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**QUALIFICATION RULING**

In the matter of the Department of Corrections  
Ruling Numbers 2021-5183, 2021-5215  
April 6, 2021

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) on whether her October 14, 2020 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. While the ruling request was pending, the grievant submitted two additional grievances, both dated January 4, 2021, which have now proceeded to EDR for qualification rulings as well. For the reasons discussed below, the grievances are not qualified for a hearing.

FACTS

On or about October 14, 2020, the grievant initiated a grievance alleging workplace harassment, retaliation, and discrimination. In particular, she asserted that her supervisor and the director of her unit were not providing “clear direction” about her work expectations or “appearances to coach/dialogue.” As examples, the grievant alleged that her supervisor failed to provide adequate feedback about drafts of her performance evaluations for the employees she supervises; denied her request to fill a part-time position that would report to her; refused to provide her with an agency mobile phone and equipment to access the internet at home that would have allowed her to telework during the COVID-19 pandemic; improperly handled her use of leave on a day when the state offices were closed due to inclement weather; and declined to provide her with a printer in her office. In addition to these specific issues, the grievant expressed dissatisfaction with her supervisor’s and the director’s management of the unit, citing general concerns about poor communication, a lack of guidance, and alleged unprofessional conduct. She further claimed that she had not received an updated Employee Work Profile (“EWP”) outlining her performance expectations for the current evaluation cycle. As relief, the grievant requested that the agency reassign supervisory responsibility for her unit to a new manager.

On or about January 4, 2021, the grievant submitted two additional grievances challenging a “stressful, oppressive, toxic, and hostile” work environment. The content of these two grievances overlap to a degree, but they largely appear to address the grievant’s request for equipment to be able to telework, which the agency did not provide. The grievant challenges the denied equipment as “retaliation and implicit bias, and systemic racism.” As relief, the grievant seeks compensatory

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and punitive damages, attorneys' fees,<sup>1</sup> and the reassignment of the unit in which she works to "new management." Following the management resolution steps, the agency head declined to qualify the grievances for a hearing. The grievant has appealed those determinations to EDR.

As EDR attempted to gather additional information from the grievant for purposes of this matter, the grievant's employment situation was evolving. First, the supervisor about whose conduct the grievant submitted these grievances was taking a different position with the agency and would no longer be her supervisor. Then, the grievant was offered and she accepted a new position in a different unit as a lateral transfer. While the grievant is currently going through the process of learning her new role, she reports that she has a productive relationship with her new supervisor so far. The grievant has also indicated that she is to be given equipment that will permit her to telework. Although the grievant is no longer under the supervisor she alleges was creating a hostile work environment and has an entirely new position, she seeks qualification of her grievances about her former position for hearing.

### 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>2</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>3</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 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.<sup>4</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 for a hearing to those that involve "adverse employment actions."<sup>5</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>6</sup> Adverse employment actions include agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>7</sup> Workplace harassment rises to this level if it includes conduct that is

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<sup>1</sup> Under the grievance procedure, attorneys' fees are only available as relief in cases involving termination of employment, which is not at issue in any of these grievances. *Grievance Procedure Manual* §§ 5.9(a), 7.2(e).

<sup>2</sup> See *Grievance Procedure Manual* § 4.1.

<sup>3</sup> Va. Code § 2.2-3004(B).

