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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2020-5012
December 23, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM")[1] on whether her August 14, 2019 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant was employed as a specialist in a department at the agency's headquarters office.[2] On July 1, 2019, agency management implemented a reorganization of the grievant's department. As part of the reorganization, the grievant's former supervisor transferred to a position as the department's assistant director.[3] Supervisory responsibility for the grievant's unit was reassigned to another manager who also reported to the grievant's former supervisor prior to the reorganization. The new manager of the grievant's unit continued to report to the assistant director (*i.e.*, the grievant's former supervisor) after the reorganization.[4] During this time, the grievant was out of work on an approved medical absence. She briefly returned to work with restrictions before the reorganization took effect on July 1, went back out of work while awaiting clarification about her medical restrictions, and returned a second time on July 15.

The grievant filed a grievance on August 14, 2019, alleging that she "was passed over for a position with promotional opportunities" while she was out of work. In essence, the grievant challenges the agency's decision to reassign supervisory responsibility for her unit to another manager without either competitively recruiting for the position or reassigning that responsibility

[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] After the events that gave rise to this grievance, the grievant was issued multiple Written Notices over a period of several months and ultimately terminated on October 30, 2019. The status of these matters is discussed further below.

[3] It appears that the former supervisor's Role and Pay Band remained the same.

[4] The grievant's new manager did not have supervisory authority over the grievant prior to the reorganization, and was instead responsible for managing a different function in the department.

to the grievant based on her skill and experience. The grievant further asserts that the new manager of the unit used her position "to harass [the grievant] and threaten [her] because [the new manager] lacks the competency to perform the position in which she was placed." Finally, the grievant argues that the agency decided not to assign supervisory authority for the unit to her because of her race and/or disability status. As relief, the grievant requested "to be able to perform [her] job . . . without harassment" from the new manager and reversal of the agency's assignment of supervisory duties to the new manager. Following the management resolution steps, the agency head determined that the grievance record did not contain evidence demonstrating that a misapplication of agency policy had occurred or supporting the grievant's allegations of workplace harassment and/or discrimination. As a result, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that 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.[5] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[6] Claims relating to issues such as the methods, means, 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 or agency policy may have been misapplied or unfairly applied.[7]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[8] Thus, typically, a 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."[9] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[10] For purposes of this ruling only, EDR will assume that the grievant has alleged an adverse employment because the agency's reorganization purportedly impacted her opportunities for advancement.[11]

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[5] *See Grievance Procedure Manual* §§ 4.1 (a), (b).
[6] *See* Va. Code § 2.2-3004(B).
[7] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[8] *See Grievance Procedure Manual* § 4.1(b).
[9] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[10] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[11] On the one hand, EDR notes that the grievant does not appear to allege that the reorganization had a direct impact on her employment because there was no change to her job responsibilities. On the other hand, the reorganization impacted the reporting structure for the grievant's department, and, thus, could have limited her career progression. Consequently, there is some basis to suggest that an adverse employment action has occurred. Ultimately, this issue need not be fully discussed in this ruling because the grievance is not qualified for a hearing for the other reasons described herein.

Reorganization of the Grievant's Department

In her request for qualification, the grievant argues that the agency misapplied and/or unfairly applied DHRM Policy 2.10, *Hiring*, by non-competitively reassigning supervisory authority for her unit to the new manager, and DHRM Policy 3.05, *Compensation*, by approving an in-band adjustment for the new manager in conjunction with her newly-assigned supervisory responsibilities. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that 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 intent of the applicable policy.

The General Assembly has recognized that the Commonwealth's system of personnel administration should be "based on merit principles and objective methods" of decision-making.[12] Moreover, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.[13] DHRM Policy 2.10 "provide[s] guidelines for an efficient and consistent competitive hiring process that promotes equal employment opportunity and a highly effective workforce."[14] Importantly, however, the grievance procedure reserves to management the exclusive right to manage the affairs and operations of state government and accords much deference to that exercise of judgment, including the assignment of duties to employees.[15] While agencies are afforded great flexibility in making decisions such as those at issue here, agency discretion is not without limitation. Rather, EDR has repeatedly held that even where an agency has significant discretion to make decisions, qualification is warranted where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[16]

Here, there was no competitive recruitment process for the new manager's position. The grievant essentially argues that the agency intentionally reassigned supervisory responsibilities to the new manager (and other current employees in the reorganization) to avoid recruiting for the position competitively, thus exceeding the scope of its discretion under policy. The grievant particularly asserts that the agency should have instead assigned supervision of the unit to the grievant because of her skill and experience.

