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QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2020-4956
September 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 May 8, 2019 grievance with the Virginia Department of Transportation (the "agency") qualifies for a hearing. For the reasons discussed below, EDR concludes that the grievance is qualified for a hearing.

FACTS

The grievant is a military veteran with service-related disabilities. She alleges that, since at least 2017, the director of her division has treated her with skepticism, condescension, and hostility. She further alleges that communications with her immediate supervisor deteriorated after she inquired about a substantial pay disparity between herself and her male colleagues. Finally, she claims that, following her return from short-term disability leave, her supervisor and the director created a hostile work environment by treating her in an intimidating manner.

In 2017, the grievant sought an accommodation that would allow her to leave work by 4:00 p.m. as needed to receive disability-related medical care. According to the grievant, her division director was unusually involved in the accommodation discussions, appearing skeptical of the grievant's justification for accommodation.[2] To minimize the number of times she must explicitly request an accommodation, the grievant arranged to shift her regular work hours to an earlier block, even though she does not need or necessarily want to work early every day.

In mid-2018, the grievant began reporting to a new immediate supervisor with whom she initially felt she had a good working relationship. However, in November 2018, the grievant

[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 viewed this skepticism as consistent with the director's general approach to her, *i.e.* demonstrating an inclination to deny requests that would benefit the grievant, even when made by the grievant's former supervisor. Following the former supervisor's death in 2018, the grievant alleges that the director attempted to restrict the grievant's duties, responsibilities, and access to agency resources, mostly without success.

brought up to the new supervisor her discovery that her two male coworkers out-earned her by over 35 percent of her annual salary. Following her inquiry, the grievant perceived that her new supervisor became much less approachable, often seeming bothered by her questions.

In January 2019, pursuant to medical advice, the grievant began a period of short-term disability leave that coincided with Virginia's legislative session, a busy time for her division. While on leave, the grievant apprised her supervisor by monthly emails as to her status; he did not respond to these updates. The grievant alleges that, when she returned to work in March 2019, her work environment declined significantly, in that her duties shifted to unfamiliar assignments for which she did not receive training, and she felt constantly criticized by her supervisor and the director. The director allegedly began a practice of attending the supervisor's discussions with the grievant even about routine matters; during these meetings, the director would allegedly interrupt the grievant and belittle her contributions.[3]

In April 2019, at the agency's invitation, the grievant sought her supervisor's permission to represent the agency at an event for women veterans. The supervisor advised the grievant that she would have to use personal leave during her absence. The grievant discovered that other agency attendees were not being required to use personal leave. Ultimately, the supervisor and director elected not to require the grievant to use her personal leave, but they allegedly did not inform the grievant of their decision until she confronted them about the issue.

On May 3, 2019, the supervisor invited the grievant to a meeting with the director to discuss "training and assignments." The grievant was excited about this discussion because she had been seeking development opportunities. However, when she arrived at the director's office, the director closed the door and, instead of returning to her desk, sat in a position that placed the grievant between the two managers. They then presented her with a performance improvement plan. The grievant felt deceived about the purpose of the meeting and physically closed in by the director. She experienced a panic attack and ended the meeting.

On or about May 8, 2019, the grievant filed a grievance alleging "[r]etaliation and intimidation," "[d]iscrimination based on disability," "[g]ender inequality," and "[v]eteran status." She requested that the agency investigate her allegations, transfer her to a different division, end the retaliation against her, and ensure that she is treated with respect and civility. The third step-respondent[4] concluded that the grievant's allegations neither constituted any tangible employment action nor were discriminatory, retaliatory, or otherwise related to a protected status. The third step-response did not address the grievant's claims with respect to civility in the workplace, *i.e.* unprofessional and/or intimidating behavior. The agency head declined to qualify the grievance for hearing. The grievant now appeals that determination to EDR.

