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## QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2020-4955
August 27, 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 March 21, 2019 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 March 21, 2019, the grievant filed a grievance alleging that, since November 2018, a Manager at her facility[2] had engaged in ongoing harassment and/or retaliation directed at her that created a hostile work environment. As relief, the grievant requested that disciplinary action be issued to the Manager and for agency staff to receive training on addressing claims of workplace harassment. 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

*Alleged Agency Noncompliance*

In her request for qualification, the grievant appears to argue that EDR should render a decision in her favor due to alleged substantial noncompliance with the grievance procedure by the agency. In particular, the grievant asserts that none of the step-respondents adequately addressed the issues raised in her grievance and that agency management did not fully

[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 Manger does not supervise the grievant and is not in the grievant's chain of command.

investigate or resolve her concerns during the management steps. The *Grievance Procedure Manual* states that "[a]ll claims of noncompliance should be raised 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."[3] Even accepting the grievant's claims regarding these issues as true, she does not appear to have notified the agency about the alleged noncompliance as required by the *Grievance Procedure Manual*, nor did she otherwise demand that the alleged noncompliance be corrected at the time it occurred. Based on these facts, EDR finds that any agency noncompliance that may have occurred during the management steps has been waived by the grievant based on her continuation of the grievance.

*Hostile Work Environment*

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[4] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[5] 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.[6]

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."[7] 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."[8] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9] 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."[10]

In this case, the grievant essentially alleges that the Manager has engaged in harassment and/or retaliation that have created a hostile work environment in violation of DHRM Policy 2.35, *Civility in the Workplace*. Although Policy 2.35 prohibits workplace harassment, bullying, and violence, alleged violations must meet certain requirements to qualify for a hearing. For a claim of workplace harassment under Policy 2.35 to qualify for a hearing,[11] the grievant must

[3] *Id.* § 6.3; *see also, e.g.*, EDR Ruling No. 2004-752; EDR Ruling No. 2003-042; EDR Ruling No. 2002-036.
[4] *See Grievance Procedure Manual* § 4.1.
[5] Va. Code § 2.2-3004(B).
[6] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[7] Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).
[8] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[9] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[10] 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)).
[11] Traditionally, workplace harassment claims were linked to a victim's protected status or protected activity. However, Policy 2.35 also recognizes non-discriminatory workplace harassment, defined as "[a]ny targeted or

present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) sufficiently severe or pervasive so as to alter the conditions of employment and to create 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]

In support of her position, the grievant claims that the Manager engaged in sexually inappropriate conduct by grabbing her shoulders on November 27, 2018, and by making explicit comments about rape and drinking alcohol during a work-related conversation on December 5, 2018. The grievant further argues that the Manager unfairly criticized her work performance to others at the facility on November 30, December 14, and December 19. The grievant reported the Manager's behavior to agency management on or about December 20, 2018, and it began an investigation of the grievant's complaint.

In December 2018, the grievant's office was moved to a different location at the facility to limit her contact with the Manager, though the grievant alleges that the Manager has continued to approach her and that she is still required to work around the Manager. According to the grievant, the warden at her facility told her that he would attempt to limit the Manager's contact with her and advised the grievant that, if the Manager entered an area where she was working, she should leave. The grievant argues that these actions have interfered with her work performance because her office has been relocated, she has not been able to enter areas where the Manager works, and she has not attended meetings when the Manager is present.

The grievant further contends that, after she complained about the Manager's conduct, the Manager began retaliating against her. The grievant alleges that the Manager stated she "equally harass[ed] everyone" in the grievant's presence on March 5, 2019; criticized the grievant's work performance to an employee at the agency's headquarters in an attempt to influence other managers who supervise the grievant's work; and slammed a door when the grievant was nearby on April 3, 2019. The agency completed its investigation of the grievant's complaint on April 9, 2019, finding that her allegation of workplace harassment was

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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." As a result, and although the grievant in this case argues that the Manager's conduct was based on a protected status and/or protected activity, that element is not necessary for EDR to find that the Manager violated Policy 2.35 by directing prohibited conduct at the grievant, regardless of the reason.

[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).

unsubstantiated.[15] On May 20, 2019, the grievant took a medical leave of absence. It appears that she has not yet returned to work.

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 as to whether the Manager's conduct was so severe or pervasive as to alter the conditions of the grievant's employment.[16] Accordingly, the grievance does not qualify for a hearing. However, the grievant has articulated legitimate concerns about the Manager's conduct warranting further comment.

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. 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. The grievant unquestionably found the Manager's conduct to be subjectively offensive, and EDR agrees that some of her allegations about the Manager's behavior – including, for example, touching the grievant's shoulders, making comments about rape and drinking alcohol during a work-related conversation, and describing herself to other employees as someone who "equally harass[es] everyone" (regardless of whether the statement was directed at the grievant) – describe objectively unprofessional conduct that appears to be inconsistent with the provisions of Policy 2.35. Such allegations merit further action by the agency.

Indeed, the grievant's allegations are, in some respects, more troubling because the agency has already conducted an investigation of the grievant's complaint, determined that her allegation of workplace harassment was unsubstantiated, and appears to have taken no further steps to address the Manager's behavior.[17] Even if the agency determined that the Manager's conduct was not discriminatory and/or retaliatory workplace harassment under the standard discussed above, the agency's response to the Manager's alleged conduct in this case is not acceptable in light of the expectations set forth in Policy 2.35 regarding workplace behavior in general. Policy 2.35 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.[18]

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[15] Although it is not clear whether the grievant's allegation of retaliation was considered separately or as part of the harassment investigation, several of the incidents that the grievant describes as retaliatory were discussed in the investigation report.

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

[17] It does appear that the warden took steps to separate the grievant and the Manager, and further advised the grievant to avoid the Manager if possible. While these may be short-term methods for addressing to the larger issue of an ineffective working relationship, the grievant clearly believes the Manager has engaged in inappropriate workplace behavior, and that the agency's decision to separate her from the Manager has impacted her ability to perform her job. The grievant has been on a medical leave of absence since May 2019, however, and it is not clear how or whether the agency plans to address the grievant's concerns about her work environment with the Manager going forward.

[18] 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."

EDR recommends that the agency take additional action, consistent with its obligations under Policy 2.35, to prevent any further unprofessional treatment of the grievant and others by the Manager. This ruling does not mean that EDR deems the alleged behavior of the Manager, if true, to be appropriate; it finds only that the grievant's claim of workplace harassment does not qualify for a hearing. 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 about the Manager's unprofessional workplace behavior.

EDR's qualification rulings are final and nonappealable.[19]

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[19] *See* Va. Code § 2.2-1202.1(5).