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QUALIFICATION RULING

In the matter of the Virginia Information Technologies Agency
Ruling Number 2020-4950
August 30, 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 his May 16, 2019 grievance with the Virginia Information Technologies Agency (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

As disclosed in his grievance, on or about March 22, 2019, the grievant submitted a complaint to the Office of the State Inspector General's Fraud, Waste and Abuse Hotline, alleging that his supervisor was misusing their agency's audit process to punish the audited entity (the supervisor's former employer). On or about May 16, 2019, the grievant filed a grievance further alleging that his supervisor had, among other things, engaged in a pattern of retaliatory and/or otherwise improper behavior toward him because of his report to the Hotline. As described in the grievance and attachments, this conduct included no longer speaking to the grievant, instead relaying instructions through coworkers or not at all; criticizing the grievant[2] in front of coworkers, sometimes when the grievant himself was not present; and abruptly removing the grievant as the lead auditor for an upcoming audit. The grievant requested that the agency (1) cease any retaliation, (2) update its whistleblower reporting policies, (3) prohibit improper dissemination of personnel information,[3] and (4) provide documents requested by the grievant.[4]

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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 alleges his supervisor, in retaliation for the Hotline complaint, contrived unfair accusations against him related to the grievant's pace and scheduling of audit work, his use of leave, and a requirement that the grievant take his work laptop home with him each night.

[3] While the agency has represented that it has taken steps to address improper personnel discussions in the grievant's work group, it has appropriately declined to disclose to the grievant its personnel management with respect to specific individuals.

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As the grievance proceeded through the management resolution steps, the agency concluded that the supervisor's actions alleged as retaliatory appeared to be motivated by the grievant's legitimate work-performance issues, or were otherwise "in line with typical management practices." The agency head denied most outstanding relief sought by the grievant and declined to qualify the grievance for a hearing. The grievant now appeals the latter 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.[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 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]

Retaliation

For a claim of retaliation to qualify for hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[11] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity – in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does

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[4] To the extent that the agency has not satisfied the grievant's request for grievance-related documents, it appears that this issue is to be addressed in a compliance ruling forthcoming from EDR, arising from a subsequent, similar grievance filed by the grievant with his agency.
[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] *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] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the agency's 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." *See also Grievance Procedure Manual* § 4.1(b)(4).

not qualify for a hearing unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[12] For purposes of this ruling, EDR assumes that the grievant's March 22 report to the State Fraud, Waste, and Abuse Hotline was a protected activity in the retaliation analysis.[13] However, 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 grievant suffered an action adverse to the terms, conditions, or benefits of his employment.

As to the supervisor's instances of counseling on miscellaneous work expectations, verbal or informal 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. Here, the supervisor allegedly counseled the grievant both verbally and via email, both of which are types of informal supervisory action – in contrast to, for instance, a formal Written Notice. Even if the grievant reasonably objects to the basis of his supervisor's criticisms and counseling, such disagreement does not establish that those actions are "adverse" for purposes of hearing qualification.

Under limited circumstances, a significant loss of job responsibilities may constitute an adverse action, comparable to a reassignment or demotion.[14] Here, the supervisor apparently abruptly removed the grievant from the lead role on an audit, directing him to act instead in a support role to the newly-assigned lead. But this change does not appear to have significantly impacted the grievant's job responsibilities or impeded his career.[15] Absent evidence that the grievant is being relegated indefinitely to duties less than those his Employee Work Profile identifies as part of his primary responsibilities, the record does not indicate that working in a support, rather than lead, role on one audit engagement creates the basis for an adverse employment action that would support qualification for a hearing in this case.

Similarly, the grievance record does not reflect that the grievant has experienced "a significant change in [his] employment status"[16] due to the apparent breakdown in his working

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

[13] As of the date of this ruling, EDR is not aware of any determination by either the agency or the Office of the State Inspector General as to whether the grievant's underlying Hotline complaint was founded, *i.e.*, that the agency's audit process was misused by the grievant's supervisor.

[14] *See* Twisdale v. Snow, 325 F.3d 950, 953 (7th Cir. 2003) ("[L]ightening a worker's load can constitute actionable harassment – but only if by depriving him of the opportunity to maintain and improve his skills it impedes his career . . . .") (internal citations omitted).