Although the grievant describes the agency's action as a voluntary transfer of the new manager, her characterization of events is not accurate. Under DHRM Policy 3.05, *Compensation*, a voluntary transfer takes place "when an employee moves to a different position within the same or different Role within the same Pay Band."[17] However, the new manager did not move to a different position. The grievant's former supervisor transferred to a position as the

[12] Va. Code § 2.2-2900.
[13] *Id.* § 2.2-2901 ("In accordance with the provision of this chapter all appointments and promotions to and tenure in positions in the service of the Commonwealth *shall be* based upon merit and fitness, to be ascertained, as far as possible, by the competitive rating of qualifications by the respective appointing authorities." (emphasis added)).
[14] DHRM Policy No. 2.10, *Hiring*, at 1.
[15] *See* Va. Code § 2.2-3004(B).
[16] *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as "[i]n disregard of the facts or without a reasoned basis"); *see also, e.g.*, EDR Ruling 2010-2365; EDR Ruling No. 2008-1879.
[17] DHRM Policy 3.05, *Compensation*, at 24.

department's assistant director, and the position the grievant's supervisor formerly held was eliminated. The former supervisor's responsibilities were then reassigned to other employees in the department. The agency revised the new manager's Employee Work Profile ("EWP") to include supervision of the grievant's unit, and assigned the former supervisor's other duties elsewhere. The new manager's Role, Pay Band, and position number have all remained the same. Indeed, the agency explained to EDR that, except for newly-created or vacant positions, the departmental reorganization was implemented by reassigning duties in this manner. In other words, the new manager and many other impacted employees have retained their Role, Pay Band, and position number, while undergoing changes in their job duties consistent with the agency's reorganization of the department. EDR is unaware of anything that prohibits an agency from taking such steps, so long as the classification and compensation of employees remains consistent with state policy and the reorganization actions are not otherwise improper.

Relatedly, the grievant further argues that the new manager's position is inappropriately classified based on the assumption of supervisory responsibility for the grievant's unit, and, accordingly, required competition to fill if at a higher Pay Band. The grievant appears to contend that responsibility for supervision of her unit requires the new manager's position to be classified in a higher Role and Pay Band, based on the classification of the former supervisor's position when she was responsible for management of the grievant's unit. EDR has reviewed nothing to suggest that the agency's decision to revise the new manager's EWP without an accompanying increase in Role or Pay Band was an abuse of discretion in this case or otherwise arbitrary or capricious. Based on a review of the relevant EWPs, EDR cannot find that the classification of the new manager and her assigned duties is inconsistent with state policy, the Commonwealth's job organization structure, or the department's reorganization in general. In addition, the agency explained to the grievant during the management steps that, prior to the reorganization, the new manager was already responsible for supervising other employees and had extensive experience with the agency, particularly in the functions performed by the units they now manage, including the grievant's unit. The grievant's concerns about the departmental reorganization are understandable, and such changes in employee responsibilities must be undertaken with care to ensure compliance with policy. Nevertheless, EDR has thoroughly reviewed the grievance record and cannot conclude that the agency's decisions regarding either the assignment of duties to the new manager or the classification of the new manager's position were outside the scope of its discretion.

Finally, the grievant disputes the agency's decision to authorize an in-band adjustment for the new manager in conjunction with their assumption of additional duties through the reorganization. An in-band adjustment is a "non-competitive pay practice that allows agency management flexibility to provide potential salary growth and career progression within a Pay Band or to resolve specific salary issues."[18] Like all pay practices, in-band adjustments are intended to emphasize merit rather than entitlements, such as across-the-board increases, while providing management with great flexibility and a high degree of accountability for justifying their pay decisions.[19] While DHRM Policy 3.05 reflects the intent that similarly situated

[18] *Id.* at 7.
[19] *See* DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

employees should be comparably compensated it also reflects the intent to invest agency management with broad discretion for making individual pay decisions and corresponding accountability in light of each of thirteen enumerated pay factors.[20] In this case, the agency has explained to EDR that the new manager, as well as other employees who were impacted by the reorganization, received in-band adjustments as part of that process. These salary increases were implemented to ensure internal alignment and pay equity across different units within the department, and to account for changes in job duties and reporting structures. While the grievant could argue that certain pay factors might support a decision that a salary increase for the new manager was unwarranted, the agency's position is also valid. Factors such as an employee's experience and job responsibilities, as well as internal salary alignment, represent just several of the many different factors an agency must consider in making determinations about whether, when, and to what extent in-band adjustments should be granted in individual cases and throughout the agency.[21] Based on the totality of the circumstances, EDR cannot find that the agency's approval of an in-band adjustment for the new manager was improper.