[3] The grievant alleges that the director's practice of being present in discussions with the supervisor began only after the grievant returned from short-term disability leave. The director's explanation for being present so frequently was that "in this day and age" it was not advisable for a male employee to meet one-on-one with a female employee. The grievant alleges that the director (female) meets with the grievant's male colleagues one-on-one.

[4] The grievant appears to have waived the first and second management resolution steps.

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

Although DHRM Policy 2.35 prohibits workplace harassment[12] and bullying,[13] 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.[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

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

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]

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. Thus, 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. Policy 2.35 also 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.[17] Accordingly, where an employee reports that corrective feedback or other interactions have taken a harassing or bullying tone, Policy 2.35 requires agencies to determine in the first instance whether such perceptions are supported by the facts. Where an agency fails to meet these obligations, such failure may constitute a misapplication or unfair application of Policy 2.35 such that the harassing or bullying behavior is imputable to the agency.

Having thoroughly reviewed the grievance record and the information provided by the parties, EDR finds that the facts presented raise a sufficient question whether the managers' treatment of the grievant was so persistently hostile and inconsistent with Policy 2.35 that it altered the conditions of the grievant's employment. The grievant has unquestionably found her managers' conduct to be subjectively intimidating, and EDR agrees that many of her allegations, if true, describe objectively disrespectful, insensitive, and/or unprofessional conduct that appears to be prohibited by Policy 2.35.

For example, the grievant alleges that her director has made a practice to join meetings between the grievant and her supervisor, making the grievant feel outnumbered in routine work discussions. While managers have exceedingly broad discretion to supervise staff meetings and may have any number of legitimate reasons for participating in such meetings, the director's proffered reason in this case – that the grievant's sex warrants the director's presence – is not, without more, a legitimate reason for this practice. In addition, the grievant alleges that the director's manner toward her during these meetings has included interruptions and unnecessarily disparaging and humiliating comments about the grievant's work. If true, the grievant's account describes conduct that would be viewed as hostile by an objective, reasonable employee.

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[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] 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 . . . ."

The grievant further alleges that her managers' responses to her legitimate requests to be away from the office – *e.g.*, to use leave to which the grievant is entitled as a benefit of her employment – have been consistently negative and/or retaliatory. According to the grievant, her 2017 schedule accommodation was met with skepticism from the director; her short-term disability leave in 2019 was followed by excessive criticism to the point of hostility; and her representation of the agency at the women veterans event was initially considered a personal absence. If true, the grievant's account of her managers' conduct in these respects would lead an objective, reasonable person to perceive antipathy and intimidation directly connected to a benefit of employment.

In addition, the grievant alleges that her communications invoking one or more protected statuses have been followed by apparent disengagement by her immediate supervisor. When she pointed out a sex-correlated pay disparity, he allegedly began to seem bothered by her work-related questions. When she periodically apprised him of her medical-leave outlook, he appeared to ignore her. These allegations, if true, could potentially amount to rude and/or unprofessional conduct from a manager that is inconsistent with Policy 2.35.

Finally, the grievant alleges that her managers' performance feedback took the form of bullying, ultimately causing her to have a panic attack and "emotional meltdown." The grievant was "extremely embarrassed" to be in that condition in the workplace as a result of her managers' treatment of her. To the extent that the managers misled the grievant about the purpose of the May 3 meeting and physically positioned themselves to surround her, an objective, reasonable employee could find such behavior to be dishonest, insensitive, humiliating, and/or intimidating, particularly in light of the other conduct alleged here.

The available evidence suggests that the agency is aware of these alleged pervasive violations of Policy 2.35 through the grievant's initial statements to human resources staff immediately following the May 3 meeting, her subsequent grievance materials, and the agency's civil rights investigation report which took up many of the same complaints raised by the grievant. The report concluded that the "atmosphere in [the grievant's] section has created the appearance of a hostile environment"; yet EDR is not aware of any steps the agency has taken at this time to "stop any prohibited conduct of which they are aware" or to "take immediate action to eliminate any hostile work environment when there has been a complaint of workplace harassment."[18] Thus, the grievant has raised a sufficient question whether the agency has misapplied or unfairly applied Policy 2.35 in its response, or lack thereof, to her allegations of pervasive hostility – many of which implicate the terms, benefits, and/or conditions of her employment.

