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QUALIFICATION RULING

In the matter of the Virginia Department of Emergency Management
Ruling Number 2020-5088
May 26, 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 her grievance filed with the Virginia Department of Emergency Management (the "agency") on March 2, 2020 qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

On or about March 2, 2020, the grievant filed a grievance challenging multiple agency acts and omissions as retaliatory. The grievant alleges that, in November and December 2019, she and other members of her work group suggested safety improvements for their new work facility. She perceived that her supervisor was "upset" with this feedback. On January 14, 2020, she allegedly learned that some of her supervisees had received bonuses, while she was neither told her staff would receive bonuses nor given a bonus herself. That evening, she discussed the bonuses by phone with a human resources employee. The human resources employee later reported that, in the course of the discussion, the grievant referenced becoming an "active shooter" because of the bonus issue. The grievant denied saying she could become an active shooter; she claims she instead expressed that "this is the type of issue that creates very poor morale, dissention [sic] among the ranks, and can even create something like an active shooter." The grievant's supervisor issued a Written Counseling to her on January 31, 2020, advising that the grievant's "use of the term 'active shooter' was imprudent and careless" and that she must "communicate with other staff in a manner that is not perceived as threatening."

The grievance alleged that management's acts and omissions during this period – *i.e.*, failing to communicate with the grievant about her staff's bonuses, failing to give her a bonus and a performance review, failing to implement security measures, and issuing the Written Counseling – were forms of retaliation for the safety improvements the grievant suggested to her supervisor.

[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.

As relief, she sought to receive a bonus and performance evaluation, to have her security suggestions implemented, and to have the Written Counseling rescinded. During the management steps, the agency granted much of the relief sought,[2] but found the retaliation allegation unsupported[3] and declined to rescind the Written Counseling. The agency head declined to qualify the grievance for a hearing, and 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.[4] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[5] 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.[6]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[7] 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."[8] Adverse employment actions include agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9]

Written Counseling

The grievant has asked the agency to rescind its Written Counseling on grounds that it is premised on statements she denies making.[10] Such written counseling is an example of informal supervisory action. It is not equivalent to a written notice of formal discipline.[11] Written counseling

[2] The grievant indicated in her responses to agency management that she considered the grievance resolved with respect to her bonus, her performance evaluation, and her requested security improvements.
[3] The agency engaged a third party to investigate the grievant's claims. The investigator produced a written summary of her findings to agency management on March 5, 2020.
[4] *See Grievance Procedure Manual* § 4.1.
[5] Va. Code § 2.2-3004(B).
[6] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[7] *See Grievance Procedure Manual* § 4.1(b).
[8] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[9] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[10] While this ruling does not address the merits of the allegations against the grievant, EDR notes that, in the Written Counseling, the grievant's supervisor explained that he had "no way of determining the actual words you used" during the grievant's discussion with the human resources employee, but that her admitted use of the phrase "active shooter" under the circumstances was "perceived as threatening."
[11] *See* DHRM Policy 1.60, *Standards of Conduct*.

does not generally constitute an adverse employment action because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[12]

However, the grievant also alleges that the Written Counseling violated DHRM Policy 2.35, *Civility in the Workplace*, because it was "false and character-damaging." 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. While these terms must be read together with agencies' broader authority to manage the means, methods, and personnel by which agency work is performed, management's discretion is not without limit. Thus, 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.[13] Accordingly, where an employee reports that corrective feedback or other interactions have exceeded the bounds of civility, Policy 2.35 requires agencies to determine in the first instance whether such perceptions are supported by the facts. Where an agency fails to meet these obligations, such failure may constitute a misapplication or unfair application of Policy 2.35 such that harassing or bullying behavior is imputable to the agency and may qualify for a hearing on those grounds.

