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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Numbers 2021-5217, 2021-5245
May 24, 2021

The grievant seeks a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") as to whether her grievances filed respectively on September 18, 2020 and January 19, 2021 with the Department of Corrections (the "agency") qualify for hearing. For the reasons set forth below, the grievances are not qualified for hearing.

FACTS

The grievant works for the agency as an Executive Secretary, in the Role of Administrative and Office Specialist III. According to the grievant, her job duties have continuously expanded and grown more complex, such that her current job classification is no longer an accurate reflection of her responsibilities. She claims that most of the changes have related to providing administrative support to the Virginia Board of Local and Regional Jails ("the Board"),[1] whose membership and support needs have evolved significantly in recent years. In 2020, the grievant sought a reclassification of her position and corresponding pay band,[2] but the agency's human resources staff concluded that "neither a classification change nor a salary increase is supported at this time." On or about September 18, 2020, the grievant filed a grievance (the "First Grievance") continuing to seek reclassification, on grounds that the agency failed to account for her duties and unique responsibility within the agency to support both the Board and her unit's internal operations.

On or about January 7, 2021, the agency presented to the grievant a due process memorandum citing two offenses, both potentially meriting formal discipline. The first offense related to the grievant's interaction with a member of the media on December 7, 2020; the second offense charged that the grievant had failed to monitor the Board's email inbox for a long period of time. On or about January 19, 2021, the grievant filed another grievance (the "Second Grievance") alleging a "Hostile Environment, Harassment, False Accusations, Beratement, [and]

[1] The Board is an independent state entity with members appointed by the Governor. *See* Va. Code § 53.1-2.
[2] The grievant had raised previous challenges to her assignment to support the Board and/or to the agency's failure to update her job classification in connection with the assignment. In an earlier ruling, EDR determined that her most recent challenge could proceed as a new issue; *i.e.* not already grieved. *See* EDR Ruling No. 2021-5166.

Retaliation." The grievant maintained that she had not committed misconduct and that the agency's contemplation of formal discipline was not only unfounded but motivated by retaliation for pursuing the First Grievance.[3] She further alleged that the manager who first brought the email issue to her attention did so in a hostile and humiliating manner.

During the management steps of the First Grievance, the agency's step respondents adopted human resources' conclusion that no reclassification was warranted. As to the Second Grievance, the agency concluded that the disciplinary charges against the grievant were warranted and that her allegations of hostile and/or retaliatory conduct were not supported. The agency head declined to qualify either grievance for a hearing, and the grievant has now appealed both decisions 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, or whether state policy may have been misapplied or unfairly applied.[6] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action in its totality was so unfair as to amount to a disregard of the applicable policy's intent.

Further, the grievance procedure generally limits grievances that qualify 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 any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9] 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."[10]

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[3] On February 8, 2021, the agency purportedly issued to the grievant a Group I Written Notice regarding the media contact and a Written Counseling Memorandum regarding the email issue.
[4] *See* § 2.2-3004(A); *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] Va. Code § 2.2-3004(A); *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] 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)).

Job Classification and Scope of Duties

In her First Grievance, the grievant contends that her duties have consistently increased in connection with the need to support the Board's operations. Although the grievant's primary duties[11] relate to supporting her agency unit, her current EWP estimates that 70 percent of her time will be spent on Board-related assistance, namely "provid[ing] informational and logistical coordination" for Board meetings, posting meeting notices as required by law, preparing meeting agendas and minutes and disseminating them to the public, and preparing reports from the agency to be presented to the Board.

However, the grievant alleges that her support for the Board's operations has expanded well beyond these listed duties, in part because she performs additional unlisted duties, and in part because, in practice, these tasks require additional knowledge and training that the agency has not provided. For example, the grievant claims that in addition to the duties listed in her EWP, she prepares various documents to support the Board more generally, including the "annual Profile Sheet," requests and/or reports to the Office of the Governor and Secretary of Administration, and other correspondence from the Board Chairman. Since summer 2020, she also serves as the webmaster for the Board's website, meaning that she is listed as the primary contact and is responsible for updating content. As such, she fields inquiries from members of the media and the public, including Freedom of Information Act ("FOIA") requests. According to the agency, the grievant is also responsible for monitoring the Board's email inbox and forwarding messages as appropriate. The grievant alleges that she also arranges transportation and catering for Board meetings and "[s]chedules training as required/requested by" Board members. According to the grievant, she "frequently advise[s] Board members of policy, parliamentary procedure, codes, standards and other applicable processes including legislation," for which she received no training from the agency. Most recently, the grievant reports that management has advised her that she will also provide direct administrative support to the Board's executive director (in addition to her agency unit's management).

