EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of the Department of Health
Ruling Number 2020-5104
July 6, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether her March 23, 2020 grievance with the Department of Health (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

In February 2020, the grievant applied and interviewed for a position as a Senior Public Health Nurse in a different health district than the one where she currently works. On February 19, 2020, she was selected as the finalist for the position and gave permission for the agency to move forward with background and reference checks. The hiring district then requested reference information from the grievant's nurse manager in her current district. According to the resulting reference check form, the manager indicated she would not rehire the grievant for her current role if given the opportunity. She expressed that the grievant had communication issues with colleagues, had not followed her "chain of command," was frequently tardy, and in the manager's opinion was not ready for a leadership role. On March 11, 2020, the hiring district informed the grievant that it would not be offering her the position. On or about March 23, 2020, the grievant initiated a grievance challenging the agency's decision not to select her, claiming that her supervisor's input during the reference check was not an accurate reflection of her work or performance. Following the management resolution steps, the agency head determined that the grievance record did not demonstrate that any policy had been misapplied or unfairly applied during the selection process; thus, he declined to grant relief or to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to a hearing" unless there is sufficient evidence of discrimination, retaliation,

unwarranted discipline, or a misapplication or unfair application of policy.[1] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that 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 applicable policy.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve an "adverse employment action."[2] Typically, then, a 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."[3] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[4] For purposes of this ruling, EDR will assume that the grievant has alleged an adverse employment action, in that it appears the position for which she was a finalist would have been a promotion.

In this case, the grievant takes issue with the reference feedback provided by her manager, arguing that it misrepresents her work performance. As examples contravening the reference check responses, the grievant cites her time spent orienting new staff, work across various clinics and filling in during staff shortages, recognition for being a "team player" and "helping hand," and giving presentations during staff meetings. The grievant further notes that her manager's criticisms were not noted in her performance evaluations. She alleges that the hiring department did not seek references from previous supervisors and that the manager's "family and social connections" in the hiring district diminished her selection chances.

State hiring policy is designed to ascertain which candidate is best suited for the position, not just to determine who might be qualified to perform the duties of the position.[5] Once an agency selects a final candidate for the position, DHRM Policy 2.10, *Hiring*, encourages hiring staff to seek reference information from the candidate's current supervisor, including performance information and whether the employer would rehire the applicant.[6] Any such reference information obtained "must be documented and retained with other recruitment and selection documents."[7] It appears that the agency in this case uses a standardized form to collect and document reference check information, and it followed this procedure after selecting the grievant as the finalist. The agency's management step respondents confirmed that the supervisor's unfavorable reference input was a consideration in not offering the grievant the position. The step respondents also indicated that the agency's typical hiring practices do not necessarily include fact-checking reference input or contacting previous supervisors.

---

[1] Va. Code § 2.2-3004(C); *see Grievance Procedure Manual* §§ 4.1(b), (c).
[2] *Grievance Procedure Manual* § 4.1(b)
[3] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[4] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[5] *See* DHRM Policy No. 2.10, *Hiring*, at 22.
[6] *Id.* at 11-12. It appears that the nurse manager who performed the reference check became the grievant's direct acting supervisor as of December 2019.
[7] *Id.* at 11.

EDR notes that, by state law, "employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management."[8] Thus, to the extent that the manager's unfavorable reference was determined by the grievant's failure to "follow chain of command" in discussing her concerns, the negative input provided could create the appearance of retaliation.[9] EDR also agrees with the grievant's position that a false or misleading internal reference should not prevent an employee's advancement within the agency.[10] However, after reviewing a detailed explanation of the manager's reference input provided by the agency, EDR cannot conclude that a sufficient question exists whether the reference responses resulted from an improper motive, or whether any other policy was misapplied or unfairly applied.

The manager's reference input is not necessarily inconsistent with the grievant's view that she is actively developing her professional skills and making significant contributions to the work of her department. While the manager's focus on the grievant's "chain of command" is concerning, it appears that management had identified broader issues with the grievant's communication style, which at times was perceived as negative and/or uncooperative. Although state law generally protects employees' right to raise concerns with management, supervisors are entitled to set expectations regarding professional dialogue and, under certain circumstances, may reasonably view escalation as overly disruptive to the work environment.[11] Here, the manager indicated that, before providing the reference input, she solicited opinions from other staff members, who expressed similar views that the grievant was a skilled nurse but had difficulty addressing differences of opinion constructively. While the grievant may reasonably disagree with these views, the record does not present a sufficient question whether the input was false, misleading, or otherwise dishonest.

The record is ambiguous as to how much the grievant was or has been made aware of management's concerns in this regard. Given the manager's apparent view that the grievant's communication issues are serious enough to override her other skills, to the point that the manager would not rehire the grievant, EDR agrees that these issues should be addressed with the grievant as soon as possible via appropriate performance management methods. However, even assuming that management did not effectively address these concerns with the grievant, failure to do so before giving an unfavorable reference in this case does not rise to the level of a misapplication or unfair application of any policy. The manager has asserted that the grievant has eschewed

---

[8] Va. Cod § 2.2-3000(A).

[9] A qualifiable retaliation claim must be based on evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity; (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. *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.* 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." *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

[10] *See generally* Va. Code § 2.2-2901(A) (providing that, under the Virginia Personnel Act, "all appointments and promotions to and tenure in positions in the service of the Commonwealth shall be based upon merit and fitness, to be ascertained, as far as possible, by the competitive rating of qualifications by the respective appointing authorities.").

[11] *See* DHRM Policy 2.35, *Civility in the Workplace*, at 3 (prohibiting unprofessional conduct); DHRM Policy 1.60, *Standards of Conduct*, at 2-3 (listing general work standards to include demonstrating respect for other staff and "resolv[ing] work-related issues and disputes in a professional manner and through established business processes").

performance management discussions at times, and the grievant has likewise indicated reluctance to discuss the basis of the reference with the manager herself. Nevertheless, such discussions are likely necessary to the extent the grievant seeks clarity on the manager's views and expectations.

Although the grievant's frustration and surprise at receiving the unfavorable reference is understandable, the evidence does not raise a sufficient question whether the manager's reference input contravened any policy or was the result of any improper motive. Due to the legitimate concerns articulated in the reference responses, which the agency has supported with the manager's detailed explanation, the hiring district ultimately chose not to offer its open position to the grievant. Accordingly, EDR finds that the facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.[12]

EDR's qualification rulings are final and nonappealable.[13]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[12] *See Grievance Procedure Manual* § 4.1.
[13] *See* Va. Code § 2.2-1202.1(5).