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QUALIFICATION RULING

In the matter of the Virginia Department of Juvenile Justice
Ruling Number 2020-5008
February 10, 2020

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 September 26, 2019 grievance with the Virginia Department of Juvenile Justice (the “agency”) qualifies for a hearing. For the reasons discussed below, EDR concludes that the grievance is not qualified for a hearing.

FACTS

The grievant has been employed in a small unit within the agency since approximately 2014. The grievant has alleged that, since she began working for the agency, a Coworker in her unit routinely interacted with the grievant, with other employees, and with interns in a sexual and otherwise disrespectful manner. The unit Supervisor allegedly tolerated and even sometimes echoed the Coworker’s attitude. The grievant claims that, in April 2019, the Coworker sexually abused her in the workplace. Although the agency investigated the incident and ultimately terminated the Coworker’s employment, the grievant now alleges that the agency was slow to respond to the incident, failed to address the Supervisor’s role in the Coworker’s behavior and its effects on the workplace, and has permitted the Supervisor to retaliate against her since she reported the incident.

While working with the unit, the Coworker allegedly called the grievant “Porkchop” in reference to her weight and regularly commented on her body and other women’s bodies. Between 2015-2017, the Coworker made “sexually offensive jokes” to interns working in the unit, such as commenting to an intern that “us redheads taste different,” asking if the movie *50 Shades of Grey* made an intern “horny,” and commenting that “all you women are just f–ed up.”²

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 In an investigation by the agency that concluded on July 29, 2019, multiple witnesses stated that the Coworker was the only employee in the unit offered the opportunity to work with interns during this period, most of whom were “young, attractive” women. Multiple interns told investigators that the Coworker frequently made inappropriate comments not only of a personal or sexual nature but also disparaging their religious and/or political beliefs. The

In March 2018, the grievant allegedly walked to the Coworker's office to say goodbye for the day and found him sitting in his chair in his underwear with the door open. In August 2018, the Coworker allegedly told the grievant he was "concerned about 'not being able to get an erection'" with his new girlfriend and asked whether her husband used Viagra. The Coworker also allegedly antagonized his colleagues, including an instance in March 2017 in which he put his face against another employee's face while cursing at and spitting on him. After that employee complained to the unit's Director, the Coworker allegedly characterized the reporting employee to the grievant as a "pussy" and "little bitch." On at least two occasions, the Coworker made unwanted physical contact with the grievant and an intern. The grievant, who had disclosed that she experiences attention difficulties, also alleges that the Coworker frequently attempted to distract her at work and to use her medication.

During an agency investigation, multiple witnesses told investigators that the unit Supervisor was aware of multiple instances of the Coworker's pattern of inappropriate behaviors. The grievant alleged that the Supervisor not only tolerated the Coworker's pattern of conduct but also spoke inappropriately to her himself. In September 2018, when the grievant told the Supervisor and Coworker that she and her husband would start having date nights on Wednesdays, the Supervisor allegedly commented, "we know what [the grievant] and [her husband] will be doing every Wednesday night!" The Supervisor and Coworker allegedly made similar comments over several weeks referencing the grievant's sexual activity. In March 2019, the grievant alleges that when she was discussing yoga with another employee, the Supervisor commented, "don't tell [Coworker] you can put your legs behind your head." The Supervisor then allegedly referenced yoga periodically over the next "couple of weeks" and suggested that the grievant should "try hot yoga." At around the same time, when someone in the unit mentioned gagging on food, the Supervisor allegedly asked the Coworker, "remember that intern you had that didn't have a gag reflex?" The Supervisor denied making these comments.³

On the afternoon of April 15, 2019, the Coworker entered the grievant's office and told her he was looking for a new relationship, asking if she had any "crazy" girlfriends he could date. After brief additional conversation, the Coworker approached the grievant at her desk and began to rub his genital area against her shoulder. She indicated he should stop, but he continued for 30 to 60 seconds. When the Coworker left her office, the grievant decided to go home, but stopped in the restroom. When she exited into the hallway, the Coworker was there with his pants removed. He said he had walked past the restroom naked several times while she was inside. The grievant left the facility.⁴

On April 16, 2019, the grievant called the Supervisor after work hours to report the incident. The Supervisor, who was at an out-of-town conference with the Director and other agency management, asked the grievant to send a written account; he also allegedly told her that he would ensure she would not be alone with the Coworker. The Supervisor reported the grievant's call to the Director.⁵

investigation substantiated allegations that the Coworker had violated prohibitions on sexual harassment while working with interns and that the Supervisor had failed to report these violations.

