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## QUALIFICATION RULING

In the matter of the Department of Social Services  
Ruling Number 2020-5077  
May 14, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”)<sup>1</sup> at the Virginia Department of Human Resource Management (“DHRM”) on whether her November 14, 2019 grievance with the Department of Social Services (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

### FACTS

On or about November 14, 2019, the grievant initiated a grievance alleging “harassment/bullying” in violation of DHRM Policy 2.35, *Civility in the Workplace*. The grievant also requested a review of her Employee Work Profile (“EWP”) because she believes she is underpaid in comparison with other employees who are performing similar work. As relief, the grievant sought “[d]isciplinary action . . . against management” for the alleged improper conduct and to be “fairly compensated” after the agency conducted a salary review of her position.<sup>2</sup>

The grievance record contains evidence of conflict between the grievant and some agency managers dating from at least 2018. The grievant alleges that her supervisor at that time engaged in discriminatory “inappropriate behavior,” which she reported to a deputy commissioner. In particular, the grievant alleges that the supervisor attempted to persuade her to withdraw from a position for which she had applied; presented her with a “medal that was insulting to [her] culture/race”; insulted her “heritage [and] religious beliefs”; talked down to and embarrassed her in front of other employees; left threatening messages on her desk; and failed to provide appropriate support for her to complete projects. That supervisor left his position with the agency in February 2019.

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<sup>1</sup> 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.

<sup>2</sup> The grievant also asked for “lost wages from work because stress and anxiety” have caused her to be absent, as well as “lost wages” from the agency’s alleged failure to review her EWP previously. These requests appear to amount to a request for damages, which is not a form of relief available under the grievance procedure. *Grievance Procedure Manual* § 5.9(b); see Va. Code § 2.2-3005.1(A).

The grievant's team then appears to have been temporarily managed by the deputy commissioner. The grievant claims that, during this time, the deputy commissioner attempted to terminate her because he believed she had reported concerns about the agency's management practices to the media. After the grievant's team began reporting to a new supervisor, she alleges that "the mistreatment continued." More specifically, the grievant argues that the new supervisor "singled [her] out" and "targeted" her because she needed to be out of work due to a health condition.<sup>3</sup> The grievant also asserts that, on one occasion, the supervisor "yelled at [her] . . . in a negative tone in front of other staff members" and generally engaged in similar unprofessional behavior.

On October 16, 2019, a director asked to meet with the grievant after she returned from leave. The director asked to see the grievant's cell phone, apparently out of concern that the grievant may have been recording the conversation. The grievant placed her cell phone on the director's desk. The director picked up the grievant's cell phone and, when the grievant asked him to return the phone, did not immediately do so. The grievant alleges that she and the director briefly engaged in a "tug of war" over the cell phone before the director returned it to her. The grievant left the director's office and reported the incident to her supervisor and the agency's human resources office. Shortly thereafter, the director announced his intention to retire and left employment with the agency in February 2020.

On or about November 10, 2019, the grievant began reporting to a third supervisor. While this ruling was pending, the grievant explained to EDR that she believes she has continued to be "targeted" and "treated differently." She further alleges that she is "being set up for failure" and that she has reported these concerns to management and her human resources office. Most recently, the grievant claims that she has received what appears to be a counseling memorandum addressing alleged attendance and work performance issues.

The grievant additionally claims that, since at least 2018, she has sought a review of her salary and EWP, based on her belief that she is not fairly compensated as compared with other employees who are responsible for similar tasks. According to the grievant, the agency has not addressed her concerns about her salary and job duties in the past. The grievant's current supervisor referred this matter to the agency's human resources office for review in March 2020.

After the grievant initiated her November 14, 2019 grievance, the parties agreed that, due to the grievant's allegations about the conduct of the first and second step-respondents, the grievance would proceed directly to a meeting with the third step-respondent. In his response, the third step-respondent reviewed the grievant's concerns and determined that much of the conduct described by the grievant had occurred more than 30 days before she initiated her grievance, concerned employees who no longer worked for the agency, and/or did not rise to the level of severe or pervasive harassment that created a hostile work environment. The third step-respondent did, however, agree that the agency's human resources office should conduct a review of the grievant's salary and EWP.

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<sup>3</sup> It appears the grievant has taken several leaves of absence for medical reasons during the events described in this ruling. It is unclear whether the grievant's health condition was the cause of these absences. The nature of the grievant's need for leave is not material to EDR's analysis of the issues in this case.

Following the third step response, the agency head determined that the grievance record did not contain evidence that a misapplication of agency policy occurred, that the grievant experienced an adverse employment action, or that management had engaged in severe or pervasive harassment that created a hostile work environment. 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.<sup>4</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>5</sup> 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, or whether state policy may have been misapplied or unfairly applied.<sup>6</sup>

Further, while grievances that allege retaliation or other misapplication of policy may qualify for a hearing, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."<sup>7</sup> 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."<sup>8</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>9</sup> 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."<sup>10</sup>

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

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<sup>4</sup> See *Grievance Procedure Manual* § 4.1.

<sup>5</sup> Va. Code § 2.2-3004(B).

