 2.35. However, it is notable that the grievant has not alleged that this behavior has recurred since 2019 or that it is currently ongoing.

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 in his current work environment such that the grievance qualifies for a hearing at this time.[17] 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 authority to manage the means, methods, and personnel by which agency work is performed. Generally, then, management has the authority to determine, among other things, the grievant's performance expectations and the appropriate level of substantive feedback to address performance deficiencies. Although the grievant clearly disagrees with the department's assessment of his work performance and considers the actions described in the grievance as harassing in nature, his belief does not, by itself, render the university's actions improper. Without facts that would cause an objective reasonable person to perceive the university's exercise of authority in these areas as hostile or abusive, EDR cannot conclude that its failure to meet the grievant's subjective standards constitutes any conduct prohibited by DHRM Policy 2.35.

The grievant further contends that the actions described above were retaliation for previous complaints he made about alleged misconduct and mismanagement within the university's police department. A claim of retaliation may qualify for a hearing if the grievant presents evidence

[15] EDR has long held that verbal or 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. *E.g.*, EDR Ruling No. 2017-4443; *see* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[16] The grievant has provided documentation to confirm that he filed a complaint, but EDR has not reviewed the complaint itself or other information about the subject of the complaint beyond the grievant's assertions.
[17] *See, e.g.,* EDR Ruling No. 2014-3836; *cf. Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.

raising a sufficient question whether (1) he engaged in a protected activity; (2) he suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[18] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[19]

The grievant has provided extensive documentation demonstrating that he engaged in protected activity by reporting various concerns to university management since at least 2016. However, as explained above, the grievance record does not reflect that he has suffered an adverse employment action. Further, even if DHRM Policy 2.35 establishes a lower standard for acts that may be considered retaliatory, the grievant has not identified acts or omissions that could reasonably be viewed as exceeding managerial discretion and approaching the level of reprisal, interference, restraint, penalty, discrimination, intimidation, or harassment as specified by the policy.[20]

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 grievance does not qualify for a hearing on any of these grounds.

Demotion and Additional Subsequent Actions

In addition to the actions challenged in the grievance itself, the grievant has asserted to EDR that the university engaged in further retaliation against him since he initiated his grievance. More specifically, the grievant argues that the university's management responses contain "false statements," that the university opened an "Internal Affairs investigation" into at least some of the matters he has grieved, and that he was improperly demoted from Corporal to Master Police Officer.

The grievant has not identified any of the allegedly false statements in the agency's step responses, nor have we identified any other apparent inaccuracies in the management responses after a thorough review of the grievance record. To the extent the grievant disagrees with the content of the responses or believes they were inadequate, that issue could have been raised during the management steps using the noncompliance process described in Section 6.3 of the *Grievance Procedure Manual*.[21]

Based on the information provided by the university, the "investigation" complained of by the grievant appears to have been the agency's review of the April 27, 2020 counseling memoranda in response to the grievant's concerns, one of which has now been rescinded. The university's communications with the grievant about the nature of its review, its timing, and in particular the characterization of the review as an "Internal Affairs investigation" caused the grievant to

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[18] *See* Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[19] *Id.*
[20] 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.
[21] Each step response "must address the issues and the relief requested and should notify the employee of their procedural options." *Grievance Procedure Manual* §§ 3.1, 3.2, 3.3.

reasonably perceive the review as disciplinary in nature and potentially retaliatory. It appears that the "investigation" resulted in no further action against the grievant and was closed.

Regarding the grievant's demotion from Corporal to Master Police Officer, the facts provided by the parties are unclear in some respects. According to the university, the grievant's General Instructor certification, which is a required qualification for the Corporal position, expired in November 2019. The grievant alleges that the agency unfairly assessed his training credentials and denied him the opportunity to attend training that would have allowed him to retain the General Instructor certification. The information the grievant has provided, however, indicates that management denied his request to attend several training courses *after* his General Instructor certification had expired. The university has presented email records to demonstrate that management communicated with the grievant multiple times before the certification expired about his progress in completing the General Instructor certification requirements, which the grievant ultimately did not satisfy. Management discovered the issue in June 2020 and demoted the grievant accordingly.

The exact sequence of events that led to the expiration of the grievant's General Instructor certification are disputed, but it is clear that his certification expired in November 2019. The agency requires all employees who hold a Corporal position to have a General Instructor certification. EDR perceives no inherent impropriety or unfair application of policy in the university's decision to demote the grievant when it became aware of his failure to maintain the required qualifications for the position.[22] Although the demotion is not otherwise fairly challenged in the initial grievance,[23] nothing in this ruling prevents the grievant from challenging any related concerns about training opportunities or his position in a separate timely grievance, including whether the grievant is continued to be denied training opportunities to attain the certifications necessary for the rank of Corporal.

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.[24] If the grievant experiences a future adverse employment action that is connected with any of the events challenged in this grievance—including those that occurred after the initiation of the grievance, such as his concerns about the denial of training opportunities and his demotion to Master Police Officer—this ruling does not prevent the grievant from raising that issue in a subsequent, timely grievance challenging the related adverse employment action.

EDR's qualification rulings are final and nonappealable.[25]

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[22] At least one other employee was also demoted from Corporal to Master Police Officer at the same time as the grievant, also for failing to maintain the required training credentials for the position.
[23] The grievance procedure does not permit new allegations to be added to an existing grievance after it is filed; such new challenges would need to be addressed by a subsequent timely grievance. *Grievance Procedure Manual* § 2.4.
[24] *See Grievance Procedure Manual* § 4.1.
[25] *See* Va. Code § 2.2-1202.1(5).

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