<sup>4</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>5</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>6</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>7</sup> *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.”<sup>8</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 does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.<sup>9</sup>

In her grievances, the grievant has challenged, generally speaking, an alleged hostile work environment created by her previous supervisor, along with other specific issues, such as the denial of equipment for telework. As described above, the grievant is no longer reporting to that supervisor and has accepted a transfer to a new position where she will be given the opportunity to telework. Because of these changes to the grievant’s employment, a hearing officer would be unable to provide any effective relief if these grievances were qualified for a hearing. A hearing officer does not have authority to award monetary damages or issue disciplinary action against another employee.<sup>10</sup> If a hearing officer were to find that the grievant’s work environment was indeed hostile, the hearing officer could order, for example, the agency to create an environment free of discrimination and retaliation.<sup>11</sup> However, because the grievant has effectively been removed from the allegedly hostile work environment and does not appear to be experiencing the issues challenged in her grievances any longer, there is no live issue for a hearing officer to address in these grievances. As such, the grievances do not qualify for hearing under the grievance procedure. EDR will, however, address some of the facts of the grievant’s hostile work environment claims below as these were reviewed and considered during the pendency of these rulings.

#### *Hostile Work Environment/Retaliation*

In her grievances, the grievant essentially alleges that her former supervisor and the director of her former unit engaged in workplace harassment that created a hostile work environment. DHRM Policy 2.35, *Civility in the Workplace* prohibits workplace harassment<sup>12</sup> and bullying.<sup>13</sup> The grievant further alleges that her allegations constitute discrimination based on her

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<sup>8</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)).

<sup>9</sup> See, e.g., EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.

<sup>10</sup> *Grievance Procedure Manual* § 5.9(b).

<sup>11</sup> *Rules for Conducting Grievance Hearings* § VI(C)(3).

<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.”

race, sex, and age. In support of her position, the grievant states that she is an African-American female over the age of 40, and that leadership, made up primarily of white males, “does not seek to understand how” she thinks and is not “open to different options or perspectives.” The grievant further contends that her former supervisor’s and the director’s conduct is in retaliation for her past grievance activity.<sup>14</sup>

The grievant has identified a number of management actions that she believes were improper and form a pattern of alleged harassing conduct. The grievant supervises a group of several employees. The grievant claims that she received limited, ineffective feedback from her former supervisor in October 2020 about draft performance evaluations for her direct reports. Her former supervisor determined the evaluations needed revisions because they were brief, appeared to have been copied from a template,<sup>15</sup> and contained clerical errors. The grievant argues that her former supervisor did not provide sufficient feedback about needed corrections, which left her with what she felt was insufficient time to complete the evaluations.

The grievant had also asked, on multiple occasions, to fill a vacant part-time position that reports to her and is responsible for providing administrative support. It appears that the grievant received approval to fill the position before the COVID-19 pandemic. The agency ceased filling certain vacant positions for a period during the pandemic. After the agency began recruiting for positions again, the grievant’s former management did not give her approval to fill the vacant position. Management explained to the grievant that it did not see a sufficient business justification for hiring. The grievant disagrees, arguing that she needed to fill the position.

The grievant further alleges that she has been denied equipment she needs to complete her assigned tasks during the COVID-19 pandemic, both for teleworking and working at her office. In March 2020, when the pandemic began, the grievant started working from home. She later resumed working at her office full-time because she no longer had the ability to use her home internet or personal mobile phone for work. The grievant also explained that, although she is able to telework, she needs to work from her office on an intermittent basis to process and mail documents. The grievant requested that the agency provide her with an agency-issued mobile phone and a means for accessing the internet at home; her former management denied these requests. The agency has clarified that no employees have agency-provided equipment for at-home internet access, and that only one of the grievant’s peers has an agency-issued mobile phone that management determined was necessary due to the employee’s work responsibilities. EDR reviewed this allegation and requested information from the grievant that might contradict the agency’s assertions. However, EDR was not able to substantiate that the grievant was treated differently than others in substantially similar positions. It appears that some agency employees are provided, for example, agency-issued mobile phones, but this is appears to be based on the duties of the position.

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The policy specifies that bullying behavior “typically is severe or pervasive and persistent, creating a hostile work environment.”

<sup>14</sup> The grievant filed a grievance in 2019 that advanced to a hearing.

<sup>15</sup> The agency explained that the grievant appeared to have used the same document for each employee, changing only their names, and that the evaluations were also very similar to those she had given the employees in previous years.