This ruling takes no position on any substantive performance concerns that have been communicated to the grievant. To the extent that the grievant's supervisor and/or director seek to counsel the grievant regarding areas for professional improvement, they retain broad discretion to do so within the bounds of Policy 2.35. However, when an employee perceives that corrective feedback or other interactions have taken the form of bullying, intimidation, or other uncivil conduct, Policy 2.35 permits – indeed, requires – agencies to determine in the first instance whether such perceptions are supported by the facts and to take action to stop prohibited conduct from

[18] *See* DHRM Policy 2.35(D)(4) (noting that agencies must stop prohibited conduct of which they are aware whether or not a complaint has been made). The agency maintains that the grievant did not file a civility complaint. However, it is apparent that the agency was aware of alleged conduct that would violate Policy 2.35, as later confirmed by the report of the agency's civil rights division following their investigation of the allegations.

occurring.[19] Because the record does not reflect that any such steps have been taken, the facts in this case raise a sufficient question whether the agency has misapplied or unfairly applied Policy 2.35 in a way that has resulted in an adverse employment action against the grievant here.

Accordingly, the grievant's claims regarding violations of DHRM Policy 2.35 qualify for a hearing.

Discrimination/Retaliation

DHRM Policy 2.05, *Equal Employment Opportunity*, requires that "all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability." For a claim of discrimination on any of these grounds to qualify for a hearing, the grievance must present facts that raise a sufficient question as to whether the issues describe an adverse employment action that has resulted from prohibited discrimination. However, if the agency provides a legitimate, nondiscriminatory business reason for the acts or omissions grieved, the grievance will not be qualified for hearing absent sufficient evidence that the agency's proffered justification was a pretext for discrimination.[20]

Similarly, a claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether the grievant's protected activity is causally connected to a subsequent adverse employment action against her.[21] Ultimately, a successful retaliation claim must raise a sufficient question as to whether, but for the grievant's protected activity, the adverse action would not have occurred.[22]

Here, the grievant appears to allege that she has experienced adverse consequences as a result of her status as a female, as an individual with disabilities, and as a military veteran. As explained above, the grievant's work conditions as described in her grievance have created an "appearance of a hostile work environment," due to alleged pervasive conduct prohibited by DHRM Policy 2.35 – much of it implicating the terms, conditions, and/or benefits of the grievant's employment. Therefore, the grievant has satisfied the elements of being a member of one or more protected classes and having experienced an adverse employment action.

Further, the grievant has alleged facts that raise a sufficient question whether the adverse consequences have resulted from one or more protected statuses. The grievant alleges that her supervisor disengaged from open communication following her inquiry about a sex-correlated pay disparity between herself and her male colleagues. After she used leave related to her service-related disabilities, one or both of her managers allegedly changed her work assignments, became significantly more critical and disparaging of her work, interacted with her in an intimidating manner (and invoked her sex as a basis to do so), and attempted to penalize her for her planned

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[19] Where allegations of prohibited conduct are not supported, the employee's perception of incivility may nevertheless point to an opportunity to improve employees' interpersonal communications through conflict management strategies suited to the particular circumstances. EDR offers a variety of resources and services on which agencies may draw when faced with these or similar circumstances.

[20] *See Strothers*, 895 F.3d at 327-28; *see, e.g.*, EDR Ruling No. 2017-4549.

[21] *See id.*; Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338 (2013)).

