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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2020-5103
July 2, 2020

The grievant seeks a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") as to whether her March 19, 2020 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons set forth below, the grievance is not qualified for a hearing.

FACTS

The grievant is employed at one of the agency's correctional centers. She worked in the facility's officer training department from approximately September 30, 2019 through January 31, 2020. During this period, the grievant claims she raised concerns with her facility's management that her supervisor was not keeping timely and accurate training records. In late January 2020, she shared with an agency staff-development manager from outside the facility that her supervisor had improperly credited officer training hours. The grievant contends that, within a few days of this report, her facility's management removed her from its training department and reassigned her to a series of temporary posts.[1] The grievant alleges that the major in her supervisory chain criticized her for reporting wrongdoing outside the facility. Approximately two weeks after removing the grievant from the training department, the major and the facility's human resources officer ("HRO") issued a notice to the grievant that she was under investigation for violating the agency's standards of conduct and DHRM Policy 2.35, *Civility in the Workplace*.[2] On or about March 19, 2020, she initiated a grievance requesting that the major and HRO be "held accountable for retaliating against [her] by removing [her] from training before thoroughly investigating these matters in the months previous." The agency contends that, following the grievant's report, management initiated an audit of the training department's records and elected to remove both the grievant and her supervisor from the department during that process. In early March, the facility's

[1] On February 5, 2020, the grievant reported the reassignment to the agency's central office as retaliation and also claimed that her supervisor in the training department had created a hostile work environment. The agency investigated these claims and, on April 17, 2020, concluded that both were unfounded. Despite some factual overlap, the grievance does not appear to challenge the agency's conclusions with respect to the grievant's former supervisor and/or a hostile work environment in the training department.

[2] On February 14, 2020, the major and human resources officer issued an Investigation Notice pursuant to the Correctional Officer Procedural Guarantee Act. *See generally* Va. Code §§ 9.1-508 through 9.1-512. The record does not suggest that the agency ultimately took disciplinary action against the grievant for misconduct.

assistant warden assigned the grievant to an administrative sergeant role, in which she continues to serve as of the date of this ruling. Noting that there had been no change in the grievant's rank or pay band, the agency head declined to grant relief or to qualify the grievance for a hearing. Asserting that she still lacks a permanent post,[3] the grievant now appeals that determination.

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.[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, 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]

Finally, qualification may not be appropriate even if a grievance challenges a management action that might ordinarily qualify for a hearing. For example, an issue may have become moot during the management resolution steps, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.[11]

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[3] The grievant has indicated that she is satisfied in her current role but has concerns that it is only temporary. She seeks written apologies from agency staff who suggested wrongdoing on her part and also requests a permanent post outside the major's supervisory chain.
[4] *See* § 2.2-3004(A); *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] *See, e.g.*, EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.

Retaliation

The grievant maintains that her management removed her from her role in the training department in retaliation for reporting wrongdoing to agency personnel outside her own facility. She alleges that, in explaining her removal, the major indicated that the grievant could be held accountable for her supervisor's documentation problems; he also allegedly expressed disapproval that she had reported problems to external authorities.[12] The grievant further contends that, although she is satisfied with her current placement, she has never had a permanent post since her removal from the training department. Finally, the grievant asserts problems with the grievance process, specifically that it became improperly "intertwined" with her hostile-work-environment complaint against her former supervisor and that it was shared with the HRO who was one of the subjects of the grievance.

A qualifiable retaliation claim must be based on evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[13] (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.[14] If the agency presents a non-retaliatory business reason for the adverse employment action, the grievance may qualify for a hearing only if the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[15] For purposes of this ruling, EDR presumes that the grievant engaged in a protected activity by reporting recordkeeping inaccuracies within her department to her agency's management.[16]

The record presents at least some evidence to support a causal link between the grievant's reporting outside her facility and her abrupt reassignment out of the training department and into a series of tenuous arrangements, including the position she currently holds. The grievant kept detailed notes reflecting persistently unprofessional behavior by her supervisor, including a failure to maintain timely and accurate documentation of officer training. The notes, which were shared with her facility's management, indicate that she complained multiple times about problems with her supervisor, yet he retained his responsibilities until agency-level personnel contacted the facility. At that point, it appears that management immediately moved both the supervisor and the grievant to different assignments. The grievant further alleges that, despite her repeated requests for management assistance, the major suggested she shared blame for her supervisor's failures and faulted her for not allowing the facility to address the situation. Although the major denies these

[12] In a statement for the agency's retaliation investigation, the major denied these allegations.
[13] *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 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).
[14] *See, e.g.*, 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)). 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. *Id.*
[15] *See id.*
[16] State law mandates that employees of the Commonwealth "shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Va. Code § 2.2-3000.