Based on the grievant's alleged increase in duties, she seeks a reclassification of her position description and associated pay range. Specifically, the grievant claims her position, now classified at Pay Band 3, Sub-Band 6,[12] would more appropriately be classified at Sub-Band 9 or 10. In support, she alleges that the agency employee who previously served as the Board's primary administrative support had fewer responsibilities but was classified at Sub-Band 8. The grievant also alleges that other state positions providing primary administrative support to governor-appointed boards are classified at higher pay ranges. However, upon reviewing the grievant's request, the agency concluded that reclassification was not warranted based on the classification of other Executive Secretaries within the agency that reported to comparably-classified supervisors. Of approximately 29 comparators, the agency observed that the grievant's salary was in the top quarter.

Based on the issues alleged, the First Grievance essentially seeks both a reclassification and an in-band pay adjustment. For these claims to qualify for a hearing, the evidence must raise

[11] On a state employee's EWP form, categories of core responsibilities are listed in order of importance.
[12] *See* DHRM Policy 3.05, *Compensation*, at 22-23 (discussing the Pay Structure and Salary Range system in the commonwealth, which includes nine stepless Pay Bands but also provides for Sub-Bands to be used based on agency need).

a sufficient question as to whether management violated a mandatory policy or whether the challenged action, in its totality, is so unfair as to amount to a disregard of the intent of the applicable policy.

Recognizing that the state's personnel administration should be "based on merit principles and objective methods" of decision-making,[13] Virginia law requires that the Commonwealth's classification plan "provide for the grouping of all positions in classes based upon the respective duties, authority, and responsibilities," with each position "allocated to the appropriate class title."[14] Consistent with these principles, DHRM Policy 3.05, *Compensation*, provides for in-band adjustments, a "non-competitive pay practice that allows agency management flexibility to provide potential salary growth and career progression within a Pay Band or to resolve specific salary issues."[15] Like all pay practices, in-band adjustments are intended to emphasize merit rather than entitlements, such as across-the-board increases, while providing management with great flexibility and a high degree of accountability for justifying their pay decisions.[16] While Policy 3.05 reflects the intent that similarly-situated employees should be comparably compensated, it also reflects the intent to invest agency management with broad discretion for making individual pay decisions and corresponding accountability in light of each of 13 pay factors: (1) agency business need; (2) duties and responsibilities; (3) performance; (4) work experience and education; (5) knowledge, skills, abilities and competencies; (6) training, certification, and licensure; (7) internal salary alignment; (8) market availability; (9) salary reference data; (10) total compensation; (11) budget implications; (12) long-term impact; and (13) current salary.[17]

Thus, with regard to employee classification and pay, the grievance procedure accords much deference to an agency's exercise of judgment, including management's assessment of the degree of change, if any, in the job duties of a position. However, EDR has repeatedly held that even where an agency has significant discretion to make decisions (for example, classifying a position in a particular Role), qualification is warranted where the evidence raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[18]

In this case, the parties do not appear to dispute that the grievant's responsibilities have increased to some extent since at least mid-2020, especially with regard to the Board's public-facing operations. In particular, the record indicates that the grievant has become the primary contact for members of the public with inquiries about the Board's activities, proceedings, and online content. Upon review of the grievant's current EWP, these responsibilities are not necessarily evident in the duties explicitly listed. Moreover, the agency initiated a disciplinary process against the grievant in direct relation to her performance of these public-facing responsibilities. In light of these allegations, the grievant understandably views her increasing duties to support the Board, absent any change in her job classification, as having a tangible and negative impact on the terms of her employment.

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[13] Va. Code § 2.2-2900.
[14] *Id.* § 2.2-103(B)(1).
[15] DHRM Policy 3.05, *Compensation*.
[16] *See* DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.
[17] *See* DHRM Policy 3.05, *Compensation*.
[18] *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as "[i]n disregard of the facts or without a reasoned basis"); *see also, e.g.*, EDR Ruling 2010-2365; EDR Ruling No. 2008-1879 (and rulings cited therein).

