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QUALIFICATION RULING

In the matter of the Department of Game and Inland Fisheries
Ruling Number 2020-5042
February 6, 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 his grievance filed with the Department of Game and Inland Fisheries (the "agency") on October 24, 2019, qualifies for hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant challenges the annual performance evaluation he received on October 19, 2019, which indicated an overall "Contributor" rating, but a "Below Contributor" rating in one of five core responsibilities. The grievant objected to certain comments included in the evaluation and its call for increased scrutiny of his future job performance. He claimed that these aspects of the evaluation were based in part on an unethical "quota" requirement for issuing law enforcement citations and, more generally, that the performance feedback was motivated by retaliation for a grievance he had initiated in June 2019.[2] During the management resolution steps, the agency implemented several changes to the grievant's performance evaluation as of December 6, 2019, removing specific details identified by the grievant and increasing the grievant's rating in one core responsibility from "Contributor" to "Advanced Contributor." However, the agency maintained the overall "Contributor" rating and the single "Below Contributor" sub-rating. The agency also did not find any of the actions grieved to have been motivated by harassing or retaliatory intentions.

[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] The previous grievance alleged that the grievant's former supervisor was harassing him. Although the agency apparently reassigned the grievant to a different supervisor as relief, the grievant believes the former supervisor nevertheless contributed input, with improper motives, to the performance evaluation. The former supervisor apparently no longer works at the agency.

After the grievant chose to advance the grievance to seek additional relief,[3] the agency head declined to qualify either grievance for a hearing. The grievant now appeals those determinations to EDR.[4]

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] 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, whether state policy may have been misapplied or unfairly applied, or whether a performance evaluation was arbitrary and/or capricious.[7] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the facts in the grievance record 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 intent of the applicable policy.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[8] 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."[9] Adverse employment actions include agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[10] Workplace harassment rises to this level if it includes conduct that is

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[3] Following the agency's amendment of his performance evaluation, the grievant continued to seek an end to retaliation, "a productive non-hostile work environment," non-discriminatory treatment, a "work plan that I have input in," and "[a] fair and equitable evaluation process."

[4] EDR notes that, in addition to requesting review of the agency's qualification determination, the grievant has requested that EDR "investigate [the agency] based on [the grievant's] allegations for EEOC violations and retaliation against [the grievant] as a Whistleblower in violation of State law and policy." EDR's investigative authority is limited to "allegations of retaliation as the result of the use of or participation in the grievance procedure or for reporting, in good faith, an allegation of fraud, waste or abuse to the State Employee Fraud, Waste and Abuse Hotline." *Grievance Procedure Manual* § 1.5; *see* Va. Code § 2.2-1202.1(4). However, "[a]n employee may not pursue both a retaliation investigation and a grievance on the same management action or omission alleged to be retaliatory." *Id.* To the extent that the grievant seeks an investigation by DHRM of allegations of discrimination on the basis of a protected status and/or retaliation, "[a]n employee may not simultaneously use the grievance process and a formal complaint of discrimination with DHRM to address the same work-related action." *Grievance Procedure Manual* § 1.6. Thus, EDR lacks authority to investigate separately the conduct the grievant has challenged via the grievance process. However, those allegations will be reviewed properly under the grievance process.

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

[6] 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).

"sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[11]

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.[12]

Performance Evaluation

In this case, the grievant received an overall rating of "Contributor" on his performance evaluation.[13] In general, a satisfactory performance evaluation is not an adverse employment action.[14] When the grievant presents no evidence of an adverse action relating to the evaluation, such a grievance does not qualify for a hearing. Even if a single "Below Contributor" sub-rating on an overall satisfactory evaluation could be an adverse employment action, "a poor performance evaluation is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment."[15]

EDR has held that a performance rating may be arbitrary or capricious if management misapplied or unfairly applied evaluation policies by determining the rating without regard to the facts, drawing conclusions that no reasonable person could make after considering all available evidence.[16] If the grievance raises a sufficient question whether a performance evaluation resulted merely from personal animosity or some other improper motive – rather than a reasonable basis – a further exploration of the facts by a hearing officer may be warranted. But if an evaluation is fairly debatable such that reasonable people could draw different conclusions, EDR cannot find that there is a sufficient question whether the evaluation is arbitrary or capricious.

