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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2021-5228
April 26, 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 his November 12, 2020 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On or about October 14, 2020, the grievant was issued a Notice of Improvement Needed/Substandard Performance ("NOI"). The grievant initiated a grievance on November 12, 2020, alleging that the NOI contained information that was "either false or incomplete." The grievant further argued that the NOI was part of a pattern of retaliation and harassment from his supervisor that has been occurring for several years. As relief, the grievant sought removal of the NOI and respectful treatment from his supervisor.[1]

During the management steps, the NOI was reduced to a verbal counseling. The agency head subsequently determined that the grievance record did not contain evidence demonstrating that the grievant had experienced an adverse employment action and 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.[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

[1] While this grievance is pending, the agency appears to have temporarily reassigned the grievant to report to a different supervisor.
[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).

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]

Verbal Counseling

The grievant originally received a written NOI, which was reduced to a verbal counseling during the management steps. Verbal counseling is a type of informal corrective action;[9] it is not equivalent to a Written Notice of formal discipline. A verbal counseling 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.[10] Therefore, the grievant's claims relating to the verbal counseling do not qualify for a hearing.[11]

Nonetheless, though the verbal counseling has not had an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against the grievant. Should the verbal counseling grieved in this instance later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits

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[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] *See* DHRM Policy 1.60, *Standards of Conduct*, at 6.
[10] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[11] 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 the grievant gives notice that he wishes to challenge, correct, or explain information contained in his 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 his 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.*

of these allegations through a subsequent grievance challenging such a future adverse employment action.[12]

Retaliation and Workplace Harassment

The grievant further alleges that his supervisor has engaged in harassing and retaliatory conduct that has created a hostile work environment. Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment[13] and bullying,[14] 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 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.[15] 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.[16]

In support of his claim, the grievant argues that, in 2017,[17] his supervisor[18] used profanity in the workplace that offended him. The grievant further alleges that his supervisor has used similar profanity on several occasions since 2017 and has engaged in other unprofessional conduct that is disrespectful and belittling. Additionally, the grievant contends that his supervisor issued the NOI to retaliate against him for raising safety concerns about the spread of COVID-19 in the workplace and that the supervisor delivered the NOI to him outdoors where other employees were able to

[12] The second-step respondent noted that the verbal counseling was issued during the previous evaluation cycle and did not affect the grievant's annual performance evaluation rating.
[13] 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."
[14] 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."
[15] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[16] 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).
[17] The agency's investigative report indicates that this incident may have occurred in 2016. The grievant alleges that it occurred in 2017.
[18] At the time, the grievant and his current supervisor were colleagues and did not have a direct reporting relationship.

observe the discussion. Furthermore, the grievant has identified a number of other actions that appear to have occurred after he initiated his grievance, which he believes constitute further retaliation. For example, the grievant alleges that he has experienced increased management scrutiny after filing his grievance. He also claims that he was selected for random drug testing that caused him to be exposed to COVID-19, and that he experienced issues with his use of leave while self-isolating.[19]

In this case, the grievant unquestionably found his supervisor's prior use of profanity and other behavior to be subjectively offensive. Seemingly in response to the grievance, the agency conducted an investigation of these matters. The agency determined that the grievant's allegations of retaliation and workplace harassment were unfounded, specifically noting that the grievant had reported the supervisor's initial use of profanity at the time (4 to 5 years ago) and that matter had been addressed with the supervisor. Furthermore, regarding the grievant's receipt of the NOI, the agency noted that the meeting took place outdoors due to safety rules restricting indoor gatherings during the COVID-19 pandemic and that no other employees were able to overhear the content of the discussion with the grievant. In response, the grievant argues that the agency investigation did not adequately address his concerns, and he disagrees with many of the agency's conclusions about his supervisor's conduct. In essence, the grievant appears to believe that his supervisor is treated more favorably than he and other employees would be if they engaged in similar behavior.

EDR has reviewed the grievance record in its entirety and interviewed the grievant by phone about his claims. The primary complaint appears to center around the supervisor's alleged use of profanity. While it is not in dispute that there was such an incident in 2016 or 2017, management took action to address the issue at that time. Although the grievant disagrees with the manner in which management handled the matter, this fact does not support a claim that the agency has failed to address the supervisor's behavior in violation of policy. The grievant additionally claims that there are other incidents of use of profanity, but neither the grievance record, the agency's investigation, nor EDR's interview of the grievant established any specific examples or that any such incidents occurred recently. 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. These terms must be read together with agencies' broader authority to manage the means, methods, and personnel by which agency work is performed, but management's discretion is not without limit. However, having thoroughly considered the evidence in the grievance record and the information provided by the parties, EDR cannot find that the facts as alleged raise a sufficient question as to whether the grievant has experienced conduct that is so severe or pervasive such that the grievance qualifies for a hearing at this time.[20]

The grievant further contends that many of the actions described above were retaliation for his raising concerns about workplace safety issues prior to his receipt of the NOI. A claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) he engaged in a protected activity; (2) he suffered an adverse employment action; and

[19] While agency management initially questioned the proper leave type, the agency has indicated that the grievant's absence was ultimately approved for Public Health Emergency Leave.
[20] *See, e.g.,* EDR Ruling No. 2014-3836; *cf. Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.

(3) a causal link exists between the protected activity and the adverse action.[21] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[22]

The grievant arguably engaged in protected activity by reporting workplace-related safety concerns to management.[23] However, as explained above, the grievance record does not reflect that he has suffered an adverse employment action. Further, the grievant has not identified acts or omissions that could reasonably be viewed as exceeding managerial discretion or would not have occurred but for a retaliatory motive.[24]

Accordingly, because the grievant has not raised a sufficient question as to the existence of severe or pervasive harassment, bullying, or retaliatory conduct at this time, the grievance does not qualify for a hearing on any of these grounds.[25] If the grievant experiences any further incidents of harassing or retaliatory conduct, he should report the information to the agency's human resources department or another appropriate authority. 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.[26] Lastly, this ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.

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.[27] EDR's qualification rulings are final and nonappealable.[28]

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[21] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).
[22] *Id.*
[23] *See* Va. Code § 2.2-3000(A).
[24] 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 these claims.
[25] To the extent this ruling does not address any specific issue raised in the grievance, EDR has thoroughly reviewed the grievance record and determined that the grievance does not raise a sufficient question as to whether the grievant experienced an adverse employment action, whether discrimination, retaliation, or discipline may have improperly influenced any management decision cited in the grievance, or whether the agency may have misapplied and/or unfairly applied state policy that would warrant qualification for a hearing.
[26] 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 . . . ."
[27] *See Grievance Procedure Manual* § 4.1.
[28] *See* Va. Code § 2.2-1202.1(5).