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QUALIFICATION RULING

In the matter of the Department of Social Services
Ruling Number 2020-5062
March 27, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management[1] on whether her May 13, 2019 grievance with the Department of Social Services (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

In September 2018, the grievant went out of work on approved maternity leave. She returned to work on or about January 22, 2019. While the grievant was on maternity leave, the agency completed 2017-2018 annual performance evaluations for its employees.[2] The grievant's former supervisor submitted the grievant's 2017-2018 performance evaluation to management on January 24, after she returned to work. The evaluation was based on the grievant's performance for the time she was at work during the evaluation cycle (*i.e.*, until her maternity leave began), with an overall rating of "Contributor" for the year.[3] The grievant's former supervisor left the agency on or about February 25.

The grievant claims that she did not receive a copy of her annual performance evaluation until March 19, 2019.[4] In April 2019, the grievant requested that the reviewer[5] revise her evaluation. The grievant provided a proposed evaluation of her performance for the reviewer's

[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] *See* DHRM Policy 1.40, *Performance Planning and Evaluation* (stating that the performance evaluation cycle runs from October 25 of each year through October 24 of the following year).

[3] *See id.* (stating that certain types of leave, including medical leave, "must not be used to negatively impact the employee's overall performance rating" for the year).

[4] The performance evaluation completed by the former supervisor is dated January 24, 2019, the day it was submitted to management, but is unsigned. Though it is unclear precisely when the grievant first received the evaluation, that detail is not material to EDR's analysis of the issues in this case.

[5] Under DHRM Policy 1.40, *Performance Planning and Evaluation*, the reviewer is "[t]he supervisor of an employee's immediate supervisor, or another person designated to review an employee's . . . performance rating."

consideration and requested an overall rating of "Extraordinary Contributor" for the performance cycle. The reviewer made some modifications to the former supervisor's original evaluation, retaining the overall rating of "Contributor," and provided the grievant with a copy on April 29.

The grievant initiated a grievance on or about May 13, 2019, alleging that the evaluation was not an accurate reflection of her performance and claiming that she was "being discriminated against and retaliated against because of my sexual gender . . . and my previous complaints and investigation of my former supervisor." The grievant contends that she was "treated differently" by her former supervisor after she complained to management about the former supervisor's alleged improper conduct, and that two male employees who also reported to the former supervisor "were given the option to complete their own performance evaluations and submit them for review and approval," whereas she did not have that opportunity. As relief, the grievant requested "[a]n evaluation that accurately reflects my performance" and for the alleged "discrimination and retaliation to stop."

During the management resolution steps, the second step-respondent further revised the grievant's evaluation based on her concerns. The grievant received the second revised evaluation, still with an overall rating of "Contributor," on or about July 29, 2019. Following the remainder of the management steps, the agency head determined that the grievance record did not contain evidence demonstrating that a misapplication or unfair application of agency policy had occurred or evidence supporting the grievant's allegations of discrimination and retaliation. As a result, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.[6]

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.[7] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government, including the establishment of performance expectations and the rating of employee performance against those expectations.[8] Accordingly, for a grievance challenging a performance evaluation to qualify for a hearing, there must be facts 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 the performance evaluation was arbitrary and/or capricious.[9]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[10] Thus, typically the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action

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[6] In her qualification appeal to EDR, the grievant makes several assertions about the contents of her job description, claiming this had a negative impact on the agency's evaluation of her performance. It appears the grievant has a second grievance pending with the agency concerning issues with her job duties. This ruling will only address the grievant's claims regarding her performance evaluation because her arguments about her position description are the subject of another grievance.
[7] *See Grievance Procedure Manual* § 4.1.
[8] Va. Code § 2.2-3004(B).
[9] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).
[10] *See Grievance Procedure Manual* § 4.1(b).