³ The agency's investigative report does not address many of the grievant's allegations against the Supervisor himself.

⁴ The agency's investigation of this incident found the grievant's allegations to be substantiated.

⁵ It is unclear whether the grievant ever became aware that the Supervisor reported her allegations up the management chain that night.

On April 17, 2019, the grievant alleges that she was in her office writing her account of the incident when the Coworker arrived at the facility around 11:30 a.m. Surprised that he was coming to work after her report, the grievant closed her office door. The Coworker nevertheless entered, closed the door behind him, and demanded to discuss the incident. The grievant asked the Coworker to leave, but he refused. She texted the Supervisor and learned that no one had yet spoken to the Coworker about the incident. She asked the Supervisor to instruct the Coworker to leave her office; he did so. Later that day, the Director informed the Coworker that he was on administrative leave effective immediately.

On May 2, 2019, the grievant informed the Director that April 15 was not the first time she saw the Coworker in his underwear at the workplace. She told the Director that the Supervisor was aware of this and of the Coworker's other inappropriate behavior toward her and others, and the Supervisor failed to address it. Between May 10 and 15, 2019, the grievant described in writing to the investigator several allegations of inappropriate and/or harassing comments by the Coworker that she alleged the Supervisor knew of and had tolerated, as well as instances of inappropriate sexual comments made to her by the Supervisor himself. On May 14, 2019, in response to concerns about the grievant working with her office door closed, the grievant emailed the following message to the Director:

- I do not believe that [Supervisor] acted appropriately (or accordance with Policy 2.35) after being told about the incident on 04/16/19.
- I do not believe that [Supervisor] took the appropriate steps on 04/16/19 or 04/17/19 and his failure to respond accordingly, led to the second incident on 04/17/19.
- I firmly believe that [Supervisor] is partly responsible for me being re-victimized by [Coworker] on 04/17/19. . . .

To be clear:

- I am a victim of assault and sexual harassment that occurred at work on 04/15/19.
- I experienced traumatic events at work on 04/15/19 and 04/17/19.
- I reported the assault/sexual harassment to [Supervisor] on 04/16/19.
- I was re-victimized by [Coworker] on 04/17/19.
- I immediately reported the incident that occurred to on 04/17/19

I view [Supervisor] as an accomplice to [Coworker]. Therefore, I do not think I should have to leave my door open to invite engagement with [Supervisor].

The Director responded: "Effective immediately, please report to [Alternate Supervisor] pending the conclusion of the internal investigation." The Alternate Supervisor worked in a different locality. The grievant disclosed that, in connection with the incident, she received a mental health diagnosis and asked if she could work outside the unit office to avoid contact with the Supervisor. The Director responded that the unit could not accommodate her request. When the grievant discussed this response with the investigator, the investigator responded: "Are you able to come up with a solution to meet everyone's needs?"

On July 16, 2019, the grievant emailed the agency's Human Resources Director to advise that she was considering resignation:

Since the incident, I have made multiple reports to [Director] regarding [Supervisor's] lack of support and attempts to harass, annoy, and/or intimidate me. Examples include [Supervisor] fake coughing loudly outside of my office window almost every morning before entering the building, [Supervisor] making sarcastic comments to me when we are the only two in the building, [Supervisor] whispering with another staff member and suddenly stopping after the other staff member saw me in the hallway, [Supervisor] whistling in his office when we are the only two people in the building, [Supervisor] accessing cases on my caseload without a professional reason and after I asked what his role in supervision was for cases he no longer supervises, [Supervisor] exiting his office abruptly, slamming the door, and pacing in the parking lot and side street after I questioned why a case that another [employee] has had for three years in another locality was suddenly being reassigned to me, and most recently (07/12/19) [Supervisor] walked slowly by my office, looked at me in a manner meant to intimidate me while smirking, swinging his keys, and remarking, "HMMM!"

