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QUALIFICATION RULING

In the matter of the Department of Aging and Rehabilitative Services
Ruling Number 2020-4997
December 19, 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 her August 13, 2019 grievance with the Department of Aging and Rehabilitative Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is partially qualified for a hearing.

FACTS

On or about May 10, 2018, the grievant began her employment at the agency in the Role of Financial Services Specialist I, with the title of Senior Grant Accountant. On or about March 10, 2019, at the agency's request, she began working in a different position in the same Role, with the title of Accountant. In her new position as Accountant, the grievant felt that she was not adequately trained for her responsibilities and that her manager often spoke disrespectfully to her. She allegedly reported these concerns to agency management, including by meeting with human resources staff on July 29, 2019. The grievant asserts that, approximately one hour after returning from this meeting, agency management presented her with a due process notice citing continuous unsatisfactory performance. On August 1, 2019, the agency issued to the grievant a Group I Written Notice on the same grounds. The Written Notice also indicated a disciplinary transfer within the same pay band, effective on the date of issue.

On or about August 13, 2019, the grievant filed a grievance alleging harassment, intimidation, discrimination, and unfair treatment, asserting that the two transfers had not allowed her "to master any one area" and that the most recent transfer was a "demotion."[2] As relief, the

[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] It appears that the grievant initially filed her grievance using a Grievance Form A. On August 20, 2019, the agency advised the grievant that it processes all grievances using the Expedited Process provided by section 3.4 of the *Grievance Procedure Manual*. The grievant subsequently refiled her grievance using the Grievance Form A – Expedited Process. Because the agency elected to proceed with the second form, which articulates the same

grievant sought placement "with comparable space and duties," a finalized EWP "with measurable duties," training with written materials, and "[t]o null and void the temporary work assignment." On August 22, 2019, the agency provided to the grievant the core responsibilities for her temporary assignment subject to the agency's re-evaluation in 120 days.[3] The agency declined to qualify the grievance for a hearing on grounds that the grievance did not involve formal disciplinary action or other adverse employment action. The grievant has appealed the latter determination to EDR.

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] Actions that automatically qualify for a hearing include the issuance of formal discipline, such as a Written Notice.[5] More generally, however, the grievance procedure limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8] Where a grievant seeks a hearing on allegations of misapplication of policy or unfair application of policy, 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.

Written Notice

In this case, the agency's issuance of a formal Written Notice directing a disciplinary transfer is among the actions challenged by the grievant. In her description of the issues, the grievant cites "constant movement" between the agency's departments, including her most recent transfer directed by the Group I Written Notice. Her specific complaints about the new position include: (1) lack of any updated Employee Work Profile ("EWP") stating her post-transfer Role and work title; (2) new, temporary work location away from her work group; (3) lack of "adequate equipment" to perform her new duties; (4) responsibilities that constitute a "demotion" from her previous position;[9] and (5) the temporary nature of the position itself, indicated by the agency's

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substantive issues despite somewhat different wording, this ruling will consider the issues as described in the Grievance Form A – Expedited Process.

[3] The agency has represented that it is in the process of effectuating the grievant's transfer by finalizing an EWP for her new position, though it has not completed this process as of the date of this ruling.

[4] *See Grievance Procedure Manual* § 4.1.

[5] *Id.* § 4.1(a); *see* Va. Code § 2.2-3004(A).

[6] *See Grievance Procedure Manual* § 4.1(b).

[7] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[8] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

[9] A comparison of the grievant's new responsibilities with her EWP as an Accountant supports the grievant's characterization of the transfer as akin to a demotion or, at best, a "reassignment with significantly different responsibilities." *Burlington*, 524 U.S. at 761. As an Accountant, the grievant was responsible for monitoring and reporting on funds deposit transactions, preparing revenue and fixed-asset reconciliations, assisting in audit queries, serving as a subject-matter expert regarding general ledger accounts, and performing physical inventory of fixed assets with appropriate classifications. In her new role, the grievant maintains procurement files with purging as appropriate, routs and coordinates contracts, drafts sole-source and emergency procurement award notifications, purchases and

120-day timeline. Although the grievance form does not explicitly cite the Written Notice itself, it clearly challenges the disciplinary transfer documented by that Written Notice. Fairly read, the grievance also challenges the disciplinary basis for the transfer, claiming that the grievant's work performance had been hampered by lack of training in her different positions.

While it appears that the agency may have interpreted this grievance primarily as a complaint of religious discrimination, EDR finds that the issues described by the grievant directly relate to the Group I Written Notice and associated disciplinary transfer, a remedy not contemplated by DHRM Policy 1.60, *Standards of Conduct*, for a Group I offense.[10] Because formal disciplinary actions automatically qualify for a hearing under the grievance procedure,[11] and because the addition of a disciplinary transfer for a Group I offense appears to be a misapplication or unfair application of DHRM Policy 1.60, the grievance qualifies for a hearing to the extent that it challenges the basis of the Written Notice and the appropriateness of the disciplinary transfer under applicable DHRM and/or agency policies.

Discrimination/Retaliation

DHRM Policy 2.35, *Civility in the Workplace* prohibits workplace harassment and bullying.[12] However, alleged violations of these policies must meet certain requirements to qualify for a hearing. Whether discriminatory or non-discriminatory,[13] workplace harassment 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.[14] 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.[15] "[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."[16]

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stocks office supplies, and backs up the front desk and performs other administrative duties as needed. Accordingly, the grievant's transfer likely would constitute an adverse employment action even in the absence of formal discipline.