[22] *Id.*

attendance at an agency event highlighting her gender and military service. While the temporal proximity and sequence of these allegations do not necessarily prove that prohibited discrimination occurred, they sufficiently state a claim for qualification purposes that the grievant experienced an adverse employment action as a result of her sex, her disabilities (actual or perceived), her veteran status, or some combination of these.[23]

The managers' apparent belief that the grievant's performance is deficient may be a legitimate, non-discriminatory business reason for certain of the actions at issue – *i.e.*, introducing new work assignments and responsibilities, communicating the grievant's need for professional development, and presenting a performance improvement plan to her.[24] However, to the extent that the comments or surrounding circumstances implicate DHRM Policy 2.35, performance management is not a legitimate justification for prohibited conduct.[25] Ultimately, the totality of the circumstances raises a sufficient question whether the managers' heightened attention to performance management was a pretext for discrimination on the basis of sex, disability (actual or perceived), the grievant's veteran status, or a combination of these.

Similarly, the grievance presents facts that raise a sufficient question whether the grievant experienced retaliation, in that she was subject to an adverse employment action that would not have occurred but for her protected activity. The grievant engaged in protected activities when she (1) sought to discuss a potential sex-based salary disparity[26] and (2) exercised her short-term disability leave rights.[27] Shortly after these activities, the grievant's work conditions took on the "appearance of a hostile work environment," as described above. These facts raise a question sufficient for hearing qualification as to whether the grievant's managers retaliated against her for alleging sex discrimination, using disability-related benefits, or both.

Accordingly, the grievant has presented facts raising a sufficient question whether she experienced discrimination on the basis of sex, disability, and/or veteran status. She also has presented facts raising a sufficient question whether agency management retaliated against her for alleging sex discrimination and/or for using her disability-related benefits as a right provided by law.

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[23] To the extent that the agency's civil rights division reached different conclusions, such determinations are not binding on EDR's analysis.

[24] Written counseling does not generally constitute an adverse employment action on its own because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment. *See Grievance Procedure Manual* § 4.1(c)(8).

[25] For example, the record suggests no legitimate reason for the following allegations, if true: (1) the supervisor's disengagement from positive communications; (2) the director's attendance of most discussions between the grievant and her supervisor; (3) one or both of the managers interrupting and belittling the grievant during meetings; and (4) one or both of the managers creating an intimidating atmosphere during the May 3 meeting.

[26] DHRM Policy 2.05, *Equal Employment Opportunity*, reflects the Governor's Executive Order No. 1 and prohibits management "from taking retaliatory action against any person making allegations of violations" of the policy.

[27] By statute, grievances qualifying for a hearing include those relating to "retaliation for exercising any right otherwise protected by law." Va. Code § 2.2-3004(A). The grievant's exercise of her right to short-term disability leave as a benefit of employment is protected by DHRM Policy 4.57, *Virginia Sickness and Disability Program*. Similarly, the exercise of rights granted or protected by the Americans with Disabilities Act is protected by the Act's prohibition on interference, coercion, and intimidation. *See* 42 U.S.C. § 12203(b).

Salary Disparity

In her grievance materials, the grievant continues to assert as an issue the disparity in salary between herself and her two male coworkers of the same title and role. For purposes of this ruling only, EDR assumes that the grievant has alleged an adverse employment action with respect to this salary disparity in that she asserts issues with her compensation. Such a salary disparity may qualify for a hearing as either (1) a result of prohibited discrimination or (2) a misapplication or unfair application of policy.[28] As explained above, for such a claim of discrimination to qualify for a hearing, the grievance must present facts that raise a sufficient question as to whether the salary disparity has resulted from prohibited discrimination. But if the agency provides a legitimate, nondiscriminatory business reason for the disparity, the grievance will not be qualified for hearing absent sufficient evidence that the agency's proffered justification was a pretext for discrimination.

