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## QUALIFICATION RULING

In the matter of the Department of Motor Vehicles  
Ruling Number 2021-5150  
September 24, 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 March 4, 2020 grievance with the Department of Motor Vehicles (the “agency”) qualifies for a hearing. For the reasons set forth below, EDR finds that the grievance is not qualified for a hearing.

### FACTS

On or about March 4, 2020, the grievant submitted her grievance. While the grievance itself does not describe with specificity the grievant’s concerns, she seeks to be treated the same as everyone else and have policies and practices apply the same to all employees at her work location. The second step response reflects this request as a shared goal: “We both want to see consistency and equality of treatment in the workplace. You do not want to see retaliation or discrimination, nor do we. We will not tolerate either.”

The circumstances of this grievance are apparently related to an ongoing issue of apparent tardiness by the grievant for which she has been held accountable in varying ways. She was allegedly told in February 2020 that if she was late one more time she was going to be fired. Due to this exchange, she filed her grievance. The grievant has either not had any further tardiness occurrences since that time, or any tardiness has been excused or not resulted in formal action.

The grievant has indicated to EDR further background to her concerns in this matter. She feels that the rules do not apply the same to everyone where she works. For example, she says that she gets questioned if she takes a break or “goes to the back” to a locker area, whereas others are not. She says that she is held accountable for her tardiness, whereas at least one other comparator cited by the grievant is not.<sup>1</sup> The grievant can also point to other instances of allegedly unequal treatment, some of which have occurred many months or years ago. The grievant indicates that the differences in treatment are sometimes personal and/or based on race.

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<sup>1</sup> The grievant should be aware that if the agency has taken steps to hold one of her co-workers accountable for tardiness or other workplace behavior, agency management and human resources would not be able to share that information with the grievant. *See, e.g.,* DHRM Policy 6.05, *Personnel Records Disclosure*.

The second step meeting was reportedly a productive exchange. The parties' shared commitment to equal treatment was reaffirmed. The grievant's occurrences of tardiness were also discussed. The grievant was encouraged to submit any medical information that might support protection under the Americans with Disabilities Act (ADA) or Family and Medical Leave Act (FMLA). The grievance ultimately proceeded through the remaining steps, whereupon 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.<sup>2</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>3</sup> 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.<sup>4</sup> The grievant's claims of unequal treatment potentially raise an allegation of discrimination (i.e., workplace harassment), but also could fall under other provisions of DHRM's policy on Civility in the Workplace.<sup>5</sup>

Further, while grievances that allege discrimination 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."<sup>6</sup> 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."<sup>7</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>8</sup> 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."<sup>9</sup>

Although DHRM Policy 2.35 prohibits workplace harassment<sup>10</sup> and bullying,<sup>11</sup> alleged violations must meet certain requirements to qualify for a hearing. Like discriminatory workplace

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<sup>2</sup> See *Grievance Procedure Manual* § 4.1.

<sup>3</sup> Va. Code § 2.2-3004(B).

<sup>4</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>5</sup> DHRM Policy 2.35, *Civility in the Workplace*.

<sup>6</sup> Va. Code § 2.2-3004(A); see *Grievance Procedure Manual* § 4.1(b).

<sup>7</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>8</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>9</sup> *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)).

<sup>10</sup> 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."

<sup>11</sup> 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."

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.<sup>12</sup> 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.<sup>13</sup> “[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.”<sup>14</sup>

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.<sup>15</sup> 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. None of the grievant’s timely allegations involve adverse employment actions. Further, the grievant has not described conduct that rises to a sufficiently severe or pervasive level to qualify for a hearing. However, nothing in this ruling prevents the grievant from filing a further grievance or other complaint if the allegedly unequal treatment continues and/or worsens. As indicated above, this grievance does not present issues that qualify for a hearing. EDR’s qualification rulings are final and nonappealable.<sup>16</sup>

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The policy specifies that bullying behavior “typically is severe or pervasive and persistent, creating a hostile work environment.”

<sup>12</sup> See *Gilliam v. S.C. Dep’t of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

<sup>13</sup> *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.”).

<sup>14</sup> *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).

<sup>15</sup> 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 . . . .”

<sup>16</sup> See Va. Code § 2.2-1202.1(5).

While this ruling was pending, EDR explored the potential for alternative means to resolve the grievance, but we were unsuccessful. The grievant has sought mediation in the past. However, EDR was not able to identify a current dispute that would appear to be a proper subject for mediation at this time. That being said, this ruling does not find that the grievant's assertions of unequal treatment are without merit, just that the grievance does not qualify for a hearing under the grievance procedure's requirements. The grievant should notify either an appropriate member of her management chain or her agency's human resources department if there are additional situations that occur in the future that represent unequal treatment. The agency has requested to be notified of this information and has affirmed its commitment to ensure that the rules apply the same to everyone.

We are also hopeful that the grievant's timely arrival at work continues. To the extent there are any medical issues that might impact her timely arrival at work, the agency has requested the grievant to provide that information to ensure she is provided any applicable legal protections, such as under the ADA or FMLA. Further, to the extent there are issues of unequal treatment or unclear communication impacting alleged tardiness, agency management or human resources should be notified so that those issues can be addressed. EDR's conflict resolution services are available to the grievant, her colleagues, and the agency, where appropriate.

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