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QUALIFICATION RULING

In the matter of the Department of Game and Inland Fisheries
Ruling Number 2020-5058
March 31, 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 December 10, 2019, qualifies for hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

On or about December 10, 2019, the grievant filed a grievance asserting retaliation against him as a whistleblower.[2] The grievant alleges that his supervisor has created a hostile work environment by including false statements in the grievant's October 2019 annual performance evaluation, unduly scrutinizing him, and treating him disrespectfully on multiple occasions. In addition, the grievant claims that he was denied 1.5 hours of overtime pay for work he performed on November 29, 2019. The grievance also reflects the grievant's opposition to directives from agency management regarding traffic enforcement activities. During the management steps, the agency's step respondents noted that some of these issues had been raised and addressed by a previous grievance.[3] The agency ultimately compensated the grievant for his claimed overtime, but noted that similar requests would not be considered justified in the future and that the grievant

[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 grievant filed previous grievances with the agency in June 2019 and October 2019. The June 2019 grievance gave rise to an outside investigation, and the parties agreed to suspend that grievance process until the investigation was concluded. As of the date of this ruling, the investigator's final report to the agency remains pending. The October 2019 grievance concluded with EDR Ruling No. 2020-5042, which determined that that grievance did not qualify for hearing.

[3] During the previous grievance process, the agency removed statements the grievant asserted were false from his performance evaluation, but it concluded that no retaliation against the grievant was evident. *See* EDR Ruling No. 2020-5042. For purposes of the present qualification ruling, to the extent that the December 10 grievance challenges the same issues addressed in the previous grievance, EDR considers those issues resolved by its ruling that the previous grievance did not qualify for a hearing. *See id.*; *see also Grievance Procedure Manual* § 2.4(6) (providing that a grievance may not challenge "the same management action or omission challenged by another grievance").

must adhere to the agency's enforcement priorities. Finally, the agency concluded that the supervisor's actions were not retaliatory. The agency head declined to grant further relief or to qualify the grievance for a hearing. The grievant now appeals that determination 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 "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[11]

In this case, the previous grievance addressed the grievant's October 2019 annual performance evaluation and certain claims of allegedly retaliatory conduct. In this most recent grievance process, it also appears that the agency has granted the grievant's requested relief with respect to overtime compensation for November 29, 2019. Accordingly, the remaining issues to be considered for hearing qualification are the grievant's allegations regarding continued improper treatment by his supervisor and the agency's application of its policy regarding traffic

[4] In his appeal request, the grievant asserts that he has "been the victim of racism, age discrimination, a hostile work environment[,] and retaliation." The charges of racism and age discrimination, which the grievant attributes to his former supervisor who is no longer employed by the agency, were raised and addressed in the October 2019 grievance process. *See* EDR Ruling No. 2020-5042.
[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).
[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)).

enforcement. The grievant claims that these circumstances have contributed to a hostile work environment in retaliation for his earlier grievance activity.

Specifically, the grievant contends that, following his previous grievance, his supervisor began to monitor him excessively, excluded the grievant from a meeting that pertained to his duties, told the grievant "I need to talk to you" in front of other officers and then did not hold the discussion until the following day, and rolled his eyes and raised his voice to the grievant in a work conversation. The grievant also claims that, unlike other officers who have performed traffic stops, he has been "threatened" by agency management with disciplinary action for future traffic enforcement activities.

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. Under the policy, a claim of such prohibited conduct 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.[12] 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.[13] As to the third element, Policy 2.35 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.[14] 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.[15]

In this case, the second step respondent concluded that "reports being returned to you for corrections, scrutinizing your work hours/time, or the email sent to you" were normal supervisory functions and did not appear to be retaliatory. He drew the same conclusion as to the supervisor advising the grievant that they had matters to discuss the following day. The grievance record yields no basis to find that these conclusions violated any mandatory policy provision or were so unfair as to amount to a disregard of DHRM Policy 2.35. Further, while the agency's responses do not appear to address allegations that the supervisor rolled his eyes and raised his voice during a discussion, EDR cannot say that this conduct, even if true, would be so severe and/or pervasive as to raise a sufficient question whether the grievant has experienced an adverse employment action.

