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QUALIFICATION RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2021-5137
September 1, 2020

The grievant seeks a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management as to whether her May 12, 2020 grievance with the Virginia Department of Corrections (the "agency") qualifies for a hearing. For the reasons set forth below, EDR finds that the grievance is not qualified for a hearing.

FACTS

As described in the grievance, on April 29, 2020, another employee approached the grievant while she was working and "started yelling," being "very loud and intimidating and in [the grievant's] personal space." The other employee allegedly was not receptive when the grievant expressed that she did not appreciate being spoken to in that manner. The grievant reported the incident to members of management that same day, who met with the grievant and also initiated an investigation of her allegations. The meeting resulted in the grievant withdrawing from her assignment with the other employee, as documented on a form signed by the grievant and an agency manager. The form included an acknowledgment that, by withdrawing, the grievant understood she would not receive hazard pay associated with the assignment. On May 11, 2020, the agency's investigation concluded that "no indication of harassment or bullying was found."

On May 12, 2020, the grievant initiated a grievance alleging "bullying, harassment, intimidation and . . . disrespect" related to the April 29 episode. Claiming she did not withdraw from her assignment voluntarily, she sought hazard pay and mediation with the other employee. As the grievance proceeded through the management steps, the agency encouraged mediation if desired by both parties but maintained that the grievant was not eligible for hazard pay because she did not work the full assignment meriting such pay under its policies. The agency head declined to qualify the grievance for a hearing; 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.[1] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] 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.[3] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts 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 applicable policy's intent.

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."[4] 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6] 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."[7]

Workplace Harassment

Although DHRM Policy 2.35 prohibits workplace harassment[8] and bullying,[9] 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

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[1] *See Grievance Procedure Manual* § 4.1.
[2] Va. Code § 2.2-3004(B).
[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[4] Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).
[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] 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)).
[8] 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."
[9] 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."

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.[10] 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.[11] "[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."[12]

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.[13] Accordingly, where an employee reports that work 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 cannot find that the grievant has alleged facts sufficient to qualify for a hearing at this time. Even if we were to assume that the grievant had sufficiently alleged severe or pervasive conduct constituting an adverse employment action,[14] her allegations do not raise a sufficient question whether that conduct is reasonably imputable to the agency. It appears that the agency responded quickly to the grievant's report of prohibited conduct (*e.g.* yelling, making aggressive physical movements). In particular, after the grievant reported that the other employee made her feel "unsafe," it appears that the agency permitted the grievant to withdraw from her assignment,

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

[11] 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)); *see* DHRM Policy Guide – Civility in the Workplace ("A 'reasonable person' standard is applied when assessing if behaviors should be considered offensive or inappropriate.")

[12] *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).

[13] 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 . . . ."

[14] Throughout the grievance, the grievant referenced an environment she viewed as harassing and discriminatory at her assigned facility. However, apart from the grievant's account of the incident on April 29, 2020, the record does not include specific allegations of other conduct prohibited by Policy 2.35.

initiated an investigation into her allegations, and encouraged her desire to pursue mediation with the other employee.

The grievant is, perhaps understandably, unsatisfied with these responses. While the agency apparently reviewed video of the incident to determine that it did not involve physical aggression, its investigation does not seem to have addressed whether lesser prohibited conduct, such as yelling or unprofessional comments, occurred. EDR further notes that, while the grievance statutes reserve to management the exclusive right to manage the methods, means, and personnel by which work is performed, removing a complainant from her work environment would not be an appropriate response to a complaint under Policy 2.35 to the extent it constituted retaliation.[15] In this case, however, even accepting the grievant's allegation that the change to her assignment was not voluntary, the available facts do not create a sufficient question whether this response to an employee's safety concerns could have been a misapplication or unfair application of policy. Likewise, as to the grievant's claim that her coworker spoke to her disrespectfully, Policy 2.35 gives agencies substantial flexibility to respond proportionally to alleged violations with a variety of management strategies. Given that the grievant sought mediation with the other employee, the record in this case does not suggest that the agency's treatment of her complaint failed to comply with a mandatory provision of Policy 2.35 or disregarded the policy's intent.

Hazard Pay Policy

The grievant seeks "hazard pay" for the week of April 26 to April 30, 2020, for working as a member of the agency's "Rapid Response Team" through April 29, 2020. Effective April 1, 2020, the agency implemented a Pandemic Pay (Hazard Pay) Policy and "identified staff willing to assist as members of COVID-19 Rapid Response Teams" who would be "activated to respond" at facilities with "community spread and staffing shortages." These employees could receive Pandemic Pay in the amount of "a $200 pay stipend" per workweek.

To be eligible for the stipend, according to the Pandemic Pay Policy, members of a Rapid Response Team must be "[a]ble to physically work all shifts on-site as scheduled and required at their assigned facility." Employees absent during a particular workweek, other than for COVID-19-related leave, are not eligible for the stipend. In the grievant's case, the agency interpreted the policy to conclude that she was ineligible for the stipend because she withdrew from her assignment prior to completing the full workweek there. The grievant's supervisor asserted that the grievant "was clearly made aware of the bonus/hazardous pay loss both verbally in a meeting and in writing." The record includes an acknowledgment form signed by the grievant and her superintendent acknowledging: "I agreed that the deactivation of this deployment to the special response team be discontinued effective today. I understand that this deactivation would forgo any hazard payment for the week of April 26-April 30, 2020."

The grievant contends that she worked four of the five days of the workweek and withdrew before the fifth day because "the choice was made for [her]" and she "was told to sign" the acknowledgment "as if [she] was the one that made the decision to deactivate [her] deployment." Even if true, these allegations do not suggest a misapplication or unfair application of the agency's Pandemic Pay Policy. Several of the policy's provisions support an interpretation that payments to eligible employees are lump-sum and conditional on attending every assigned work shift for the

[15] *See* DHRM Policy 2.35, *Civility in the Workplace*, at 3, 6.

workweek. The stipend explicitly incentivizes full-week attendance, such that employees who are absent for a shift for any number of reasons, including approved leave, are not eligible to receive it. Accordingly, EDR cannot conclude that the agency may have misapplied or unfairly applied any policy by not granting the Pandemic Pay stipend to the grievant for the week that she withdrew from her deployment.

For the foregoing reasons, this grievance does not present issues that qualify for a hearing. EDR's qualification rulings are final and nonappealable.[16]

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[16] *See* Va. Code § 2.2-1202.1(5).