statements, the circumstances present at least a sufficient question of fact as to whether the grievant would not have been reassigned but for reporting her concerns to agency-level personnel.[17]

The record also presents substantial uncertainty as to whether the grievant experienced an adverse employment action that would meet the threshold standard for qualification. A transfer or reassignment to a different position may constitute an adverse employment action if a grievant can show that there was some significant detrimental effect on the terms, conditions, or benefits of her employment.[18] In general, a lateral transfer not motivated by disciplinary considerations will not rise to the level of an adverse employment action,[19] and subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.[20] Here, however, while the grievant has not experienced any change in her rank, pay grade, or work facility, it appears that her assignments have been provisional and piecemeal since her removal from the training department. Indeed, she reports that although she was permitted to choose her current assignment, she was later told it was not a legitimate position in its configuration at the time and had to be supplemented with additional, temporary duties. Under these circumstances, the grievant may reasonably question whether her removal from the training department has resulted in unfavorable terms of employment, even if she is satisfied with the arrangement that exists as of the date of this ruling.

On the other hand, it also appears that, since early March 2020, the agency has attempted to remedy the appearance of initial retaliation. The assistant warden ultimately apologized to the grievant for reassignments during the month of February 2020 and successfully worked with her to identify a new placement as of March 5, 2020, to a role consistent with her preferences.[21] In addition, EDR notes that continuing uncertainty regarding the grievant's role may be at least partly attributable to a leadership transition at the facility as well as its evolving response to the ongoing public health emergency. Therefore, although the grievant's removal from the training department creates the appearance of retaliation, it is not apparent what relief a hearing officer could provide at this time,[22] given that the grievant is apparently satisfied with her current role. EDR generally does not qualify grievances for hearing where it is not apparent that the hearing officer could order any meaningful relief.

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[17] In her qualification appeal, the grievant notes that the HRO omitted relevant information during the agency's hostile work environment and retaliation investigation, and that agency management improperly copied the HRO when transmitting the agency's head's qualification determination. The agency asserts that local HROs act as custodians of their employees' grievances and thus receive such correspondence as a matter of course. Because EDR can identify no evidence to suggest that the HRO in this case took part in the grievance process or influenced it in any way, her receipt of the grievance paperwork does not bear on the matters at issue in this ruling. Further, because this grievance does not challenge the conclusions of the agency's hostile-work-environment investigation, this ruling does not address the grievant's assertions in that regard.

[18] *See* Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted); James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 375-77 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253, 255-256 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 Fed. Appx. 726, 729 (4th Cir. 2004).

[19] *See* Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996). Under agency policy, its employees may be transferred "to a position in the same [Pay B]and based on [agency] operational needs." Department of Corrections Operating Procedure 102.2, *Recruitment, Selection, and Appointment*, at 8.

[20] *See*, *e.g.*, Jones v. D.C. Dep't of Corr., 429 F.3d 276, 284 (D.C. Cir. 2005); *James*, 368 F.3d at 377.

[21] In addition, the grievant has reported that management has initiated discussions about returning the grievant to the training department if she is agreeable to it.

[22] While the grievant continues to seek personal apologies from individuals she claims were accusatory toward her, relief of that nature is not within the scope of remedies a hearing officer has authority to grant, even upon a finding in the grievant's favor. *See Rules for Conducting Grievance Hearings* § VI(C), (D); *Grievance Procedure Manual* § 5.9.

Accordingly, EDR concludes based on all the available facts and circumstances that this grievance does not qualify for a hearing. However, should the grievant experience further acts or omissions that she suspects are retaliatory, including further reassignments and/or detrimental changes in the terms of her employment that follow from her removal from the training department, nothing in this ruling prevents her from challenging such future actions in a subsequent timely grievance.[23] In such a grievance, EDR would also assess whether the actions were a continuation of the retaliation challenged in this current grievance.

We are encouraged by the good faith shown by the assistant warden in attempting to identify new placement options for the grievant. We are hopeful that the facility will continue in that regard and find an appropriate, stable position for the grievant with similar hours as the position she held with the training department. In this situation, it would appear that the grievant was moved from the training department temporarily for an audit to take place. Once that audit is complete (if it is not already), absent a finding of wrongdoing by the grievant, it would seem that returning the grievant to her former position is a reasonable resolution, should the grievant be agreeable to that return.

EDR's qualification rulings are final and nonappealable.[24]

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[23] *See Grievance Procedure Manual* §§ 2.4, 4.1.
[24] *See* Va. Code § 2.2-1202.1(5).