<sup>6</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>7</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>8</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>9</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>10</sup> *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)).

does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.<sup>11</sup>

### *Hostile Work Environment*

In this case, the grievant essentially alleges that members of agency management have engaged in workplace harassment and/or bullying that have created a hostile work environment. Although DHRM Policy 2.35 prohibits workplace harassment<sup>12</sup> and bullying,<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> “[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.”<sup>16</sup>

EDR finds that the grievant has articulated legitimate concerns about her employment. In particular, the October 16, 2019 incident with the director, if it occurred as described by the grievant, unquestionably describes objectively unprofessional conduct that appears to be inconsistent with the provisions of DHRM Policy 2.35. Indeed, the third step-respondent acknowledged that, while the director may have reasonably questioned whether the grievant might be recording the meeting without his permission, he “acted inappropriately when he did not immediately return [the grievant’s] cell phone.” EDR agrees with the step-respondent’s assessment of the director’s behavior. Similarly, some of the grievant’s assertions regarding her treatment by

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<sup>11</sup> See, e.g., EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.

<sup>12</sup> 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.”

<sup>13</sup> 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.”

<sup>14</sup> See *Gilliam v. S.C. Dep’t of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

<sup>15</sup> *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)).

<sup>16</sup> *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).

the first of her former supervisors are troubling, especially those involving alleged denigration of her culture, race, heritage, and/or religious beliefs.

Considered as a whole, the alleged improper conduct described by the grievant appears to have been ongoing in some form since 2018. However, many of the grievant's allegations involve employees who are either no longer employed by the agency or are no longer responsible for supervision of the grievant. The director retired from the agency shortly after the October 16, 2019 incident that appears to form the primary basis of the grievance.<sup>17</sup> Likewise, the first of the grievant's former supervisors left his position with the agency in February 2019. The second former supervisor and the deputy commissioner are still employed by the agency, but do not directly supervise the grievant, and she has not identified allegedly improper conduct by these individuals that has continued since she began reporting to her current supervisor.

Even assuming that the grievant's allegations regarding the behavior of these managers, viewed in its totality, sufficiently describe conduct pervasive enough to constitute an adverse employment action, EDR perceives no meaningful relief that a hearing officer could grant as to their conduct. If an issue of discrimination, retaliation, and/or workplace harassment is qualified for hearing and the hearing officer finds that it occurred, the hearing officer may order the agency to create an environment free from the behavior, and to take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence.<sup>18</sup> Two of the managers in question—the director and the first former supervisor—are no longer employed by the agency. The grievant further appears to have been removed from the alleged harassing environment created by the second former supervisor and the deputy commissioner. EDR therefore finds that the issue of the work environment that may have been created by these employees is moot. EDR does not generally grant qualification of claims for which no effective relief is available.

With regard to the grievant's contention that her current supervisor's behavior is a continuation of the pattern of alleged workplace harassment discussed above, EDR has thoroughly reviewed the grievance record and the information provided by the parties and finds that the grievant has not presented facts that raise a sufficient question as to whether she has experienced conduct that is so severe or pervasive as to alter the conditions of her employment *in her current work environment* such that the grievance qualifies hearing at this time.<sup>19</sup> 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 current supervisor has authority on the agency's behalf to determine, for example, the scope and substance of the grievant's work assignments 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 current supervisor's exercise of authority in these areas as hostile or abusive, EDR cannot conclude that the supervisor's failure to meet the

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<sup>17</sup> The Grievance Form A lists the date of the challenged management action as October 16, 2019, the day the grievant met with the director.

<sup>18</sup> *Rules for Conducting Grievance Hearings* § VI(C)(3).

<sup>19</sup> *See, e.g.*, EDR Ruling No. 2014-3836; *cf. Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.

grievant's subjective standards constitutes any conduct prohibited by DHRM Policy 2.35. To the extent that the grievant disagrees with any specific action taken by her current supervisor (*e.g.*, the counseling memorandum she described in her response to EDR), the grievance procedure provides that additional management actions or omissions cannot be added to a grievance after it is filed.<sup>20</sup> However, any such action could appropriately be the subject of a new grievance.

In conclusion, EDR notes that DHRM 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.<sup>21</sup> Should the grievant raise concerns about unprofessional treatment in the future, the agency should take appropriate action consistent with its obligations under Policy 2.35 to prevent or address any further instances of alleged prohibited conduct. This ruling does not mean that EDR deems the alleged behavior described by the grievant, if true, to be appropriate; it finds only that the grievant's claim of workplace harassment does not qualify for a hearing at this time. Moreover, this ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens. A subsequent grievance presenting the same or substantially similar allegations could qualify for a hearing on the basis that the agency has misapplied and/or unfairly applied DHRM Policy 2.35 by failing to adequately address the grievant's complaints.

#### *Review of Grievant's Salary and Job Duties*

In her grievance, the grievant further seeks a review of her EWP and to be "fairly compensated." While this ruling was pending, the agency's human resources office completed a review of the grievant's position classification and compensation at the request of her current supervisor and the third step-respondent. The agency's report on these matters makes recommendations for further review to address perceived issues with the grievant's classification and compensation. In at least some respects, the agency has therefore provided what the grievant requested in her grievance: a review of her salary and EWP. Based on EDR's review of the agency's report, it appears that some of the grievant's concerns about her classification and compensation may be justified. However, the agency has not yet had an opportunity to fully evaluate or implement the recommendations identified in the report, which may resolve at least some of the issues alleged by the grievant.

Under these circumstances, EDR declines to qualify this issue for a hearing at this time. In the event that the grievant disagrees with the agency's future steps addressing any concerns with her EWP and salary, or if the agency declines to address those matters further, this ruling does not prevent the grievant from challenging any such ongoing matters in a separate timely grievance.

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<sup>20</sup> *Grievance Procedure Manual* § 2.4.

<sup>21</sup> 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."

EDR's qualification rulings are final and nonappealable.<sup>22</sup>



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<sup>22</sup> See Va. Code § 2.2-1202.1(5).