However, even assuming for purposes of this ruling that the grievant's circumstances could constitute an adverse employment action, EDR cannot say that the agency's decisions with respect to the grievant's job duties and pay classification exceed its discretion to manage personnel matters. To the extent that the grievant has been performing tasks that are not explicitly outlined in her position description, her EWP states that she is expected to "respond[] to ad hoc assignments as directed to ensure smooth operation of the work unit and agency." Further, EDR has reviewed nothing to indicate that any additional tasks have been so substantial that the agency's classification of the grievant's position as an Executive Secretary is no longer appropriate. Even considering the grievant's alleged interpretation and application of Board-related policies and procedures, as well as her public-facing responsibilities, such tasks appear to be consistent with those outlined for the grievant's position within DHRM's Administrative and Office Support Career Group.[19]

We note that the grievant appears to be seeking primarily an updated sub-band and documentation of her duties, rather than a change in her job title. However, the evidence suggests that the agency assessed whether a reclassification of the grievant's pay was appropriate by comparing her classified sub-band to that of other Executive Secretaries within the agency. In doing so, it appears that the agency considered the grievant's duties as she has described them, not only those listed on her current EWP. While the grievant may reasonably contend that her position differs from other Executive Secretaries by virtue of her substantial support for the operations of an independent governor-appointed board, the agency's evaluation of her job/pay classification as compared to other employees of the same job title and supervising structure also appears to be reasonable. Under those circumstances, while the grievant understandably disagrees with the agency's decision not to update her classification or pay range, EDR cannot say that the record presents a sufficient question whether the agency misapplied and/or unfairly applied policy, acted in a manner inconsistent with its other comparable decisions, or was otherwise arbitrary or capricious. Accordingly, these claims do not qualify for a hearing.

That said, the grievant also reports that her duties continue to expand, in particular with respect to the number of managers to which the agency has assigned her to provide direct administrative support. EDR notes that such additional direct support duties do not appear to be reflected either in the grievant's current EWP or in the agency's most recent assessment of whether her position should be reclassified. To the extent the grievant is ultimately assigned to provide primary administrative support to multiple members of the agency's or the Board's management, these duties would be an appropriate Pay Factor to consider in any future reclassification determination, consistent with DHRM Policy 3.05.[20]

Hostile Work Environment/Retaliation

In her Second Grievance, the grievant challenges the agency's disciplinary response to two issues relating to performance of her Board-related duties: charges that the grievant (1) failed to check the Board's email inbox for over two years, and (2) offered statements to a journalist who

[19] DHRM's administrative guidance regarding this Career Group is available online at: web1.dhrm.virginia.gov/itech/DHRMWebAssets/careergroups/admin/AdminOfficeSupport19010.htm.

[20] Depending on all the facts and circumstances, direct administrative support to multiple members of management could also potentially raise a question whether the agency has a reasoned basis to focus its classification analysis mainly on the difference between the grievant's pay range and that of her *immediate* supervisor, as it did in its most recent salary study for the grievant's position.

had contacted the grievant with questions about pending legislation relating to the Board's authority. The grievant's objections in this context arise primarily from her view that management never conveyed the expectations she allegedly failed to meet. In addition, the grievant claims that her manager first brought the email issue to her attention in a berating, humiliating manner. She contends in her Second Grievance that these disciplinary acts have created a hostile work environment and are motivated by retaliation against her for pursuing the First Grievance.

Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment[21] and bullying,[22] alleged violations must meet certain requirements to qualify for a hearing. Like discriminatory workplace harassment, a claim of 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.[23] 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.[24] "[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."[25]

Considering the grievant's claims as a whole, EDR cannot find that the facts as alleged raise a sufficient question whether the conduct at issue was so severe or pervasive as to alter the conditions of the grievant's employment in her current work environment such that the grievance qualifies for a hearing at this time. 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. However, these terms must be read together with agencies' broader authority to manage the means, methods, and personnel by which agency work is performed. Generally, then, management has the authority to determine, among other things, the grievant's performance expectations and the appropriate manner of substantive feedback to address performance deficiencies. Such substantive feedback includes management actions such as the disciplinary process that the agency began with the due process memorandum issued to the grievant in early January 2021.

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[21] 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."

[22] 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."

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

[24] 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)).

[25] *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).