In August 2019, in consultation with agency management, the grievant decided to maintain her employment with the agency, and she accepted the agency's offer to participate in individual conflict coaching to address ongoing conflict with the Supervisor.⁶ However, she continued to perceive hostility from the Supervisor. She alleges that, on September 4, 2019, the Supervisor entered her office abruptly and stood close behind her purportedly to investigate a computer issue. The grievant alleges that the Supervisor's manner brought to mind the April incident where the Coworker had assaulted her at her desk. The grievant claims she was "visibly uncomfortable" with the situation. She also alleges that the Supervisor's tone with her has frequently been argumentative and dismissive. She alleges that the Supervisor smirked at her on one occasion when he was returning from conflict coaching.

On September 23, 2019, the grievant met with the Director and Human Resources Director and learned that the Coworker's employment had been terminated. They discussed the grievant's allegation that the Supervisor had knowingly made her uncomfortable in her office on September 4. The Human Resources Director allegedly responded that the Supervisor may not have realized how his manner would come across to the grievant because "he's a man." The grievant claims she rejected this explanation and insisted that the Supervisor had mishandled her complaint about the April incident, even with his knowledge of the Coworker's long history of inappropriate behavior including unwanted touching.

On September 26, 2019, the grievant filed a grievance alleging "harassment and retaliation by supervisor" and "hostile work environment." The grievant cited the April incident and asserted that the Supervisor had been the Coworker's "best friend." The grievant alleged that "I have made numerous complaints against [Supervisor] with the Agency's response being to volunteer me to participate in 'Conflict Coaching' with [him]." The grievant also took issue

⁶ It appears that, upon learning that the grievant's conflict with her supervisor was related to the events of April 2019, the conflict coach suggested suspending sessions until the agency had completed its response to the incident.

with an alleged lack of security improvements to the facility since the April incident, saying that she had “voiced concerns about being the only person in the building on numerous occasions” and believed that the Coworker “had an office key until his termination.” The grievant criticized the agency’s response to her allegations regarding the Supervisor’s visit to her office on September 4. Finally, the grievant alleged that her other colleagues had begun to treat her in a disrespectful manner since the April incident, speaking to her in tones she found hostile. As relief, she sought the transfer of the Supervisor, the installation of security cameras at the work facility, and mandatory training on workplace bullying for her coworkers.

On October 10, 2019, the agency’s third step respondent observed that many of the recent instances in which the grievant perceived insensitivity and/or an intent to upset her did not necessarily involve malice. The third step response characterized most of the more recent allegations against the Supervisor as being within his supervisory authority (presumably for the broader unit, since the grievant was reporting to a different supervisor). The third step response acknowledged that “sensitivity training”⁷ for the entire unit would be appropriate and referenced “numerous efforts made behind the scenes to enhance the safety of all staff.” However, the third step respondent otherwise denied relief and did not address the grievant’s allegations linking agency management to the April incident or the environment that preceded it.

On October 23, 2019, the Director announced the agency’s intention to return the grievant to the direct supervision of the Supervisor through a gradual process to be completed as of November 25, 2019. The Director noted that “conflict resolution support will continue to be offered.”

On November 5, 2019, the agency declined to qualify the grievance for a hearing, concluding: “[Y]our allegation of sexual harassment was founded. The agency took the findings seriously and has appropriately responded. However, the documentation presented in your grievance does not support your allegation of retaliation by your supervisor or bullying by your coworkers.” The agency further reasoned that the grievant’s allegations were “petty annoyances that do not rise to the level of severe or pervasive offensiveness that would constitute a hostile work environment.” The grievant has appealed the agency’s 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.⁸ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁹ Thus, claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out generally do

⁷ On or about November 12, 2019, the unit’s employees attended agency-developed training pursuant to DHRM Policy 2.35, *Civility in the Workplace*. The training materials defined “prohibited conduct” to include sexual harassment, threats of violence, and “[b]ehaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety.” The materials also included “unwelcome verbal, written, social, or physical conduct that denigrates or shows hostility or aversion towards a person” as prohibited conduct. Among the behaviors that could support a hostile work environment, the training identified unwelcome physical contact, sexually suggestive or crude/offensive comments, and sexually-oriented jokes or discussing sexual activities.