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

Compliance Issues

In her request for qualification, the grievant argues that the agency failed to comply with the grievance procedure during the management steps. In particular, she alleges that the agency substituted a different second step-respondent without her approval, and that the substituted second step-respondent did not add documents she provided at the second step meeting to the grievance record for consideration during the remaining the management steps. While the grievant's concern about the agency's consideration of her additional documentation is understandable, EDR has reviewed the grievance package and concludes that the responses issued to the grievant were adequate. Further, the *Grievance Procedure Manual* states that "[a]ll claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time."[13] While the grievant appears to have notified the agency that she did not agree to the substitution of a different second-step respondent, she did not request a ruling from EDR or otherwise halt the grievance process to correct any matters of alleged noncompliance at the time they occurred.[14] Based on these facts, EDR finds that the alleged noncompliance described in the grievant's request for qualification has been waived at this point, based on her continuation of the grievance beyond the agency head's qualification decision.[15]

Performance Evaluation

The grievant's annual evaluation for the 2017-2018 performance cycle, on which she received an overall rating of "Contributor," appears to be the primary management action challenged in the grievance. The grievant argues that she should have received an overall rating of "Extraordinary Contributor" for the year and that she was treated differently than two similarly situated male employees, whom she alleges received more favorable treatment. In general, however, a satisfactory performance evaluation is not an adverse employment action.[16] Thus, where the grievant presents no evidence of an adverse action relating to the evaluation, such a grievance does not qualify for a hearing. In this case, although the grievant disagrees with some of the information contained in her performance evaluation, she received ratings of "Extraordinary Contributor" and "Contributor" on all of the individual factor ratings, and her overall performance

[11] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[12] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[13] *Grievance Procedure Manual* § 6.3; *see also*, *e.g.*, EDR Ruling No. 2004-752; EDR Ruling No. 2003-042; EDR Ruling No. 2002-036.
[14] *See Grievance Procedure Manual* § 6.3,
[15] To the extent the grievant contends that any additional documents have not been made part of the grievance or considered properly, EDR in its review at this stage has considered all materials submitted by the grievant.
[16] *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 although his performance rating was lower than his previous yearly evaluation, there was no adverse employment action where the plaintiff failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment).

rating was "Contributor."[17] Most importantly, the grievant has presented no evidence that the performance evaluation itself or any procedural abnormalities in the creation and/or filing of the performance evaluation have detrimentally altered the terms or conditions of her employment. While the grievant clearly believes that her performance should have been rated at the "Extraordinary Contributor" level, her arguments concerning the content of the evaluation do not raise a sufficient question as to whether she experienced an adverse employment action.

Moreover, even considering the grievant's claims regarding the alleged improprieties in the agency's evaluation of her performance, EDR finds no misapplication or unfair application of policy that supports qualification for a hearing. During the management steps, the agency explained to the grievant that she could not receive an overall "Extraordinary Contributor" rating because she had not been given an Acknowledgement of Extraordinary Contribution form during the evaluation cycle. Pursuant to DHRM Policy 1.40, *Performance Planning and Evaluation,* an employee "must have received at least one documented Acknowledgement of Extraordinary Contribution form to receive an Extraordinary Contributor rating." The grievant's former supervisor was not employed by the agency at the time she requested revisions of the evaluation in April 2019, and the agency did not believe it was appropriate to retroactively complete an Acknowledgement of Extraordinary Contribution form without the former supervisor's involvement. The grievant disagrees with the agency's explanation and argues that her performance warranted an overall "Extraordinary Contributor" rating.

EDR has thoroughly reviewed the evidence submitted by the parties and finds that the agency appears to have determined that, although the grievant is a valued and competent employee, her performance during the 2017-2018 cycle did not justify an Acknowledgement of Extraordinary Contribution form or, by extension, an overall rating of "Extraordinary Contributor" for the year. While it is understandable that the grievant is frustrated by what she believes to be a failure to consider her performance as a whole, it was within management's discretion to determine that the grievant's work performance warranted an overall rating of "Contributor" rather than a rating of "Extraordinary Contributor." Accordingly, EDR finds that the grievance does not raise a sufficient question that the grievant's performance evaluation was without a basis in fact or resulted from anything other than management's reasoned evaluation of her performance in relation to established performance expectations.