Nevertheless, the grievant contends that her manager exceeded professional standards in first bringing the email issue to the grievant's attention. The grievant contends that, in that discussion, the manager berated her and spoke over her as she tried to explain that she had not been assigned to monitor the Board's email inbox. Even assuming that the tone of the manager's feedback in this instance would have violated Policy 2.35, however, the grievant has not alleged conduct so severe and pervasive as to demonstrate a hostile work environment that could constitute an adverse employment action.[26] Moreover, it appears that the agency investigated the grievant's claims and did not find that the manager had engaged in prohibited conduct when he expressed that the grievant should have been checking the inbox, and that her failure to do so was a serious performance lapse. On the facts alleged, we cannot say that the record raises a sufficient question whether the agency's response might have misapplied or unfairly applied the enforcement requirements of Policy 2.35.[27]

The grievant also argues that the timing and severity of the charges against her suggest a retaliatory motive. A claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[28] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[29]

Participating in the grievance process is a protected activity, and thus an agency may not take punitive action against an employee for pursuing a grievance.[30] In addition, it is at least arguable on the current record that the grievant has experienced an adverse employment action consisting of the continuing expansion of her "other duties as assigned" and the start of a disciplinary process related to those duties, which ultimately produced a Group I Written Notice. Regarding the disciplinary charges, the grievant contends that the agency never assigned her to be responsible for the Board's inbox or provided her the credentials to check it; similarly, she claims she had "never been given any guidance on what is allowed and not allowed when speaking with the media" even though the Board's website lists her direct phone line as its contact number.[31] However, the agency maintains that the grievant was designated as the Board's contact (including via emails) by August 2020, if not earlier, and that its policies prohibit the type of discussion she had with the journalist. As to timing, the media contact occurred on December 7, 2020, and management learned that the inbox had gone unchecked on December 17, 2020. Thus, even if the grievant reasonably believes that expectations were not effectively communicated to her, these circumstances are not sufficient to demonstrate that the agency's disciplinary charges were merely a pretext for retaliation, and that they would not have been issued but for the grievant's protected activity.

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[26] *See, e.g.*, *Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.
[27] *See* DHRM Policy 2.35, *Civility in the Workplace*, at 6 (describing agency responsibilities under the policy).
[28] *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).
[29] *Id.*
[30] *See* Va. Code § 2.2-3004(A).
[31] The agency policy cited by the agency as prohibiting the grievant's responses to the journalist provides that "[e]mployees . . . who make comments to the news media, must clearly indicate they are speaking as a private citizen not in any official capacity." The grievant maintains it was clear she was speaking in her personal capacity.

Following the initiation of the Second Grievance, the agency's disciplinary charges resulted in only one formal disciplinary action, a Group I Written Notice regarding the grievant's media contact. Because the Written Notice had not been issued as of the time the grievant initiated the Second Grievance, it is not one of the actions challenged in either the First or Second Grievance. Although "false accusations" was among the grieved issues in the Second Grievance, the only desired relief listed was "Charge B [related to the Board's email inbox] expunged from my record and an apology." The Second Grievance record gives no indication that the grievant was seeking rescission of discipline related to the media contact, although it appears she made a separate request to her supervisor to "appeal" the Group I Written Notice after it was issued. However, EDR is aware of no grievance filed by the grievant to challenge the Group I Written Notice specifically. Complicating matters further, the version of the Written Notice form provided to EDR does not include a signature by the issuing manager. Moreover, the Written Notice form was not signed by the grievant indicating receipt, and the manager did not have the form signed to indicate that the grievant refused to sign it (if that was the case). On May 10, 2021, the issuing manager has updated this version of the Written Notice form as signed with a witness that the grievant refused to sign. Thus, it is unclear from the information reviewed by EDR as to whether or when the grievant received a properly signed and issued Group I Written Notice. If the grievant still desires to submit a grievance to challenge the Group I Written Notice, she should do so as soon as possible, if she has not done so already.

CONCLUSION

For the foregoing reasons, EDR concludes based on all the available facts and circumstances that neither the First nor the Second Grievance qualifies for a hearing. However, should the grievant experience further acts or omissions that she suspects are retaliatory, including further substantial changes in the terms of her employment or disciplinary actions, nothing in this ruling prevents her from challenging such future actions in a subsequent timely grievance.[32] In such a grievance, EDR would also assess whether the actions were a continuation of the retaliation challenged in this current grievance. Noting also that the grievant states she now works in "fear" that her manager wants to terminate her employment, we encourage the parties to take constructive steps to ensure that the grievant's job expectations and accountability structure are clear to all involved and will be managed with respect and professionalism.

EDR's qualification rulings are final and nonappealable.[33]

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[32] *See Grievance Procedure Manual* §§ 2.4, 4.1.
[33] *See* Va. Code § 2.2-1202.1(5).