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QUALIFICATION RULING

In the matter of the Virginia Department of Professional and Occupational Regulation
Ruling Number 2019-4943
August 8, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR")[1] at the Virginia Department of Human Resource Management ("DHRM") on whether her April 18, 2019 grievance with the Virginia Department of Professional and Occupational Regulation (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

On or about April 18, 2019, the grievant filed a grievance alleging that, for most of her employment,[2] she had been experiencing "bullying, intimidation, harassment, coercion and retaliation" in violation of DHRM Policy 2.35, *Civility in the Workplace*.[3] She alleged that bullying behavior from her supervisor and coworker, which led to a meeting with the agency's human resources staff in March 2018, had continued since that time in other forms. As examples, the grievant alleged that her supervisor relayed a false story about her to another employee; withheld work assignments and performance feedback; added third parties to email communications the grievant intended only for her supervisor; caused the grievant to provide inaccurate information to the public; and allowed the grievant's coworker to follow a more flexible work schedule.[4] The grievant sought, among other relief, training for certain agency staff on civility and leadership; a professional development plan to include evaluations, performance goals, and a review of her position and salary; and a review of the department's overall objectives and bullying and anti-harassment policies.

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[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

[2] The grievant began her employment with the agency in December 2017.

[3] DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment, bullying, and violence. This policy became effective on January 1, 2019.

[4] EDR has carefully reviewed all of the grievant's allegations regarding her supervisor, her coworker, her work responsibilities and performance standards, and agency management and objectives. To the extent that this ruling does not specifically address certain allegations, the omission does not reflect that EDR failed to consider such allegations but rather that their effect on EDR's analysis was merely cumulative.

Following the management resolution steps, the agency head found the grievant's allegations of ongoing bullying or harassment were not supported and that "all [performance] evaluations affecting employment terms, conditions, and benefits have been completed." Thus, the agency 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.[5] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[6] 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.[7]

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."[8] 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."[9] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[10] 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."[11]

DHRM Civility Policy/Retaliation

Although DHRM Policy 2.35 prohibits workplace harassment,[12] bullying,[13] and violence, alleged violations must meet certain requirements to qualify for a hearing. Like discriminatory

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[5] *See Grievance Procedure Manual* § 4.1.
[6] Va. Code § 2.2-3004(B).
[7] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[8] Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).
[9] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[10] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[11] 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)).
[12] 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."
[13] 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."

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.[14] 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.[15] "[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."[16]

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 conduct at issue was so severe or pervasive as to alter the conditions of the grievant's employment. EDR agrees that some of the grievant's allegations – including negative and false gossip[17] and persistent unwanted comments[18] – describe inappropriate conduct that may merit further investigation by the agency under DHRM Policy 2.35. However, EDR cannot find under the circumstances that these allegations, though concerning, are so severe or pervasive to raise a sufficient question whether the grievant is subject to a hostile work environment.[19]

Likewise, with respect to the grievant's other allegations, EDR cannot find that the grievant has suffered an adverse employment action as a result of an unfair application or misapplication of DHRM Policy 2.35. The policy 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, the grievant's

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

[15] 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)).

[16] *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).

[17] The grievant alleges that, in January 2019, her supervisor told another employee that the grievant had "yelled and screamed" at the supervisor about broken office equipment. The grievant claims that, in reality, she did not yell, scream, or say anything about the broken equipment during their exchange. The grievant reported this incident to the agency's HR staff, who instructed the supervisor not to speak ill of the grievant to others.

[18] In March 2018, the grievant's supervisor allegedly referred to her as "big mama." The grievant claims that since that time, although she has repeatedly made clear that any comments on her appearance (except job-related feedback) are unwanted, her supervisor now attempts to make her uncomfortable by excessively complimenting her appearance to an extent that is inappropriate for the workplace. Because this specific allegation does not appear among those the grievant first identified as part of her grievance, and the agency denies she presented it at any other time as a form of ongoing harassment, it is not clear that this allegation has been squarely presented to the agency for resolution. Nothing in this ruling should be interpreted to conclude that DHRM Policy 2.35 does not implicate such conduct, or that the conduct could not support an adverse employment action under circumstances other than those raised by the present grievance.

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

supervisor has authority on the agency's behalf to determine, among other things: the scope and substance of the grievant's assignments, the information necessary to complete those assignments, the feasibility of individual employees' work schedule requests, the content of communications to the public on behalf of the agency, parties to be included in discussions of agency business, and the appropriate level of substantive feedback to be given to employees. Here, without facts that would cause an objective reasonable person to perceive the supervisor's exercise of authority in these areas as hostile or abusive, EDR cannot conclude that her failure to meet the grievant's subjective standards constitutes any conduct prohibited by DHRM Policy 2.35.

The grievant further contends that her supervisor's actions are in retaliation for early complaints she made to the agency alleging disrespectful, hostile, and/or harassing treatment by her coworker and supervisor. A claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) she engaged in a protected activity; (2) she suffered an adverse employment action;[20] and (3) a causal link exists between the protected activity and the adverse action.[21] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[22]

Assuming only for purposes of this ruling that the grievant engaged in protected activity under DHRM Policy 2.35 by reporting uncivil conduct,[23] the record does not reflect that the grievant has suffered an adverse employment action, as explained above. 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 by her supervisor 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.[24]

Thus, the grievant's claims relating to DHRM Policy 2.35 do not qualify for a hearing.

