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## QUALIFICATION RULING

In the matter of the Department of Corrections  
Ruling Number 2019-4948  
August 8, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”)<sup>1</sup> at the Virginia Department of Human Resource Management (“DHRM”) on whether her July 5, 2018 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

### FACTS

On or about July 5, 2018, the grievant initiated a grievance alleging that she was experiencing “unprovoked blatant disrespect[ful]” behavior and “targeted harassment” from a Manager at her facility. The grievant claims that, between April and June 2018, the Manager engaged in disrespectful, belittling, demeaning, and/or abusive conduct in front of both agency employees and visitors to the facility. In general, the incidents described by the grievant appear to consist of the Manager allegedly speaking to her loudly and aggressively in a rude tone of voice, as well as talking over or interrupting her during conversations and at staff meetings.<sup>2</sup> As relief, the grievant requested a written apology from the Manager; training on communication skills for the Manager; a mediation session with the Manager; and that she not experience retaliation from the Manager or “be forced to relocate to another facility.”

During the management steps, the third step-respondent informed the grievant that he had looked into her concerns and contacted the warden at the grievant’s facility about the need for management to communicate effectively with employees.<sup>3</sup> The agency has further indicated that

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<sup>1</sup> 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.

<sup>2</sup> EDR has carefully reviewed all of the grievant’s allegations regarding the Manager. To the extent this ruling does not specifically address certain specific instances of the Manager’s alleged inappropriate conduct, the omission does not reflect that EDR failed to consider those allegations, but rather that they merely had a cumulative effect on EDR’s analysis of the issues.

<sup>3</sup> For reasons that are unclear based on the grievance record, the third step-respondent received the grievance on or about September 6, 2018, yet did not provide the grievant with a written response until approximately May 23, 2019.

the Manager and other supervisors at the grievant's facility attended a team-building training, with the goal of enhancing their communication skills. Following the management resolution steps, the agency head determined that the grievance record did not contain evidence that a misapplication of agency policy occurred, that the grievant experienced an adverse employment action, or that the Manager engaged in severe or pervasive harassment that created a hostile work environment. As a result, 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.<sup>4</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>5</sup> 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.<sup>6</sup>

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."<sup>7</sup> 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."<sup>8</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>9</sup>

#### *Compliance Issues*

In her request for qualification, the grievant argues that the agency failed to comply with the grievance procedure during the management steps. In particular, she alleges that the first step-respondent did not address her concerns directly with the Manager; that the second step-respondent did not conduct the second step meeting before providing her with a written response, and that she did not receive the second step response within five workdays; and that the third step-respondent received the grievance in September 2018 and did not issue a written response to her until May 2019, over eight months later. Some of these events, if they occurred as described by the grievant, could constitute noncompliance with the grievance procedure. However, the *Grievance Procedure Manual* states that "[a]ll claims of noncompliance should be raised

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<sup>4</sup> See *Grievance Procedure Manual* § 4.1.

<sup>5</sup> Va. Code § 2.2-3004(B).

<sup>6</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>7</sup> Va. Code § 2.2-3004(A); see *Grievance Procedure Manual* § 4.1(b).

<sup>8</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>9</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

immediately. By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time.”<sup>10</sup>

Even accepting the grievant’s claims regarding these issues as true, she does not appear to have notified the agency about the alleged noncompliance at the first and second steps, as required by the *Grievance Procedure Manual*, or otherwise demanded that the alleged noncompliance be corrected at the time it occurred. Furthermore, and although the delay in the issuance of the third step response was understandably frustrating to the grievant, the agency ultimately brought itself into compliance by providing her with the appropriate response after she submitted a notice of noncompliance. For these reasons, EDR would not issue a finding of noncompliance on the issues raised by the grievant.<sup>11</sup> Accordingly, EDR finds that the grievant’s claims of noncompliance have been either waived or brought into compliance by the agency, and they will not be addressed further.

### *Workplace Harassment*

In her grievance, the grievant essentially alleges that the Manager engaged in “targeted harassment” directed at her that has created a hostile work environment. At the time the Manager’s alleged conduct occurred and when the grievance was initiated, the operative state policy addressing this type of behavior was DHRM Policy 2.30, *Workplace Harassment*.<sup>12</sup> For a claim of workplace harassment to qualify for a hearing, consistent with EDR’s past practices under Policy 2.30, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or protected activity;<sup>13</sup> (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.<sup>14</sup> In the analysis of such a claim, the “adverse employment action” requirement is satisfied if the facts raise a sufficient question as to whether the conduct at issue was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment.<sup>15</sup> “[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.”<sup>16</sup>

The grievant may be raising legitimate concerns about her employment and the Manager’s conduct. Indeed, it appears that agency management agreed with the grievant’s position to some degree. During the management steps, for example, the third step-respondent

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<sup>10</sup> *Grievance Procedure Manual* § 6.3; see also, e.g., EDR Ruling No. 2004-752; EDR Ruling No. 2003-042; EDR Ruling No. 2002-036.