Here, the grievant objects to the negative feedback remaining on his performance evaluation, asserting that it was not preceded by written counseling or by quarterly evaluations

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[11] 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)).
[12] *See, e.g.*, EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.
[13] *See* DHRM Policy 1.40, *Performance Planning and Evaluation*, for additional discussion of performance evaluation procedures for state employees.
[14] *E.g.*, EDR Ruling No. 2013-3580; EDR Ruling No. 2010-2358; EDR Ruling No. 2008-1986; *see also* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377-378 (4th Cir. 2004) (holding that, while an employee's performance rating was lower than on his previous evaluation, there was no adverse employment action where he failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment).
[15] *James*, 368 F.3d at 377 (citation and internal quotation marks omitted). Although DHRM Policy 1.40 establishes remedial procedures for substandard performance, these procedures do not apply unless an employee's *overall* performance rating is "Below Contributor." DHRM Policy 1.40 does not mandate any adverse results for a "Below Contributor" sub-rating where the overall rating is satisfactory. *See* DHRM Policy 1.40, *Performance Planning and Evaluation*.
[16] *See, e.g.*, EDR Ruling No. 2019-4943; EDR Ruling No. 2017-4413.

that could have provided him "notice of deficit areas." He also contends that the agency has not provided an appropriate work plan for him to improve his sub-rating from "Below Contributor." DHRM Policy 1.40, *Performance Planning and Evaluation*, provides that management "should immediately identify poor, substandard, or unacceptable performance."[17] While best management practices would generally include addressing improvement areas prior to the annual evaluation, EDR is not aware of any applicable policy that makes this practice mandatory, effectively prohibiting the agency from assigning a "Below Contributor" sub-rating without previous corrective steps. Similarly, while the grievant may reasonably seek management input as to how to meet expectations going forward, EDR identifies no applicable policy requiring the agency to offer more of a "plan" for improvement than exists as of the date of this ruling.[18] As a result, the grievance does not qualify for a hearing on the basis of inadequate corrective steps.

In addition, EDR cannot conclude that the remaining comments offered to support the "Below Contributor" sub-rating raise a sufficient question whether the sub-rating is arbitrary or capricious, such that no reasonable person could assign that rating based on all available evidence. As areas for improvement, the comments identify efficiency in documentation, prioritizing enforcement areas other than traffic, familiarity with regulations to be enforced, and boat patrols.[19] The grievant disagrees with this feedback, contending that his achievement in this area was "outstanding" and should have merited at least a "Contributor" rating. Even if the grievant's position is reasonable, however, the agency's justifications for the comments – apparent from both the evaluation narrative and the second step respondent's explanation – are also reasonable. The parties' disparate views on the grievant's performance are not, in themselves, sufficient for EDR to find that the performance evaluation lacks a basis in fact or is otherwise arbitrary or capricious. While the grievant may reasonably be frustrated by what he sees as a failure to consider his performance in context, it was entirely within management's discretion to determine that the considerations described above were of sufficient significance that a "Below Contributor" sub-rating was warranted. Under these circumstances, EDR cannot find that the grievant has raised a sufficient question whether the "Below Contributor" sub-rating on his performance evaluation was arbitrary or capricious.[20]

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[17] DHRM Policy 1.40, *Performance Planning and Evaluation*.

[18] EDR notes that an improvement plan arising from a Notice of Improvement Needed/Substandard Performance "shall be developed by the supervisor and the employee" unless an agreement cannot be reached. DHRM Policy 1.40, *Performance Planning and Evaluation*. However, it does not appear that the agency has issued a Notice of Improvement Needed/Substandard Performance Plan to the grievant.

[19] It appears that this feedback is based at least in part on the number of arrests and citations the grievant made during the "peak" season for activities the agency regulates, which he views as a "quota" approach that injects improper incentives into the agency's enforcement function. Because the grievance statutes reserve to management the exclusive right to manage the affairs and operations of state government, EDR lacks authority to address whether the quantitative aspects of the agency's approach are consistent with its mission. For purposes of this ruling, however, the record does not disclose a basis to find that the agency's use of this approach misapplied or unfairly applied policy such that the grievant's performance rating was arbitrary or capricious.