Performance Evaluations

The grievant alleges that she has suffered an adverse employment action in the form of arbitrary and capricious performance evaluations and other feedback. A performance rating is arbitrary or capricious if management determined the rating without regard to the facts, by pure

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[20] The grievant has argued that, in considering her claims of retaliation for reporting harassing or other uncivil conduct, the "adverse employment action" standard does not apply in light of *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53, 67-69 (2006), in which the Supreme Court held that an employee claiming retaliation under the federal Civil Rights Act need only allege a "materially adverse" action that could well dissuade a reasonable employee from engaging in activity protected by the statute. However, as relevant to this ruling, whether a state employee's grievance qualifies for hearing is governed by Section 2.2-3004(A) of the Code of Virginia, which specifically provides the right to a hearing only for "adverse employment actions." *Burlington Northern* does not expand this statutory limitation on the state employee grievance procedure.

[21] *See* Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).

[22] *Id.*

[23] DHRM Policy 2.35 defines retaliation as "[o]vert or covert acts of reprisal, interference, restraint, penalty, discrimination, intimidation, or harassment against an individual or group exercising rights under this policy." The policy prohibits retaliation of "any form" against employees who report policy violations in good faith.

[24] 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 this claim, or whether the supervisor's allegedly retaliatory conduct could justify the issuance of other corrective and/or disciplinary action by the agency.

will or whim. An arbitrary or capricious performance evaluation is one that no reasonable person could make after considering all available evidence. If an evaluation is fairly debatable such that reasonable people could draw different conclusions, it is not arbitrary or capricious. However, if the grievance raises a sufficient question whether a performance evaluation resulted merely from personal animosity or some other improper motive – rather than a reasonable basis – a further exploration of the facts by a hearing officer may be warranted. In general, a satisfactory performance evaluation is not an adverse employment action.[25] When the grievant presents no evidence of an adverse action relating to the evaluation, such a grievance does not qualify for a hearing.

Here, the grievant has received three performance reviews since beginning her employment with the agency in December 2017, each coinciding with benchmarks of her probationary status and indicating an overall rating of "Contributor." Attachments to the grievant's three-month and probation-ending evaluations include personalized comments endorsed by the grievant's supervisor detailing her substantive contributions to the division. Based on a detailed description of the grievant's work contributions by reference to the responsibilities listed in her Employee Work Profile, the grievant's probation-ending evaluation indicates that her performance exceeded expectations.[26] Thus, the uniformly positive record of evaluations in this case does not support the contention that the grievant was evaluated based on personal animosity or other improper motive.[27]

Although the agency's alleged failure to complete a further evaluation promised by June 2019 may reasonably frustrate the grievant, EDR identifies no DHRM or agency policy that requires such further evaluation. DHRM Policy 1.40, *Performance Planning and Evaluation*, establishes guidelines for evaluating employees over an annual performance cycle[28] and sets forth limitations for performance-based salary increases. Applying these provisions, the grievant has not presented evidence that she was entitled to additional evaluation or feedback under DHRM Policy 1.40 or that, because she did not receive such feedback, the terms and conditions of her employment were adversely affected. Agency management has significant discretion in the administration of its policies and standard operating procedures,[29] and under the circumstances present in this case, EDR cannot find that any lack of performance feedback alleged by the grievant violated a mandatory policy provision or was so unfair as to amount to a disregard of the intent of the policy.

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[25] *E.g.*, EDR Ruling No. 2013-3580; EDR Ruling No. 2010-2358; EDR Ruling No. 2008-1986; *see also* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377-378 (4th Cir. 2004) (holding that, while an employee's performance rating was lower than on his previous evaluation, there was no adverse employment action where he failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment).

[26] The grievant's probation-ending narrative evaluation was signed by her supervisor, although the grievant alleges that she prepared much of the content herself.

[27] In her appeal, the grievant appears to contend that the "mere existence" of her position as described in her Employee Work Profile is "a waste of state resources." While employment positions and responsibilities are generally a matter within the discretion of agency management, this ruling does not address whether the grievant's responsibilities constitute fraud, waste, or abuse of state resources.

[28] Per DHRM Policy 1.40, a probationary employee must be evaluated after six months of employment and at the time his or her probationary period ends. For evaluation of non-probationary classified employees, a performance cycle "usually begin[s] October 25th of each year." Non-probationary employees "should receive interim evaluations near the middle of the performance cycle," but such evaluations "may" be conducted at any time.

[29] *See, e.g.*, EDR Ruling No. 2011-2903.

Although it is not apparent that a lack of performance feedback has adversely affected the grievant's employment to date, she has expressed legitimate concerns that arbitrary and/or capricious performance feedback – including both standards and ratings – could negatively affect her future evaluations and/or her selection for salary increases, bonuses, and promotions. Should the grievant experience future adverse employment actions in connection with the manner of feedback that she has received to date, this ruling does not prevent the grievant from raising the issue in a subsequent grievance challenging a related adverse employment action.

CONCLUSION

The facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.[30] Because the grievant has not raised a sufficient question as to the existence of severe or pervasive harassment or bullying, retaliatory conduct, or arbitrary or capricious performance feedback, the grievance does not qualify for a hearing on any of these grounds.

EDR's qualification rulings are final and nonappealable.[31]

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