Here, it appears that the agency promptly engaged a third party to investigate whether the management acts and omissions grieved were the result of retaliation or were otherwise improper. The investigator's report reflects interviews with the grievant and several other employees regarding potential hostility in the workplace, the distribution of bonuses, the grievant's lack of performance evaluation, and the conflicting accounts of the grievant's use of the phrase "active shooter." A review of the investigator's findings suggests that they are consistent with agency communications to the grievant at the second and third management steps; *i.e.*, that, although certain of the grievant's complaints may merit relief, no basis was found to support allegations of a hostile work environment or retaliatory motives for the grieved acts and omissions, and the Written Counseling issued to the grievant was warranted under the circumstances. EDR perceives no grounds to conclude that the agency's response to the grievant's allegations was inconsistent with its obligations under DHRM Policy 2.35.

Accordingly, the grievant's claims relating to the Written Counseling in this case do not qualify for a hearing.[14] However, although it is not apparent that the Written Counseling in itself has adversely affected the terms, conditions, or benefits of the grievant's employment, it could be used to support an adverse employment action against her in the future. Should the informal

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[12] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

[13] 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 . . . ."

[14] 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 a grievant gives notice that they wish to challenge, correct or explain information contained in their 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 their 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.*

supervisory action grieved in this instance later serve to support an adverse employment action, such as a formal written notice or a "Below Contributor" overall annual performance rating, this ruling does not prevent the grievant from contesting the merits of these allegations through a subsequent grievance challenging a related adverse employment action.

Retaliation

In her request for a qualification ruling, the grievant also maintains that she has experienced retaliation in the form of "false and highly defamatory statements" in her supervisory file, contained not only in the Written Counseling but also in the agency's conclusions following investigation of her initial retaliation claim.[15] For a claim of retaliation to qualify for hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[16] (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.[17]

Here, assuming for purposes of this ruling that the grievant engaged in protected activity by seeking security improvements to her work facility,[18] EDR cannot find that the grievant has suffered an adverse employment action that could qualify for a grievance hearing. As discussed above, the Written Counseling does not rise to the level of adverse employment action for qualification purposes. In addition, even if EDR were to assume the existence of an adverse employment action, the grievance record as a whole does not raise a sufficient question whether the grievant's security suggestions caused her supervisor to issue a Written Counseling. It appears that the counseling arose from a report by the human resources employee that the grievant told him "she was about to become an active shooter" – a legitimate basis for disciplinary action.[19] The grievance record does not suggest any connection between the grievant's security suggestions and the human resources employee's report. Further, the Written Counseling appears to have accepted, at least to some degree, the grievant's denial of the extremely serious threat she was accused of making, focusing instead on her admitted use of the phrase "active shooter" as inherently alarming.

To the extent the grievant contends that the alleged retaliation against her extended to negative findings in the retaliation investigation report, EDR has reviewed the findings and perceives no indication that the findings and/or conclusions drawn from them could be an

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[15] The grievant objects to the conclusions as disclosed in the agency's third-step response. The grievant has also sought to review the investigative findings. Because neither party has requested that EDR address production of investigative documents as a compliance issue, this ruling does not do so.

[16] *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 an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." *See also Grievance Procedure Manual* § 4.1(b)(4).

[17] *See, e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).

[18] State "employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Va. Code § 2.2-3000(A); *see, e.g.*, EDR Ruling No. 2019-4827.

[19] *See* DHRM Policy 1.60, *Standards of Conduct*, Att. A (listing "threatening others" as an offense meriting a Group III Written Notice).

extension of any retaliation initially alleged in the grievance. The findings, based on interviews with the grievant and multiple other employees, do not suggest any connection with the grievant's past security suggestions or, indeed, with the views of the grievant's supervisor more generally. While the investigation results are not otherwise fairly challenged by the initial grievance,[20] nothing in this ruling prevents the grievant from seeking to understand the basis for the agency's conclusions in this regard or from challenging subsequent agency actions in a separate timely grievance.

EDR's qualification rulings are final and nonappealable.[21]

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[20] The grievance procedure does not permit new allegations to be added to an existing grievance after it is filed; such new challenges would need to be addressed by a subsequent timely grievance. *Grievance Procedure Manual* § 2.4.
[21] *See* Va. Code § 2.2-1202.1(5).