<sup>11</sup> The same result would be reached had it been the grievant who missed a five-workday deadline.

<sup>12</sup> Policy 2.30 was superseded by Policy 2.35, *Civility in the Workplace*, on January 1, 2019. Policy 2.35 is discussed in greater detail below.

<sup>13</sup> See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: “participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.” *Grievance Procedure Manual* § 4.1(b)(4).

<sup>14</sup> See *Gilliam v. S.C. Dep’t of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

<sup>15</sup> See generally *id.* at 142-43.

<sup>16</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

indicated that he had contacted the warden at the grievant's facility to discuss the importance of training managers to communicate effectively, and the Manager appears to have attended at least one training session intended to enhance communication skills. Significantly, however, the grievant has not alleged that the offending conduct was based on a protected status or prior protected activity, and while the grievant's concerns are understandable, prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.<sup>17</sup> For these reasons, EDR finds that the facts alleged by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure based on a theory that the Manager's conduct created a discriminatory or retaliatory hostile work environment.<sup>18</sup>

### *Civility in the Workplace*

On January 1, 2019, while this grievance was proceeding through the management steps, Policy 2.30 was superseded by DHRM Policy 2.35, *Civility in the Workplace*. Policy 2.35 prohibits workplace harassment,<sup>19</sup> bullying,<sup>20</sup> and violence. During its investigation of the issues raised in the grievance, EDR contacted the grievant for information about whether the Manager has continued to exhibit the behavior described in the grievance since the implementation of Policy 2.35. According to the grievant, the Manager currently "ignores [her] most of the time."<sup>21</sup> The grievant has not made additional complaints to the agency about the Manager's conduct, but argues that the Manager is "not treating [her] in a professional manner" by ignoring her, and has reported to management that she believes the Manager cannot "be fair and impartial in handling any matters concerning" her.

The grievance procedure provides that additional management actions or omissions cannot be added to a grievance after it is filed.<sup>22</sup> Nonetheless, the management action at issue here—the Manager's allegedly unprofessional conduct—appears to have been ongoing in some form since 2018. While the policies regulating behavior in the workplace have changed during that time, the Manager's underlying conduct itself has not. EDR has considered the grievant's statement that the Manager "mostly ignores [her]" currently, as well as the examples she has provided of the Manager's allegedly disrespectful, unprofessional, and/or abusive behavior occurred in 2018, prior to the implementation of Policy 2.35. However, it appears, based on the

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<sup>17</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("[C]onduct must be extreme to amount to a change in the terms and conditions of employment . . . ."); see *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996).

<sup>18</sup> See *Grievance Procedure Manual* § 4.1. This ruling only determines 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 managers' allegedly unprofessional behavior could justify the issuance of corrective and/or disciplinary action by the agency.

<sup>19</sup> Traditionally, workplace harassment claims were linked to a victim's protected status or protected activity, as discussed above. However, Policy 2.35 also prohibits 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."

<sup>20</sup> 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."

<sup>21</sup> The grievant also described an incident where the warden placed her on paid administrative leave in May 2019. That management action is the subject of a separate grievance and will not be discussed further here.

<sup>22</sup> *Grievance Procedure Manual* § 2.4.

grievant's description of current events, that the Manager's overt disrespectful/abusive/belittling comments have ceased. Thus, EDR finds no basis to conclude that the Manager's current behavior, as described by the grievant, has been so severe or pervasive as to alter the conditions of her employment such that the grievance can qualify for hearing.

Nevertheless, a senior manager who explicitly ignores another manager (or any employee for that matter) is engaging in unprofessional conduct. Agency leaders must exhibit appropriate communication and management skills to actively engage professionally with all employees. Thus, the grievant has raised legitimate concerns about the Manager's behavior under the *Standards of Conduct* and *Civility in the Workplace* policies, if true. As such, EDR recommends that the agency investigate the current situation and take appropriate action to prevent any further unprofessional treatment of the grievant and others by the Manager.<sup>23</sup> If the conduct of the Manager as alleged by the grievant continues or worsens, it could be considered non-discriminatory workplace harassment and/or bullying, both of which are prohibited under Policy 2.35.<sup>24</sup>

EDR's qualification rulings are final and nonappealable.<sup>25</sup>



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<sup>23</sup> Pursuant to the terms of Policy 2.35, the agency is to establish an internal complaint procedure and assign responsibilities for the investigation and communication of findings.

<sup>24</sup> The grievant originally sought mediation with the Manager to work through the issues raised in her grievance. While it is unclear whether this matter is appropriate for mediation, the agency properly notes that mediation is a voluntary process, requiring both participants to agree to mediate. To the extent the Manager has been reluctant to engage in such a process, we recommend that the agency provide her with information about EDR's mediation program to better educate about the potential benefits. Both the grievant and the Manager should consider reaching out to EDR confidentially to discuss whether any of our services could assist with improving their working relationship.

<sup>25</sup> See Va. Code § 2.2-1202.1(5).