For an allegation of misapplication or unfair application of policy to qualify for a hearing, the facts in the grievance record must raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

While Policy 3.05, *Compensation*, reflects the intent for similarly situated employees to be comparably compensated, it also reflects the intent to invest agency management with broad discretion for making individual pay decisions and corresponding accountability in light of each of 13 pay factors: (1) agency business need; (2) duties and responsibilities; (3) performance; (4) work experience and education; (5) knowledge, skills, abilities and competencies; (6) training, certification, and licensure; (7) internal salary alignment; (8) market availability; (9) salary reference data; (10) total compensation; (11) budget implications; (12) long-term impact; and (13) current salary.[29] Because agencies are afforded great flexibility in making pay decisions, EDR has repeatedly held that qualification is warranted only where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[30]

Here, the grievant alleges that the disparity between her salary and that of her two male coworkers – a difference of approximately 36 percent of the grievant's salary – is not consistent with the fact that they share a title and role and seem to be similarly qualified. However, the agency has provided EDR with salary information about the grievant and her two coworkers, as well as how it considered the pay factors in determining their salaries. Even assuming solely for purposes of this ruling that the grievant has sufficiently alleged as an initial matter that an unfavorable pay disparity has resulted from discrimination on the basis of sex, the totality of the facts and circumstances apparent from the grievance record identifies legitimate, non-discriminatory business reasons for the disparity such that the issue of salary disparity is not qualified for hearing.

While the grievant may reasonably argue that certain pay factors such as internal salary alignment suggest that the disparity is excessive, the agency's position that its consideration of the

[28] *See* Va. Code § 2.2-3004(A).
[29] *See* DHRM Policy 3.05, *Compensation*. DHRM Policy 3.05 has been amended effective July 1, 2019. While this grievance arose under the former version of this policy, the analysis and result is the same under both versions.
[30] *See Grievance Procedure Manual* § 9 (defining an "arbitrary or capricious" decision as one made "[i]n disregard of the facts or without a reasoned basis"); *see also, e.g.*, EDR Ruling No. 2008-1879.

pay factors justifies the employees' relative salaries is also valid. Internal salary alignment is just one of the 13 pay factors an agency must consider in making difficult salary determinations. Thus, compensating employees with arguably similar qualifications at different rates does not, on its own, amount to a disregard of the intent of the applicable policies, which allow management flexibility in making individual pay decisions based on consideration of the 13 pay factors.[31] Agency decision-makers deserve appropriate deference in making these determinations, and thus the question for qualification purposes is whether the applicable policy mandates that the agency reduce the relevant salary disparity such that its failure to do so disregards the facts or is otherwise arbitrary or capricious.

Although the grievant may disagree with the agency's conclusions, the facts available present legitimate, non-discriminatory business reasons, based on the 13 pay factors, for the disparity in salaries between the grievant and her coworkers, and EDR has reviewed nothing to suggest that the agency's determination was a pretext for discrimination, disregarded pertinent facts, unfairly considered any of the 13 pay factors, or was otherwise arbitrary or capricious.[32] Under these circumstances, EDR will not second-guess management's decisions regarding the administration of its procedures.[33]

Relief Available at Hearing

When issues are qualified for hearing, a hearing officer may order appropriate remedies but may not grant relief that is inconsistent with law, policy, or the grievance procedure.[34] When an issue of policy application is qualified for a hearing and the hearing officer determines that a policy mandate has been misapplied or applied unfairly, the hearing officer may order the agency to comply with applicable law and policy and/or to reapply the policy from the point at which it became tainted.[35] If an issue of retaliation or discrimination is qualified for hearing and the hearing officer finds that it occurred, the hearing officer may order the agency to create an environment free from discrimination and/or retaliation and to take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence.[36] Hearing officers must avoid providing