[15] The grievant's Employee Work Profile indicates that, as an IT Security Auditor, the grievant's primary responsibility is to "[perform] engagement fieldwork with minimal supervision." This duty involves completing audits on schedule, organizing work papers, creating timely documentation consistent with the scope of the engagement, and presenting conclusions that can be traced directly back to testwork. According to the agency, while auditors are assigned to a lead position based on availability and experience, multiple auditors work on each engagement to provide "checks and balances" to the results. In addition, it appears that the grievant continues to serve as the lead auditor for other engagements.

[16] *See Ellerth*, 524 U.S. at 761. Hostile or harassing conduct may qualify for a hearing if it is so severe or pervasive as to alter the conditions of employment by creating a hostile or abusive work environment. *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 v. City of Laurel, 895 F.3d 317, 331 (4th Cir. 2018) (holding that a hostile work environment could exist where a supervisor overruled the

relationship with his supervisor. Nevertheless, EDR notes that a supervisor who refuses to speak to his subordinate is engaging in unprofessional conduct under DHRM Policy 2.35, *Civility in the Workplace*.[17] In addition, under certain circumstances, a supervisor who persistently discusses his subordinate to colleagues in disparaging terms – even if such discussions are work-related – may also be engaging in conduct that is unprofessional or otherwise prohibited by DHRM policies. Policy 2.35 places affirmative obligations on agency management to respond to complaints of conduct prohibited by the policy, including unprofessional behavior.[18] Here, the grievant has alleged that interpersonal communications with his supervisor deteriorated following his report to the state's whistleblower Hotline, such that the supervisor avoided speaking with him and allegedly began discussing him in negative terms to other employees. While this record does not reflect circumstances sufficient to constitute an adverse employment action,[19] EDR recommends that the agency take actions necessary and appropriate to fulfill its obligations under Policy 2.35 to prevent any further unprofessional treatment of the grievant by his supervisor, if it has not done so already.

Further, while EDR concludes that the grievant has not alleged facts to support an adverse employment action that qualifies for a hearing, this ruling takes no position as to whether the conduct alleged – which closely followed his Hotline complaint – was caused or motivated by retaliation. Although it is not apparent that any performance counseling, work assignment change, or interpersonal conduct has adversely affected the grievant's terms, conditions, or benefits of employment at this time, these occurrences could nevertheless form the basis of a qualifiable adverse employment action against the grievant in the future. For example, should the allegations grieved in this instance later serve to support a formal Written Notice, a "Below Contributor" overall annual performance rating, or further deterioration of the grievant's work environment, this ruling does not prevent the grievant from contesting the merits of his allegations through a subsequent grievance challenging a related adverse employment action. In addition, 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 about unprofessional workplace behavior.

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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] *See* EDR Ruling No. 2019-4948 ("[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.").

[18] Under DHRM 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."

[19] The grievant alleges that his supervisor impugned his time management to or within earshot of other employees. These allegations, though concerning, do not appear to rise to the level of a hostile work environment at this time. *See Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331. However, the grievant asserts that his subsequent grievance addresses ongoing improper communications between his supervisor and other employees. To the extent that continuing violations of DHRM policies are so pervasive as to create a hostile work environment, they could rise to the level of an adverse employment action that qualifies for a hearing.

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.[20] Because the grievant has not presented evidence to demonstrate that he has suffered an adverse employment action, his grievance alleging retaliation does not qualify for a hearing on that basis.

Lastly, while this ruling was pending, the agency submitted a request to administratively close this grievance[21] because the grievant has submitted his resignation, which is apparently effective September 10, 2019. As EDR has determined in this ruling that the grievance does not qualify for a hearing, the agency's request to close the grievance is moot and need not be addressed.

EDR's qualification rulings are final and nonappealable.[22]

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[20] *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 his claim, or whether the supervisor's allegedly retaliatory conduct could justify the issuance of corrective and/or disciplinary action by the agency.
[21] It is unclear whether the grievant was also sent a copy of the request.
[22] *See* Va. Code § 2.2-1202.1(5).