[10] *See* DHRM Policy 1.60, *Standards of Conduct*, at 8-10 (citing demotion and disciplinary transfer as options only in the context of disciplinary action at the Group II and III levels).

[11] *Grievance Procedure Manual* § 4.1(a).

[12] 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."

[13] 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."

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

[15] *See* DHRM Policy Guide – Civility in the Workplace, at 1; 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)).

[16] *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 v. City of Laurel, 895 F.3d 317, 331-32 (4th Cir. 2018) (holding that a hostile work environment

DHRM Policy 2.05, *Equal Employment Opportunity*, requires that "all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability." For a claim of discrimination on any of these grounds to qualify for a hearing, the grievance must present facts that raise a sufficient question as to whether the issues describe an adverse employment action that has resulted from prohibited discrimination. However, if the agency provides a legitimate, nondiscriminatory business reason for the acts or omissions grieved, the grievance will not be qualified for hearing absent sufficient evidence that the agency's proffered justification was a pretext for discrimination.[17]

Similarly, a claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether the grievant's protected activity is causally connected to a subsequent adverse employment action against her.[18] 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.[19]

Here, the grievant contends that her previous supervisor inadequately trained her for her Accountant position, including an instance of excluding the grievant from necessary training offered to her coworkers. The grievant further contends that her supervisor frequently spoke disrespectfully to her, raising her voice in meetings. When the grievant reported this conduct to a manager as inappropriate, he responded, "that's just how [your supervisor] is." The grievant also alleges that an employee of a different religion appeared to receive preferential approval for leave requests. The grievant claims that, on July 29, 2019, she went to human resources staff to discuss her concerns about disrespectful treatment by her supervisor. EDR considers the grievant's complaint to be a protected activity for retaliation purposes.[20]

The grievant alleges that, within an hour after engaging in this protected activity, management presented her with a due process notice that resulted in the adverse action of formal discipline with transfer. While it appears that the agency had viewed the grievant's work performance as deficient prior to her human resources meeting, the temporal proximity between the meeting and the improper disciplinary transfer – allegedly one hour – raises a sufficient question whether the grievant would have been subject to this discipline but for her complaints about her supervisor's behavior and management's failure to address it.[21]

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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).

[17] *See Strothers*, 895 F.3d at 327-28; *see, e.g.*, EDR Ruling No. 2017-4549.

[18] *See id.*; 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)).

[19] *Id.*

[20] Va. Code § 2.2-3000(A). Grievances qualifying for a hearing include those relating to "retaliation for exercising any right otherwise protected by law." Va. Code § 2.2-3004(A). The grievant's exercise of her right to make a complaint of disrespectful workplace conduct is protected by DHRM Policy 2.35, *Civility in the Workplace*, which independently prohibits retaliation for reporting harassment or bullying prohibited by the policy.

[21] *See* Foster v. Univ. of Md.-E. Shore, 787 F.3d 243, 253 (4th Cir. 2015) (finding that the temporal proximity of one month between the plaintiff's retaliation complaint and her termination created a jury question whether the two events were causally related for retaliation purposes).

However, EDR cannot find that the grievant has raised a sufficient question whether she experienced discrimination or retaliation on the basis of religion. The grievant's sole allegation supporting this issue is a comment made by her coworker implying that the grievant would be able to take more leave if the grievant converted to the coworker's religion. The meaning of this isolated comment is unclear and, further, the grievant concedes she did not report this comment to agency management. Accordingly, EDR declines to qualify the grievance for a hearing on the issue of discrimination or retaliation on the basis of religion.

CONCLUSION

For the reasons explained above, the facts presented by the grievant constitute certain claims that qualify for a hearing under the grievance procedure.[22] Because the grievant challenges formal disciplinary action, including a Written Notice and transfer, the grievance qualifies for a hearing on those grounds. The grievance also qualifies for a hearing on the question whether the agency issued the Written Notice and/or transfer for retaliatory reasons. At the hearing, the agency will have the burden to prove that the employee engaged in the behavior described in the Written Notice, whether the behavior constituted misconduct, and whether the disciplinary action was consistent with law and policy.[23] Even if the disciplinary action is found to be supported by record evidence, a finding that the disciplinary transfer was not appropriate under the *Standards of Conduct*[24] will result in the removal of the transfer and reinstatement of the grievant to her prior role. To the extent that the grievant raises the issue of retaliation as an improper basis for the disciplinary action, the grievant bears the burden to prove such retaliation as an affirmative defense.[25]

Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B. However, this ruling is not intended to prevent or discourage the parties from resolving the underlying issues outside the context of a hearing. Should the parties wish to pursue resolution of the issues herein prior to a hearing date, EDR is available to assist in such any efforts as desired and appropriate.

EDR's qualification rulings are final and nonappealable.[26]

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[22] *See Grievance Procedure Manual* § 4.1.
[23] *Rules for Conducting Grievance Hearings* § VI(B).
[24] Based on the record at this stage, EDR has reviewed nothing that would support a finding that the disciplinary transfer was permissible under the *Standards of Conduct*.
[25] *Rules for Conducting Grievance Hearings* § VI(B).
[26] *See* Va. Code § 2.2-1202.1(5).