The grievant also argues that two male comparators were permitted to complete self-evaluations, and that at least one comparator filled out an Acknowledgement of Extraordinary Contribution form as part of his self-assessment, while she was not afforded such opportunities. DHRM Policy 1.40 provides that an employee "should be asked to provide a self-evaluation at least two weeks prior to the evaluation meeting." Even though the grievant did not have this opportunity before the former supervisor completed her original evaluation in January 2019, EDR has not reviewed anything to suggest that her inability to submit a self-evaluation resulted in a material and detrimental impact on the evaluation itself. Indeed, and regardless of any initial failure on the agency's part, EDR notes that the grievant effectively received an opportunity to complete a self-assessment when she requested revisions of her evaluation. For example, the grievant provided the reviewer with a detailed assessment of her performance as part of her request to change her rating to an overall "Extraordinary Contributor." During the grievance process, the

[17] For purposes of this ruling, the second revision of the grievant's evaluation, completed at the second step of the grievance and delivered to her on July 29, 2019, will be considered the final version of the document.

grievant also shared many additional documents describing her assignments and responsibilities over the evaluation cycle. EDR is sympathetic to the grievant's concerns and acknowledges that she may not have had an opportunity to provide the thoughtful and reasoned response she might have otherwise prepared before receiving her original evaluation. Nonetheless, the circumstances surrounding the agency's evaluation of the grievant's performance and subsequent revisions of that document do not appear to be inconsistent with policy, suggest her evaluation was arbitrary or capricious, or demonstrate that she was treated differently than other similarly situated employees in a material way such that qualification for a hearing is warranted. Indeed, it is clear that the agency has made efforts to revise the grievant's evaluation to provide a more detailed and accurate assessment of her performance than was contained in the former supervisor's original evaluation.

For the foregoing reasons, the grievant's claims that the agency misapplied and/or unfairly applied policy in relation to her 2017-2018 performance evaluation do not qualify for a hearing.

Discrimination

In addition, the grievant argues that the agency's evaluation of her performance constituted discrimination based on her sex, based in particular on her former's supervisor reference in the original evaluation to her use of maternity leave. DHRM Policy 2.05, *Equal Employment Opportunity*, requires that "all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability." For a claim of discrimination on any of these grounds to qualify for a hearing, the grievance must present facts that raise a sufficient question as to whether the issues describe an adverse employment action that has resulted from prohibited discrimination.[18] However, if the agency provides a legitimate, nondiscriminatory business reason for the acts or omissions grieved, the grievance will not be qualified for hearing absent sufficient evidence that the agency's proffered justification was a pretext for discrimination.[19]

EDR shares the grievant's concern about the former's supervisor apparent consideration of the grievant's absence from work on maternity leave as a factor in her evaluation. DHRM Policy 1.40 specifically provides that an employee's leave of this type "must not be used to negatively impact the employee's overall performance rating" for the year. But the agency has amended the evaluation since the grievant originally asked for reconsideration of her evaluation, removing references to her maternity leave from the document. EDR has not reviewed anything to suggest that her absence was a factor in the agency's revised assessments of her performance or, indeed, that it had any impact on her evaluation following the two revisions completed by management. With regard to the remainder of the grievant's performance evaluation, EDR has reviewed the grievance record as well as information submitted for this ruling and found no basis to support a conclusion that the grievant's performance evaluation was arbitrary, capricious, or otherwise improper, as discussed more fully above. While the grievant may disagree with the agency's assessment of her work performance, such disagreement alone does not establish that the agency's assessment of her performance was motivated by discrimination, and there is otherwise insufficient evidence to show that the agency's stated business reasons were pretextual. To qualify for a hearing, a grievance must present more than a mere allegation of discrimination – there must be

[18] *See* Strothers v. City of Laurel, 895 F.3d 317, 327-28 (4th Cir. 2018).
[19] *See id.*; *see, e.g.*, EDR Ruling No. 2017-4549.