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

[13] 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)); *see* DHRM Policy 2.35 – Policy Guide at 1. "[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." *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).

[14] *See* DHRM Policy 2.35, *Civility in the Workplace*, at 5.

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

While the grievant may reasonably have concerns about disrespectful conduct from his supervisor if it becomes pervasive and goes unaddressed, the allegations as currently presented do not rise to the level of a hostile work environment.

In addition, EDR cannot find that the agency has misapplied or unfairly applied its policy in counseling the grievant to spend less time on traffic enforcement activities. In general, EDR accords an agency's interpretation of its own policies great deference and has previously held that, where the plain language of an agency policy is capable of more than one interpretation, the agency's interpretation of its own policy should be given substantial deference unless that interpretation is clearly erroneous or inconsistent with the express language of the policy.[16] In this case, the policy makes clear that the agency's mission focuses on other types of law enforcement activities over traffic enforcement. Nevertheless, the grievant objects to correspondence he received from his supervisor on December 7, 2019, which directed that "continued traffic stops with multiple verbal and written warnings for basic traffic infractions should be minimized." In addition, the agency's second step respondent clarified that "[i]f traffic stops for minor traffic violations and general speeding continue to occur in violation of [agency policy], disciplinary action will be taken."[17]

The grievant appears to dispute these communications because the policy's "guidelines are vague and inconsistently enforced," and he alleges that other staff "conduct traffic stops and do not receive disciplinary actions." However, the agency's policy does not prohibit all traffic stops, and the record does not reflect that the agency has instructed the grievant to cease all traffic stops. Instead, the policy requires officers to prioritize serious traffic infractions in making stops. Consistent with this mandate, the grievant's supervisor advised against making stops for infractions that merit only warnings. While the grievant apparently disagrees with management's interpretation of the policy as applied to him, EDR perceives no evidence to suggest that their interpretation is clearly erroneous or inconsistent with the policy's express language. Accordingly, management's continued feedback – including reference to potential discipline for failure to comply – appears to be within the agency's statutory authority to manage means, methods, and personnel by which work activities are to be carried out. Because EDR does not find that the agency has violated any mandatory policy provision or acted in a manner that was so unfair as to amount to a disregard of the intent of the applicable policy, the grievant's allegations regarding this issue are not qualified for hearing.

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;[18] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the

[16] *See, e.g.*, EDR Ruling No. 2019-4803; EDR Ruling No. 2012-3336.
[17] EDR notes that the record does not reflect any formal discipline or other adverse employment action related to the issue of traffic enforcement. As explained in its qualification ruling as to the grievant's October 2019 grievance, a "Below Contributor" rating on one field of his annual performance evaluation does not rise to the level of an adverse employment action where his overall rating was "Contributor." *See* EDR Ruling No. 2020-5042.
[18] *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).

protected activity – in other words, whether management took an adverse action because the employee had engaged in the protected activity.[19] While EDR assumes for purposes of this ruling that the grievant engaged in protected activity by initiating earlier grievances, the allegations presented by the present grievance, as explained above, do not raise a sufficient question whether the grievant has suffered an action adverse to the terms, conditions, or benefits of his employment.[20]

That said, the grievance record makes clear that the agency is aware of and attempting to manage ongoing tension between the grievant and his supervisor. As in its prior ruling, EDR encourages the agency to continue taking appropriate measures to prevent any conduct prohibited by DHRM Policy 2.35, especially to the extent that it could appear to be causally related to the grievant's participation in the grievance process. Upon request, EDR can offer assistance if the parties are in need of outside resources to improve the work relationship. 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. Nevertheless, as presented in this grievance, the grievant's allegations are not qualified for hearing.[21]

EDR's qualification rulings are final and nonappealable.[22]

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[19] *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.*

[20] In its qualification ruling on the grievant's October 2019 grievance, EDR explained that, even assuming that the grievant experienced a hostile work environment as alleged in his June 2019 grievance, subsequent grievances alleging a hostile work environment could qualify for hearing only if they raised a sufficient question whether severe or pervasive conduct continued without adequate response from the agency. EDR Ruling No. 2020-5042.

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

[22] *See* Va. Code § 2.2-1202.1(5).