[31] *See* DHRM Policy 3.05, *Compensation*; DHRM Human Resource Management Manual, Ch. 8.
[32] EDR's analysis of the grievant's salary claim would reach the same conclusion under the more specific framework required by the federal Equal Pay Act. *See* 29 U.S.C. § 206(d)(1). Under the Act, a claimant can create an inference of sex discrimination by showing that the employer paid higher wages to an employee of the opposite sex who performed equal work on jobs requiring equal skill, effort, and responsibility under similar working conditions. EEOC v. Md. Ins. Admin., 879 F.3d 114, 120 (4th Cir. 2018). An employer may rebut this inference by showing that the pay differential at issue was based on a factor other than sex. *Id.* Here, while the grievant has alleged that her male coworkers have the same job title and role as she, these generalities do not raise a sufficient question whether the purported comparators perform work "virtually identical" to hers. *See* Spencer v. Va. State Univ., 919 F.3d 199, 203-05 (4th Cir. 2019) (holding that professors who taught different course levels, advised different students, and worked different hours were not comparators for purposes of the Act). In addition, any presumption of sex discrimination would be rebutted by the agency's legitimate analysis of the 13 pay factors, *i.e.*, factors other than sex. *See id.* at 206-07 (accepting previous salary as a factor other than sex that determined comparators' pay).
[33] This conclusion is based upon the facts and circumstances apparent from the grievance record at the time of this ruling. Nothing herein prevents the grievant from raising the issue of pay discrimination in the future if, for example, new material evidence is discovered to suggest that the agency's proffered justification for the pay disparity is a pretext for discrimination. Further, nothing in this ruling should be read to discourage the grievant from seeking future in-band pay adjustments whenever she deems it appropriate based on the pay factors.
[34] *Grievance Procedure Manual* § 5.9.
[35] *Id.* at § 5.9(a); *Rules for Conducting Grievance Hearings* § VI(C)(1).
[36] *Id.* at § VI(C)(3).

specific remedies that would unduly interfere with management's prerogatives to manage the agency (*e.g.*, ordering discipline for discriminatory supervisory practices).[37] In most cases, hearing officers lack the authority to order the transfer or re-assignment of an employee as a form of relief.[38] However, a hearing officer is not limited to the specific relief requested by the employee.[39]

In this case, as explained above, EDR has determined that certain issues of misapplication and/or unfair application of DHRM Policy 2.35, discrimination, and retaliation are qualified for hearing. The grievant has requested the following relief: (1) investigation, (2) lateral transfer out of the division director's supervisory chain, (3) an end to retaliation, and (4) respectful and civil treatment. Investigation, if not moot, may be ordered to the extent the hearing officer determines that the agency has failed to comply with the affirmative obligations imposed by Policy 2.35 in response to a complaint of prohibited conduct. Because transfer would not restore the employee to a former and correct status quo, the hearing officer may order transfer or reassignment only upon a determination that the employee is entitled to such relief based on the effect of law or in the absence of agency discretion, policy, procedure, or practice.[40] More generally, however, the hearing officer may order the agency to utilize its discretion to create an environment for the grievant that is free from discrimination, retaliation, and any other conduct that is prohibited by DHRM Policy 2.35, or may order any other relief consistent with law, policy, and the grievance procedure.[41]

CONCLUSION

The facts presented by the grievant constitute certain claims that qualify for a hearing under the grievance procedure.[42] Because the grievant has raised sufficient questions as to whether (1) the agency has misapplied or unfairly applied DHRM Policy 2.35 following the grievant's allegations of pervasive bullying and intimidation, (2) she experienced discrimination on the basis of her sex, disability, and/or veteran status, and (3) she experienced retaliation after making an allegation of sex discrimination and/or using disability-related benefits, the grievance qualifies for a hearing on these grounds.

EDR's qualification rulings are final and nonappealable.[43]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[37] *Id.*
[38] *Id.* at § VI(D)(3) (generally permitting transfer or assignment only to return the employee to a former status quo or where the agency lacks discretion under the circumstances).
[39] *Id.* at § VI(A).
[40] *Id.* at § VI(D)(3).
[41] *Id.* at § VI(A).
[42] *See Grievance Procedure Manual* § 4.1.
[43] *See* Va. Code § 2.2-1202.1(5).