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. There are no such facts here, and, accordingly, the grievance does not qualify for a hearing on this basis.

Hostile Work Environment/Retaliation

Finally, the grievant claims that the agency, and her former supervisor in particular, engaged in harassment and/or retaliation that created a hostile work environment. Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment,[20] bullying,[21] and violence, alleged violations must 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.[22] 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.[23] "[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."[24]

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. In her grievance, the grievant alleges that the former supervisor "discriminated" against her "because of [her] education"[25] by assigning higher-level or more favorable tasks to other employees. The grievant goes on to claim that she was "treated differently" when she complained about the former's supervisor behavior, and specifically that she was "talked down to[], treated poorly,

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[20] 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."

[21] 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."

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

[23] 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)).

[24] *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).

[25] Education is not a protected status on which a claim of discrimination may be qualified for a hearing under the grievance procedure. Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b); *see* DHRM Policy 2.05, *Equal Employment Opportunity*. This ruling will consider this claim as one of general improper conduct under DHRM Policy 2.35.

harassed[,] and bullied."[26] Even though the former supervisor no longer works for the agency, the grievant argues that her performance evaluation, as well as the agency's response to her concerns about the evaluation, are examples of continued harassment from management.[27] While the grievant may perceive legitimate issues with her employment, 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.[28]

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, agency management had the authority to determine, among other things, the scope and substance of the grievant's work assignments and the appropriate level of substantive feedback to be provided in her performance evaluation. Here, without facts that would cause an objective reasonable person to perceive the agency's exercise of authority in these areas as hostile or abusive, EDR cannot conclude that 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 the agency's evaluation of her performance was retaliatory because she previously reported her concerns about her former supervisor to agency management. 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;[29] (2) she suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[30] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[31] While the grievant arguably engaged in protected activity by discussing work-related concerns with agency management,[32] she has not identified acts or omissions 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.

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[26] Many of the grievant's assertions regarding the former supervisor's behavior appear to describe events that occurred before DHRM Policy 2.35 became effective on January 1, 2019. DHRM Policy 2.35, *Civility in the Workplace*, at 1. However, previous DHRM policies regulating workplace conduct prohibited substantially similar behavior. *See id.* (stating that DHRM Policy 2.35 "[s]upersedes Policy 1.80, Workplace Violence, and Policy 2.30 Workplace Harassment"). For purposes of this ruling, EDR will assess all of the grievant's claims regarding the former supervisor's behavior, as well as that of management more broadly, as arising under DHRM Policy 2.35.

[27] To the extent the former supervisor may have engaged in prohibited conduct under DHRM Policy 2.35, it would appear that the grievant has effectively received relief as to that behavior because the former supervisor's employment with the agency has ended. *See*, *e.g.*, EDR Ruling No. 2016-4335 at 3-5.

[28] *See, e.g.,* EDR Ruling No. 2014-3836; *cf. Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.

[29] *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).

[30] *See* Felt v. MEI Techs., Inc., 584 F. App'x 139, 140 (4th Cir. 2014).

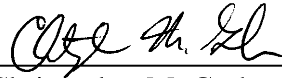
[31] *Id.* (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338 (2013)).

[32] *See* Va. Code § 2.2-3000(A).

CONCLUSION

The facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.[33] Because the grievant has not raised a sufficient question as to the existence of arbitrary or capricious performance feedback, discrimination, severe or pervasive harassment or bullying, or retaliatory conduct, the grievance does not qualify for a hearing on any of these grounds.

EDR's qualification rulings are final and nonappealable.[34]



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[33] *See Grievance Procedure Manual* § 4.1.
[34] Va. Code § 2.2-1202.1(5).