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QUALIFICATION RULING

In the matter of the Department of Wildlife Resources
Ruling Number 2021-5218
April 8, 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 January 26, 2021 grievance with the Department of Wildlife Resources (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On or about January 26, 2021, the grievant filed a grievance alleging that her supervisor and others have created a hostile work environment and engaged in bullying behavior. The allegations include, generally speaking, the supervisor's manner of communication, favoritism, and micromanagement. The grievant submitted the January 26 grievance to her supervisor's supervisor due to the allegations about her supervisor's conduct. The supervisor's supervisor forwarded the grievance to the grievant's supervisor rather than responding. The grievant then submitted a second grievance, dated February 3, 2021, to address that issue and, requesting an "[a]cknowledgement of the error" and an "apology." The supervisor's supervisor wrote an apology dated February 8, 2021, after being made aware that he had handled the first grievance improperly. The supervisor's supervisor has since retired and is no longer employed by the agency.[1]

The third-step respondent addressed the January 26, 2021 grievance in a single management step. The third-step respondent provided little in the way of a response to the issues raised, noting that the "communication/interaction" issues "had been recognized in the unit as a whole prior to the COVID 19 outbreak." The agency previously brought in an independent consultant to "improve/evaluate" the situation, but that work was concluded when the unit began to telework permanently during the pandemic. The third-step respondent stated he recommended "additional training/evaluation from an independent source to evaluate/improve communications

[1] The February 3, 2021 grievance does not appear to be the subject of a request for a qualification ruling and, accordingly, is not addressed in this ruling. It may be that the February 3 grievance was resolved given that the supervisor's supervisor was leaving the agency. In any event, there would not be a basis for the February 3 grievance to qualify for a hearing because it did not challenge an adverse employment action. *See* Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).

and employee/supervisor interaction." The agency has not begun such training as it is awaiting the conclusion of this grievance. The agency head declined to qualify the grievance for a hearing, and the grievant now appeals that decision 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.[2] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] 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.[4]

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."[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]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."[8]

Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment[9] and bullying,[10] alleged violations must meet certain requirements to qualify for a hearing. Whether discriminatory or 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

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[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[5] Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).
[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[8] 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)).
[9] 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."
[10] 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."

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.[11] As to the second element, the grievant must show that they perceived, and an objective reasonable person would perceive, the environment to be abusive or hostile.[12]

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. Thus, 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. Policy 2.35 also 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 work interactions have taken a harassing or bullying tone, 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 the harassing or bullying behavior is imputable to the agency.

For purposes of this ruling, EDR has reviewed the grievance record in its entirety, including multiple emails submitted by the grievant demonstrating the communication dynamics with her supervisor. EDR also discussed the grievant's claims with her directly by phone. Having reviewed this information in full, EDR cannot find that the grievant has alleged facts raising a sufficient question whether she has experienced conduct by her supervisor that is so severe or pervasive that it could rise to the level of a hostile work environment. As such, the grievance does not qualify for a hearing on these grounds.

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

[12] 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 Guide – Civility in the Workplace ("A 'reasonable person' standard is applied when assessing if behaviors should be considered offensive or inappropriate."). "[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).

[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 . . . ."

Information reviewed by EDR reflects that both the grievant[14] and her supervisor are competent and valued employees. Yet the agency has recognized that there are opportunities for improvement in the communication between them. In addition, it is not unreasonable for an employee in the grievant's position to perceive the work environment as hostile given some of the directness of communication, limited flexibility, and monitoring of employees. For example, EDR has reviewed an email to the grievant from a peer (who appears to have some level of supervisory or lead authority) stating "[p]lease explain why you were unavailable and missed calls for 9 mins and 26 sec." The grievant also states that she has been directed that she cannot use leave between Memorial Day and Labor Day.[15] Although an employee could describe such working conditions as objectively unpleasant, agency management has the "exclusive right to manage the affairs and operations of state government."[16] As long as these practices do not rise to the level of severe or pervasive harassment, EDR is unable to qualify such grieved matters for hearing under the grievance statutes.[17]

That said, this ruling does not mean that EDR finds that the agency should ignore the grievant's allegations, if true. Based on the grievant's allegations and the agency's acknowledgement of opportunities to improve communication, EDR recommends that the agency remain vigilant regarding its obligations under Policy 2.35 to prevent future occurrences or devolution of the workplace dynamics. 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 Policy 2.35 by failing to adequately address the grievant's complaints of ongoing conduct prohibited by the policy.

CONCLUSION

For the reasons expressed above, the facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure at this time.[18] EDR's qualification rulings are final and nonappealable.[19]

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Director
Office of Employment Dispute Resolution

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[14] The third-step respondent indicated that the grievant's most recent annual performance evaluation was "excellent."
[15] EDR presumes that the prohibition on leave between Memorial Day and Labor Day applies to all who work with and for the grievant's supervisor. If leave limitations are not applied equitably, the matter warrants the attention of the agency's human resources office. EDR also presumes that employees will be able to take leave as appropriate for sickness, disability, and/or family and medical situations even during this given period, for example.
[16] Va. Code § 2.2-3004(B).
[17] *See Grievance Procedure Manual* § 4.1. This ruling determines only that the grievant's claims do not qualify for an administrative hearing under the grievance procedure. It does not address whether there may be some other legal or equitable remedy available to the grievant in relation to her claim.
[18] *See Grievance Procedure Manual* § 4.1.
[19] *See* Va. Code § 2.2-1202.1(5).