⁸ See *Grievance Procedure Manual* § 4.1.

⁹ Va. Code § 2.2-3004(B).

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.¹⁰ 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."¹¹ 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."¹² Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.¹³ 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."¹⁴

Finally, EDR has consistently held that 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. Similarly, 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.¹⁵

Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment¹⁶ and bullying,¹⁷ alleged violations must meet certain requirements to qualify for a hearing. Both discriminatory and 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)

¹⁰ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

¹¹ Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).

¹² *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

¹³ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

¹⁴ *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)).

¹⁵ *See, e.g.*, EDR Ruling No. 2020-4989; EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.

¹⁶ 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."

¹⁷ 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."

imputable on some factual basis to the agency.¹⁸ 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.¹⁹ “[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.”²⁰

In this case, the grievant has made allegations to the agency since at least May 2019 that would present a sufficient question whether she experienced a hostile work environment that culminated in the Coworker rubbing his genital area against the grievant in her office, removing his clothing, and attempting further interaction with the grievant in their workplace. Such conduct described by the grievant may qualify for a hearing if it is imputable on some factual basis to the agency.

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. 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.²¹ 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. Thus, the key issue raised by this grievance is whether the hostile work environment reflected in the grievant’s allegations still persists, or whether, instead, agency managers have responded to her allegations by stopping prohibited conduct of which they are aware and taking immediate action to prevent retaliation and to eliminate any hostile work environment.

Despite the grievant’s reasonable frustration about the lack of action she has perceived on management’s part, it appears that the agency has responded to the grievant’s allegations of April 2019 in more ways than may have been shared with her. According to the agency, the Supervisor escalated the grievant’s allegations immediately upon learning of them. After putting the Coworker on leave, the agency launched an investigation that expanded to address the longer history of his behavior and that ultimately resulted in his termination. While the agency has appropriately declined to share with the grievant any performance management actions involving

¹⁸ See *Gilliam v. S.C. Dep’t of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

¹⁹ *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)).

²⁰ *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).

²¹ 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”

the Supervisor, the agency took steps to address both the Supervisor's oversight of the Coworker and the need to avoid any actions toward the grievant that could constitute prohibited conduct under DHRM Policy 2.35. In the meantime, the agency temporarily reassigned the grievant to a different supervisor and offered internal conflict coaching to both the grievant and Supervisor.

However, the grievant argues that, in addition to tolerating severe and pervasive conduct by the Coworker over a period of years, management did not timely respond to her allegations and, thus, she was "re-victimized" when the Coworker entered her office again on April 17 and refused to leave. She appears to hold her Supervisor responsible for a hostile work environment that culminated in the April 15 incident, which was then compounded by the agency's slow response. While the agency decided to expand its investigation to issues beyond the April 15 incident, the grievant was kept in limbo and feared the Coworker's return for months because he had personal belongings in the office and she believed he had retained his office keys.²² Although higher-level management had been involved in responding to the incident and in removing the Coworker's access to the facility, EDR is not aware that management at any level communicated with the grievant to assuage these particular concerns. In fact, it appears that, as late as July 2019, management flatly declined to discuss whether the Coworker might actually return to the grievant's workplace. By the time that management finally informed the grievant in September that the Coworker's employment had ended, she had reported multiple instances of further antagonism by her Supervisor. Under the circumstances, she understandably viewed these actions as retaliatory.