In summary, EDR has reviewed the grievance record and the submissions of the parties in detail and found nothing to suggest that the reorganization of the grievant's department, as a whole, violated any mandatory policy provision, disregarded the intent of state policy, or was otherwise arbitrary or capricious. The grievance procedure accords much deference to management's exercise of judgment, including the difficult decisions that took place as part of the reorganization at issue here, and it appears that the agency's assignment of duties to the new manager and other employees, along with its accompanying decisions about employee classification and compensation, were consistent with the discretion granted by policy. Accordingly, the grievance does not qualify for hearing on this basis.

Discrimination

In addition, the grievant alleges that the departmental reorganization was conducted in a discriminatory manner based on her race and/or disability status.[22] Grievances that may be qualified for a hearing include actions related to discrimination on the grounds of race, sex, color, national origin, religion, sexual orientation, gender identity or expression, age, political affiliation, genetics, disability, or veteran status.[23] For a claim of discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, there must be facts that raise a sufficient question as to whether the actions described within the

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[20] *See* DHRM Policy 3.05, *Compensation*, at 2, 22. The thirteen pay factors are: (1) agency business need; (2) duties and responsibilities; (3) performance; (4) work experience and education; (5) knowledge, skills, abilities and competencies; (6) training, certification and licensure; (7) internal salary alignment; (8) market availability; (9) salary reference data; (10) total compensation; (11) budget implications; (12) long term impact; and (13) current salary. *Id.*at 22.

[21] *See* DHRM Policy 3.05, *Compensation*, at 2, 22.

[22] The grievant appears to have at least one disability of which the agency was aware prior to the reorganization. Although the grievant appears to have disclosed medical information about her disability status to agency management, the agency has indicated that she only requested (and received approval for) one reasonable accommodation prior to the events at issue here.

[23] *See Grievance Procedure Manual* § 4.1(b); *see also* Executive Order 1, *Equal Opportunity* (2018); DHRM Policy 2.05, *Equal Employment Opportunity*.

grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[24]

In support of her position, the grievant states that a white employee of the department who worked in the same Role was reassigned supervisory authority for their unit (not the grievant's unit) as part of the reorganization. The grievant further claims that the reorganization only resulted in advancement or promotion for white employees in the department.[25] The agency has indicated that the comparator employee cited by the grievant had acting supervisory responsibility for their unit prior to the reorganization, and that the reorganization formally reassigned that duty to the comparator based on the department's operational needs. The comparator's Role and Pay Band remained the same.

Having carefully reviewed the grievance record and the submissions of the parties, EDR finds that there are no material facts to demonstrate that the agency's reorganization decisions were based on a discriminatory motive. Indeed, as discussed more fully above, EDR finds that the agency has identified legitimate, nondiscriminatory business reasons for its implementation of the reorganization based on the discretion provided under state policy, and there is no basis to conclude those reasons were a pretext for discrimination. Furthermore, it appears that the decision to reassign management of the grievant's unit to the new manager was based on the knowledge, skills, and abilities of the new manager, including the breadth and depth of her human resources experience and performance with the agency. While the grievant may disagree with the agency's actions here, a grievance must present more than a mere allegation of discrimination to qualify for a hearing – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. The grievance does not qualify for a hearing on this basis.

Hostile Work Environment/Retaliation

Finally, the grievant claims that her new manager engaged in harassment and/or retaliation that created a hostile work environment. Although DHRM Policy 2.35, *Civility in the Workplace,* prohibits workplace harassment,[26] bullying,[27] and violence, alleged violations must

[24] *See* Hutchinson v. INOVA Health Sys., Inc., Civil Action No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *4 (E.D. Va. April 8, 1998).

[25] The grievant does not appear to directly challenge any particular selection process or argue that she was not advanced to any other position in the department. Instead, she appears to raise this issue as support to her claim of race discrimination in general.

