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## QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2021-5236
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 January 11, 2021 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 December 14, 2020, the grievant was issued a Group I Written Notice for alleged disruptive behavior and violation of DHRM Policy 2.35, *Civility in the Workplace*. The grievant initiated a grievance on January 11, 2021, alleging that the Written Notice was "fabricated" due in part to "discrepancies" with the disciplinary process. In particular, the grievant argues that the agency's due process notification described the misconduct as occurring on November 20, 2020, while his manager spoke with him about the incident on November 19, apparently before the incident had allegedly occurred. The grievant further argued that the Written Notice was part of a pattern of retaliation and harassment from members of management that has been occurring for several years.

During the management steps, the Group I Written Notice was reduced to a written 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.[1] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the

[1] *See Grievance Procedure Manual* § 4.1.

affairs and operations of state government.[2] 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.[3]

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."[4] 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6] 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."[7]

*Written Counseling*

The grievant originally received a Group I Written Notice, which was reduced to a written counseling during the management steps. A written counseling is a type of informal corrective action.[8] It is not equivalent to a Written Notice of formal discipline. A written 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.[9] Therefore, the grievant's claims relating to the written counseling do not qualify for a hearing.[10]

Although the written 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 written counseling grieved in this instance later serve to support an adverse

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[2] Va. Code § 2.2-3004(B).
[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[4] Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).
[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] 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)).
[8] *See* DHRM Policy 1.60, *Standards of Conduct*, at 6.
[9] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[10] 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.*

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 of these allegations through a subsequent grievance challenging the related adverse employment action.

*Retaliation and Hostile Work Environment*

The grievant further alleges that the corrective action he received is part of a larger pattern of harassing, intimidating, and retaliatory conduct that has created a hostile work environment. Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment[11] and bullying,[12] 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.[13] 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.[14]

In support of his claim, the grievant argues that, in 2017, a manager used profanity in the workplace that offended him. The grievant further alleges that this same manager selected him for random audits and inspections in 2019 as a method of harassing him. Additionally, the grievant contends that the agency originally issued the Written Notice to retaliate against him for raising safety concerns about the spread of COVID-19 in the workplace. Moreover, 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

[11] 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."

[12] 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."

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

[14] 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).

experienced increased management scrutiny after filing his grievance and that his human resources office has not provided adequate information or procedural support with his grievance.[15]

EDR has reviewed the grievance record in its entirety and interviewed the grievant by phone about his claims. In essence, the grievant believes that other agency managers have frequently engaged in misconduct and been treated more favorably than he and other employees would be if they engaged in similar conduct. The grievant contends that, because he has knowledge of some of these issues, he has been singled out for harassment and retaliation, up to and including issuance of the subsequently-rescinded Written Notice following his reporting of COVID-19 safety concerns.

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 it rises to the level of a hostile work environment at this time.[16] While the grievant objects to increased monitoring of his facility and alleged policy violations by certain managers, neither the grievance record nor EDR's interview with the grievant include allegations that could support an adverse effect on the terms, conditions, and benefits of the grievant's employment.

Even if the agency's corrective action against the grievant could form the basis of an adverse employment action, the record does not raise a sufficient question whether the reduced Written Notice was improperly motivated by retaliation. 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 (3) a causal link exists between the protected activity and the adverse action.[17] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[18]

The grievant arguably engaged in protected activity by reporting workplace-related safety concerns to management.[19] However, the record does not raise a sufficient question whether the agency would not have taken the corrective action but for a retaliatory motive. Regarding the grievant's concerns about the date on which he allegedly engaged in misconduct, there appear to be clerical errors in some of the agency's documentation. The due process notification presented to the grievant prior to the issuance of the Written Notice states that the incident occurred on an unspecified date in October 2020. The evidence in the grievance record suggests that a manager spoke with the grievant about the incident on November 19; however, the due process notification describes this conversation as occurring on November 20. The Group I Written Notice identifies the alleged offense dates as "10/2020, 11/20/20." It seems that the "11/20/20" date refers to the grievant's conversation with the manager about the underlying incident, which apparently took

[15] Beyond these events relating specifically to him, the grievant alleges that at least two managers have engaged in misconduct over the past several years that did not directly involve him.
[16] *See, e.g.,* EDR Ruling No. 2014-3836; *cf. Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.
[17] *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).
[18] *Id.*
[19] *See* Va. Code § 2.2-3000(A).

place on November 19. In any event, the due process notification and the Written Notice itself clearly state that the alleged conduct that prompted the disciplinary action took place in October 2020. Although the grievant's confusion about these details is understandable, EDR is unable to identify any material error in the disciplinary documents that undermines their validity or underlying motivation. Thus, while the grievant may have legitimate concerns about his employment and clearly disagrees with management's decision to issue corrective action to him, such disagreement does not, by itself, render the agency's actions here improper or establish grounds for a hearing.[20]

Accordingly, because the grievant has not raised a sufficient question as to the existence of severe or pervasive harassment, bullying, or retaliatory conduct or other adverse employment action at this time, the grievance does not qualify for a hearing on any of these grounds.[21] 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.[22] 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.

## 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.[23] EDR's qualification rulings are final and nonappealable.[24]

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Office of Employment Dispute Resolution

[20] 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.
[21] 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.
[22] 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 . . . ."
[23] *See Grievance Procedure Manual* § 4.1.
[24] *See* Va. Code § 2.2-1202.1(5).