[20] Although this grievance does not qualify for an administrative hearing under the grievance process, 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.*

Retaliation/Hostile Work Environment

The grievant further contends that his performance evaluation is a continuation of a hostile work environment that was the subject of an earlier grievance and/or that it is a form of retaliation for that grievance. DHRM Policy 2.35, *Civility in the Workplace*, 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.[22]

Here, it appears that the agency has responded to incidents[23] of prohibited conduct raised in the June 2019 grievance by granting the grievant's request to report to a different supervisor and by initiating an outside investigation, with the results still forthcoming as of the date of this ruling. Nevertheless, the grievant contends that both the former and present supervisor contributed unfounded negative feedback to his performance evaluation, suggesting an intent to retaliate against the grievant for his claims in the June 2019 grievance. Although agency management did not find evidence of improper motives that contributed to the grievant's October 2019 performance evaluation, the agency nevertheless responded to the grievant's concerns by removing some of the feedback he had specifically objected to and by addressing some of the grievant's concerns with his new supervisor. While the grievant may have understandable concerns about potential repercussions from his participation in the grievance process, the grievance record does not disclose harassing incidents *occurring after the June 2019 grievance* that can fairly be imputed to the agency.[24] Thus, EDR cannot find at this time that management's approach to any alleged harassment has violated a mandatory policy provision or is so unfair as to amount to a disregard of an applicable policy's intent.

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[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 . . . ."

[22] *See, e.g.*, EDR Ruling No. 2020-4956.

[23] The grievant contends that his prior supervisor made inappropriate comments regarding the grievant's age and the nationality of the grievant's spouse. The agency disclosed in its management responses that the prior supervisor no longer works for the agency.

[24] The grievance record indicates that the June 2019 grievance process has been suspended by mutual agreement pending the outside investigation; thus, this ruling does not address either the merits of the grievant's June 2019 allegations or whether the agency's response to those allegations has been sufficient. This ruling also does not address any issues that may have been raised independently by a third grievance, which it appears the grievant filed in December 2019. In general, a grievant may not challenge "the same management action or omission challenged by another grievance." *Grievance Procedure Manual* § 2.4. While already-grieved allegations of harassment could be relevant to a new claim that such harassment continues as an ongoing pattern, here the agency has responded to the new allegations raised in the October 2019 grievance despite finding no evidence of improper motives. The grievance record provides no basis to find that the agency's responses are in any way inadequate.

For similar reasons, the grievant's claim of retaliation does not qualify for hearing. A qualifiable retaliation claim must be based on evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[25] (2) the employee 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.[26]

For purposes of this ruling, EDR assumes that the grievant's initiation of his earlier grievance was a protected activity in the retaliation analysis. 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 has suffered an action adverse to the terms, conditions, or benefits of his employment. As explained above, the grievant's overall satisfactory annual performance evaluation does not constitute an adverse employment action. In addition, even assuming for purposes of this ruling that the grievant previously experienced a hostile work environment, the grievant's allegations do not include continuing harassment to which the agency has failed to respond. While a hearing officer may order an agency to create an environment free from discrimination and/or retaliation and to take appropriate corrective actions necessary, here it appears that the agency is already doing so.[27] Therefore, EDR perceives no further meaningful relief that a hearing officer could grant.

That said, EDR notes that the earlier grievance and the outside investigation it prompted have not yet concluded. We further note the second step respondent's acknowledgment of "unfortunate consequences and side-effects of relief measures associated with [the earlier] complex grievance." Although the record does not disclose unaddressed instances of prohibited or adverse conduct against the grievant, EDR encourages the agency to continue taking appropriate measures to prevent any such conduct, especially to the extent that it could appear to be causally related to the grievant's participation in the grievance process. In the event that the grievant experiences future acts of perceived retaliation related to any grievance and/or contends that the agency's responses to prohibited conduct have not been effective, this ruling does not prevent the grievant from challenging ongoing issues in a separate timely grievance or, in the alternative, from seeking an investigation of such alleged retaliation.

In sum, the grievant's claims regarding his performance evaluation, workplace harassment/hostile work environment, and retaliation are not qualified for hearing.[28]

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[25] *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 Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law."*Grievance Procedure Manual* § 4.1(b)(4).

[26] *See, e.g.*, 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 raise a sufficient question as to whether, but for the grievant's protected activity, the adverse action would not have occurred. *Id.*

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

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

EDR's qualification rulings are final and nonappealable.[29]

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[29] *See* Va. Code § 2.2-1202.1(5).