[26] 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."

[27] 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."

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 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.[28] 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.[29] "[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."[30]

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 conduct at issue was so severe or pervasive as to alter the conditions of the grievant's employment. The grievant alleges that the new manager engaged in belittling, humiliating, and disrespectful behavior by unfairly scrutinizing the grievant's work performance and the assignment of tasks within the unit; asking the grievant to change her email signature; and holding regular meetings with the grievant to provide feedback and discuss work expectations. In response to the grievant's concerns, the agency conducted an investigation and found no basis to conclude that the new manager had engaged in prohibited conduct. Based on the information presented in the grievance record, EDR cannot find that the grievant's allegations describe conduct that is so severe or pervasive to raise a sufficient question whether the grievant was subject to a hostile work environment.[31]

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. However, these terms must be read together with agencies' broader authority to manage the means, methods, and personnel by which agency work is performed. Generally, then, the grievant's supervisor had the authority on the agency's behalf to determine, among other things: the scope and substance of the grievant's work assignments; the content of the grievant's communications on behalf of the unit with other agency employees or the public; and the appropriate level of substantive feedback to be given to employees. Here, without facts that would cause an objective reasonable person to perceive the supervisor's exercise of authority in these areas as hostile or abusive, EDR cannot conclude that

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[28] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[29] 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)).
[30] *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).
[31] *See, e.g.*, EDR Ruling No. 2014-3836; *cf. Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.

her failure to meet the grievant's subjective standards constitutes any conduct prohibited by DHRM Policy 2.35.

In addition, the grievant further contends that her new manager's actions constituted retaliation because the grievant had previously reported her concerns to agency management about the reorganization and the new manager's ability to supervise the unit effectively. 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;[32] (2) she suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[33] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[34] While the grievant arguably engaged in protected activity by discussing work-related concerns with agency management,[35] she not identified acts or omissions by her new manager that could reasonably be viewed as exceeding managerial discretion and approaching the level of reprisal, interference, restraint, penalty, discrimination, intimidation, or harassment prohibited under DHRM Policy 2.35. Accordingly, and for the reasons discussed above, the grievant's claims of workplace harassment and retaliation do not qualify for a hearing.

Additional Issues

In addition to the actions discussed above, the grievant argues that the new manager and/or agency management retaliated against her because she filed the grievance, and that the agency issued multiple Written Notices to her that ultimately led to her termination on October 30, 2019. The grievance procedure provides that additional management actions or omissions cannot be added to a grievance after it is filed.[36] Although these additional matters cannot, therefore, be addressed in this ruling, the grievant has filed several additional grievances disputing the disciplinary action she received, and a consolidated hearing on those matters is currently pending. To the extent the grievant believes that the agency's decision to discipline and/or terminate her was retaliatory or otherwise based on an improper motive, she may raise those claims at the hearing on the Written Notices.

CONCLUSION

For the reasons discussed above, EDR finds that the facts presented in the grievance record do not constitute a claim that qualifies for a hearing under the grievance procedure.[37] Because the grievance has not raised a sufficient question as the existence of severe or pervasive

[32] *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 a violation of fraud, waste or abuse to the state Hotline or exercising any right otherwise protected by law." *See also Grievance Procedure Manual* § 4.1(b)(4).
[33] *See* Felt v. MEI Techs., Inc., 584 F. App'x 139, 140 (4th Cir. 2014).
[34] *Id.*
[35] *See* Va. Code § 2.2-3000(A).
[36] *Grievance Procedure Manual* § 2.4.
[37] *See id.* § 4.1.

harassment or bullying, retaliatory conduct, discrimination based on her race and/or disability status, or a misapplication and/or unfair application of policy pertaining to the reorganization of her department, the grievance does not qualify for a hearing on any of these grounds.[38]

EDR's qualification rulings are final and nonappealable.[39]

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[38] To the extent this ruling does not address any specific issue raised in the grievance, EDR has thoroughly reviewed the grievance record and determined that the grievance does not raise a sufficient question as to whether the grievant experienced an adverse employment action, whether discrimination, retaliation, or discipline may have improperly influenced any management decision cited in the grievance, or whether the agency may have misapplied and/or unfairly applied state policy that would warrant qualification for a hearing.
[39] *See* Va. Code § 2.2-1202.1(5).