After thorough review of the grievance record and the information provided by the parties, EDR cannot find that the facts as alleged raise a sufficient question whether the agency has, *as of this ruling*, failed to respond to the grievant's allegations to such a degree that its failure constitutes a misapplication or unfair application of DHRM Policy 2.35. The agency received the grievant's allegations, removed the Coworker from the workplace the following business day, and ultimately terminated his employment. Management has continued to work with the Supervisor to improve office oversight and avoid retaliatory or other prohibited conduct toward the grievant. In response to the grievant's reports that her peers spoke to her in tones that were rude or hostile, the agency arranged for the unit to receive training on DHRM Policy 2.35.²³

Although the grievant's subjective interpretation of events may be understandable in light of her experiences in her workplace, EDR cannot identify evidence that creates a sufficient question whether the grievant *continues* to experience conduct by her Supervisor or peers that an objective person would view as abusive or hostile – a required element for hearing qualification. In addition to the grievant's allegation that her Supervisor entered her space in a way that evoked the April 15 incident and made her visibly uncomfortable, the grievant also cites the following actions by the Supervisor occurring in September:

- An office-wide email describing it as "unfortunate" that the grievant and another employee would share certain responsibilities
- Appearing to second-guess the grievant's judgment in front of a third party
- Delaying completion of a task in order to make the grievant handle it

²² The agency denies that the Coworker retained his office keys when he was put on administrative leave.

²³ EDR has reviewed the training materials offered and found the information therein to be accurate and appropriate with respect to DHRM Policy 2.35.

- Smirking at the grievant when walking by her office
- Giving a generic title to the conflict-coaching event on his shared calendar
- Attempting to transfer one of the grievant's cases to a different office
- Asking the grievant in a skeptical tone whether she had driven the state vehicle
- Failing to provide clearer direction and organization as agreed in previous accommodation discussions
- Failing to improve building security following the grievant's allegations of assault
- Allowing other employees more leniency to be absent from the office
- Continuing to access the grievant's calendar despite no longer acting as her supervisor

While certain of the grievant's continuing allegations do raise concerns based on what has already transpired in the unit, EDR cannot say that they are so severe or pervasive that they perpetuate a hostile work environment. Generally, the recent incidents cited suggest workplace tension but not harassment or bullying as defined by Policy 2.35. The Supervisor's acts and omissions related to assigning tasks and cases, reviewing the grievant's work, and managing the unit's equipment and staff schedules, as described, cannot be said to constitute harassment or bullying. Even though the grievant did not directly report to the Supervisor during this time, it appears that his management responsibilities at the office necessarily overlapped with the grievant's work and activities, at least to some extent. While the grievant appears to claim that her Supervisor has failed to accommodate a disability, the grievance record does not reveal specific reasonable accommodations that have been requested and not met. Further, it appears that the agency has responded to the grievant's most concerning allegations – *e.g.* smirking at her, entering her personal space in her office – by offering internal conflict coaching to both parties and by arranging for the unit's employees to attend training on DHRM Policy 2.35. Although EDR does not endorse these responses as realistic solutions to the after-effects of the April 15 incident, we cannot say that the responses failed to meet the policy's mandatory obligations for agencies to respond to complaints. Therefore, while the grievant's allegations clearly illustrate a prior hostile work environment, EDR cannot conclude that the grievant has raised a sufficient question whether such an environment persists and is attributable to the agency.

For this reason, EDR also cannot conclude that the grievant has presented a sufficient question whether her Supervisor or other agency management is retaliating against her for reasons related to her reporting of the Coworker's behavior. A claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.²⁴ Assuming here that the grievant engaged in protected activity under DHRM Policy 2.35 by reporting prohibited conduct by the Coworker and/or the Supervisor,²⁵ the record does not reflect that the grievant has suffered a tangible, adverse employment action following her reports, as explained above.

²⁴ See *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 demonstrate that, but for the protected activity, the adverse action would not have occurred. *Id.*

²⁵ DHRM Policy 2.35 defines retaliation as “[o]vert or covert acts of reprisal, interference, restraint, penalty, discrimination, intimidation, or harassment against an individual or group exercising rights under this policy.” The policy prohibits retaliation of “any form” against employees who report policy violations in good faith.

