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QUALIFICATION RULING

In the matter of the Virginia Information Technologies Agency
Ruling Number 2020-4989
October 11, 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 his June 20, 2019 grievance with the Virginia Information Technologies Agency (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

As described in his grievance, on or about March 22, 2019, the grievant submitted a complaint to the Office of the State Inspector General's Fraud, Waste and Abuse Hotline, alleging that his supervisor was misusing their agency's audit process to punish the audited entity. In a grievance filed on May 16, 2019 (the "First Grievance"), the grievant alleged that, following the Hotline complaint, his supervisor engaged in a pattern of retaliatory and/or otherwise improper behavior toward him.[2] Documents the agency produced at the grievant's request prompted him to initiate another grievance (the "Second Grievance") on or about June 20, 2019. The Second Grievance requested that the agency (1) cease any retaliation, (2) remove records of informal counseling or allow the grievant to rebut them in writing; and (3) discipline the supervisor for discussing personnel matters related to the grievant with other employees. As both grievances proceeded through the management steps, the agency did not find that the supervisor's actions were retaliatory. The agency further advised the grievant that he was permitted to rebut counseling documents, but it could not share with him details of another employee's disciplinary record. The

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[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] This conduct included avoiding the grievant and relaying instructions through coworkers or not at all; criticizing the grievant for contrived offenses and sharing this criticism with coworkers; and withholding work assignments. The First Grievance concluded with EDR Ruling No. 2020-4950, which determined that the First Grievance was not qualified for a hearing because there was insufficient evidence that the grievant had experienced an adverse employment action.

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agency head declined to qualify the Second Grievance for a hearing, and the grievant now appeals that decision to EDR.[3]

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, while grievances that allege retaliation may qualify for a hearing, 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]

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.[10]

For a claim of retaliation to qualify for hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[11] (2) the employee

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[3] The grievant resigned his employment with the agency effective September 10, 2019.
[4] *See 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] *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] *See*, *e.g.*, EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.
[11] *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 the Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." *See also Grievance Procedure Manual* § 4.1(b)(4).

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. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[12]

As in the ruling as to whether the First Grievance was qualified for a hearing,[13] EDR assumes for purposes of this ruling that the grievant's March 22 report to the Hotline was a protected activity in the retaliation analysis.[14] However, having thoroughly reviewed the grievance record and the information provided by the parties, EDR cannot find that the facts as alleged raise a sufficient question whether the grievant suffered an action adverse to the terms, conditions, or benefits of his employment.

EDR previously ruled that the grievant's informal counseling, loss of job assignment, and breakdown in supervisor communications did not constitute a significant change in his employment status.[15] However, EDR noted that "a supervisor who persistently discusses his subordinate to colleagues in disparaging terms – even if such discussions are work-related – may . . . be engaging in conduct that is unprofessional or otherwise prohibited by DHRM policies."[16] Thus, EDR recommended that the agency "take actions necessary and appropriate to fulfill its obligations under Policy 2.35 to prevent any further unprofessional treatment of the grievant by his supervisor, if it has not done so already."[17]

The Second Grievance identifies additional, previously unknown instances of the supervisor discussing the grievant via email with the grievant's coworkers in arguably disparaging or dismissive terms during April and May 2019. The supervisor advised one of the coworkers to have the team "take a walk or something" while the supervisor counseled the grievant, then said to "let me know" if the coworker ran "into any problems with" the grievant. The supervisor later disclosed to the team that the grievant "won't be with us much longer" and was interviewing for other jobs. The supervisor also continued to relay his concerns about the grievant's time management to the grievant's coworkers. In emails apparently alluding to the First Grievance process, the supervisor wrote to another employee that "I know you didn't want to" be invited to a meeting with the grievant, and "I don't know what his endgame is but wtf :)".

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[12] *See*, *e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[13] *See* EDR Ruling No. 2020-4950.
[14] As of the date of this ruling, EDR is not aware of any determination by either the agency or the Office of the State Inspector General as to whether the grievant's underlying Hotline complaint was founded, *i.e.*, that the agency's audit process was misused by the grievant's supervisor.
[15] *See* EDR Ruling No. 2020-4950.
[16] *Id.* at 4.
[17] *Id.* Under DHRM 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."

As examples of conduct prohibited by DHRM Policy 2.35, *Civility in the Workplace*, the associated policy guidance includes "making disparaging remarks, spreading rumors, or making innuendos about others in the workplace" and "impugning one's reputation through gossip." Such conduct, especially by a supervisor, creates an environment ripe for marginalization, intimidation, bullying, or other hostility. While certain of the grievant's supervisor's comments could conceivably have a legitimate management purpose, taken together, the comments could be consistent with these examples of conduct prohibited by the policy. If that conduct persisted, it could rise to the level of an adverse employment action.[18] In this case, however, after the last known improper discussion on May 31, the agency represented to EDR that it had addressed with both the supervisor and his respective manager the need for appropriate communications.[19] EDR is aware of no similar conduct that persisted thereafter.

Further, even if the grievant's allegations sufficiently described conduct pervasive enough to constitute an adverse employment action, EDR perceives no meaningful relief that a hearing officer could grant, given that the grievant is no longer employed at the agency. 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.[20] Because the grievant has left the agency in this case, the issue of his work environment is moot. EDR does not generally grant qualification of claims for which no effective relief is available.

Accordingly, the grievant's claims regarding retaliation and/or improper treatment by his supervisor are not qualified for hearing.[21]

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[18] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998). Hostile or harassing conduct may qualify for a hearing if it is so severe or pervasive as to alter the conditions of employment by creating a hostile or abusive work environment. *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 v. City of Laurel, 895 F.3d 317, 331 (4th Cir. 2018) (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).

[19] As noted in its ruling addressing the First Grievance, the agency has appropriately declined to disclose to the grievant its personnel management with respect to his supervisor or any other specific individuals. *See* EDR Ruling 2020-4950 at 1.

[20] *Rules for Conducting Grievance Hearings* § VI(C)(3).

[21] *See Grievance Procedure Manual* § 4.1. This ruling determines only that the grievant's claims do not qualify for an administrative hearing under the grievance procedure. It does not address whether there may be some other legal or equitable remedy available to the grievant in relation to his claim, or whether the supervisor engaged in retaliatory conduct because of the grievant's whistleblower complaint. Further, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the "Act"). Under the Act, if the grievant gives notice that he wishes to challenge, correct or explain information contained in his personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth his position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

CONCLUSION

For the reasons expressed above, the facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure. EDR's qualification rulings are final and nonappealable.[22]

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[22] *See* Va. Code § 2.2-1202.1(5).