In addition, the grievant requested a personal printer for her office, arguing that she needs to print sensitive documents to which other employees cannot have access. The agency provides the grievant and other employees with access to a shared network printer. According to the agency, no other employees have a personal printer because they are all expected to use the network printer. The agency has represented that the network printer has a secure printing feature that will prevent others from accessing sensitive documents.

Regarding her use of leave, the grievant states that she planned to use leave one day in August 2020. The day before her planned leave, she submitted a leave request to her former supervisor, who approved the absence. After the grievant left work, it was announced that state offices would be closed on the following day due to expected inclement weather. The grievant's management initially told her that she would still have to use leave for the day because she had already planned to be absent from work. After the grievant contacted human resources, the agency restored the grievant's leave for the day because state offices were closed.<sup>16</sup>

In addition to these specific issues, the grievant has also raised general concerns with her treatment by her previous management, which she argues created a challenging work environment. These concerns include a lack of communication and guidance, failing to address her comments and suggestions during meetings, and questioning of her schedule. The grievant specifically claims that the director of her former unit spoke to her unprofessionally during a meeting by video conference, telling her to mute her microphone in a "vulgar/intimidating voice."<sup>17</sup>

EDR has already determined that the grievances at issue in this case do not qualify for hearing. However, we observe that the grievant's allegations describe, at a minimum, ineffective communication between the grievant and her former supervisor. While EDR will not opine on the reasons for these difficulties, the grievant has certainly described a degree of hostility in her work environment with her prior supervisor. Such situations should be appropriately investigated, such as by the agency's human resources department. The agency's human resources department tried to reach out to the grievant to conduct an EEO investigation, but the grievant was "resistant" and did not provide information sufficient for the investigation to continue. Similarly, in her January 4, 2021 grievances, the second-step respondent reported that information was sought from the grievant during the face-to-face meeting to provide examples of how she has been treated differently from others. The second-step response indicates that the grievant did not provide such information and the meeting devolved and concluded.

The situation that occurred in the grievant's previous position could have benefited from an appropriate investigation of the underlying facts and incidents. EDR is including this discussion in this ruling to acknowledge that the grievant has alleged issues in her grievances that warrant the appropriate attention of the agency's human resources department into the future. If the grievant

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<sup>16</sup> This is consistent with the provisions of DHRM Policy 1.35, *Emergency Closings*. Under the circumstances presented in this case, both designated and non-designated employees who are "on pre-approved leave with pay during an authorized closing" will have their hours of leave "charged to the authorized closing, and not to their leave balances." DHRM Policy 1.35, *Emergency Closings*, at 4, 5-6.

<sup>17</sup> This event appears to be what prompted the grievant to file her October 14, 2020 grievance, as she alleges that it took place on the date that the subject of the grievance occurred.

experiences a future adverse employment action that she believes is a continuation of the pattern of events challenged in this grievance or that she feels is otherwise inappropriate, this ruling does not prevent her from raising that issue in a subsequent, timely grievance challenging the related adverse employment action. Should the grievant experience any further allegedly discriminatory, retaliatory, and/or hostile behavior, she should file an appropriate complaint with her agency, DHRM, or other appropriate authority.

### CONCLUSION

For the reasons described above, the three grievances at issue do not constitute claims for which relief could be granted by a hearing officer. As such, the grievances do not qualify for a hearing under the grievance procedure at this time.<sup>18</sup> This ruling only determines that the grievances do not qualify for a hearing and does not determine that any of the claims asserted were invalid. Further, nothing in this ruling is meant to prevent the grievant from utilizing another appropriate process to challenge the issues raised in these grievances concerning her past allegations of hostile work environment.

EDR's qualification rulings are final and nonappealable.<sup>19</sup>

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<sup>18</sup> See *Grievance Procedure Manual* § 4.1.

<sup>19</sup> See Va. Code § 2.2-1202.1(5).