That said, while the agency appears to have taken enough action to shield management from responsibility under the grievance procedure and its applicable standards, its responses fall short of what would reasonably be required to restore a “welcoming, safe, and civil workplace”²⁶ following a severe instance of harassment. When the grievant was inappropriately touched in her office by a Coworker with a long history of similarly unacceptable behavior, she could reasonably expect agency management to prevent the Coworker from having any further contact with her. She could reasonably expect reassurance from management that, provided the investigation substantiated the grievant’s allegations, the agency would not allow the Coworker to return to work. When she reported multiple allegations regarding the Supervisor’s role in the work environment preceding the April 15 incident, describing him to the Director as an “accomplice” to the Coworker’s acts, she could reasonably expect the agency to investigate her allegations *against the Supervisor* and apprise her of its general findings. The grievance record does not suggest that the agency took any of these actions.

In addition, and while acknowledging that management faced extremely difficult personnel challenges following the April 15 incident, the record suggests that the circumstances called for dispute resolution strategies other than conflict coaching. Conflict coaching is an approach to help an employee understand his or her own conflict behaviors.²⁷ In this case, by contrast, it appears that the conflict between the grievant and the Supervisor stems from her perception of his response to her report of sexual abuse and her “re-victimization” the day after she reported it. On these facts, EDR would not recommend that an agency focus its visible response on the complainant’s own behavior. While successful dispute resolution is never guaranteed, credible allegations of harassing behavior in the workplace may warrant, as a best practice, proactive restorative efforts that exceed the basic mandates of law and policy to prevent further harassment. In sum, it does not appear that the agency took actions that would have been necessary to provide a “welcoming, safe, and civil workplace” for the grievant following the April 15 incident.

However, even assuming that the grievant’s allegations sufficiently describe an agency response to her allegations that was not consistent with the purpose of DHRM Policy 2.35, EDR perceives no meaningful relief that a hearing officer could grant in this case. While the grievant has requested the transfer of the Supervisor and installation of security cameras at her office, hearing officers must “avoid providing specific remedies that would unduly interfere with management’s prerogatives to manage the agency.”²⁸ 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.²⁹ Here, it appears that the grievant’s work environment is already free of *current, ongoing* harassment or retaliation as would be perceived by an objective person, even if the environment is not “welcoming, safe, and civil” for the grievant. EDR does not generally grant qualification of claims for which no effective relief would be available at a hearing.

Accordingly, the grievant’s claims are not qualified for a hearing.

²⁶ DHRM Policy 2.35, *Civility in the Workplace*, at 1.

²⁷ See, e.g., “Workplace Conflict Consultation Program,” Dep’t of Human Resource Mgm’t, at <https://www.dhrm.virginia.gov/employment-dispute-resolution/workplace-conflict-consultation-program>.

²⁸ *Rules for Conducting Grievance Hearings* § VI(C)(3).

²⁹ *Id.*

CONCLUSION

For the reasons discussed above, the facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.³⁰ Because the grievant has not raised a sufficient question as to the existence of continuing harassment, bullying, or retaliatory conduct attributable to the agency, the grievance does not qualify for a hearing on these grounds.

Although this grievance does not qualify for a hearing, nothing in this ruling is meant to indicate that EDR condones the conduct by the Coworker or Supervisor, or the agency's response to the totality of the allegations. The grievant has raised legitimate concerns and the agency must ensure that appropriate steps continue to be taken to prevent any recurrence of a hostile work environment, whether discriminatory or retaliatory. As indicated above, the agency should also take proactive steps to establish a safe, welcoming work environment. The grievant should report any future instances of inappropriate behavior should they occur. Should the grievant's work environment deteriorate and/or should the treatment by her Supervisor or other members of management continue or worsen, nothing in this ruling precludes a grievance about such future occurrences from qualifying for a hearing.

EDR's qualification rulings are final and nonappealable.³¹



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³⁰ See *Grievance Procedure Manual* § 4.1.

³¹ See Va. Code § 2.2-1202.1(5).