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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2021-5241
May 13, 2021

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether her February 17, 2021 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about February 16, 2021, the agency issued to the grievant a due process notification advising her that the agency was considering issuing formal disciplinary action for specified misconduct. According to the grievant, the due process notice stated that the grievant was being removed from the workplace due to an investigation of alleged criminal conduct related to her job. The grievant filed a grievance on the following day, February 17, alleging that the due process notice violated agency policy and her legal rights. In particular, the grievant argued that the due process notice did not contain an explanation of the accusation against her; described alleged criminal conduct when she had not been advised of concerns about criminal conduct during the agency’s investigation; and contained conflicting information about whether the investigation was ongoing or had concluded. The grievant further claimed that the allegation of criminal conduct was “used as a fear and intimidation tactic.” As relief, the grievant sought for the “allegations . . . to be dismissed in their entirety” and a lateral transfer to another facility outside of her current region.

After the grievant initiated her grievance, the agency revised the due process notice on February 18, 2021, removing references to alleged criminal conduct from the document. The grievant later received a Group III Written Notice with a disciplinary demotion, pay reduction, and transfer on March 1 for the misconduct described in the due process notice. On March 26, the grievant filed a second grievance challenging her receipt of the Written Notice. The agency has qualified the March 26 grievance for a hearing; it is currently pending assignment to an EDR hearing officer for a grievance hearing.

Following the management resolution steps, the agency head declined to qualify the February 17 grievance for a hearing. The grievant now appeals that determination to EDR. While

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this ruling was pending, the grievant notified EDR that she wishes to amend the requested relief for her February 17 grievance to include removal of the Group III Written Notice and the associated demotion and pay reduction.

DISCUSSION

Compliance Issues

In her request for qualification, the grievant argues that the agency failed to comply with the grievance procedure during the management steps. In particular, she alleges that the agency head's qualification decision did not address all of the issues in the grievance and that the third step response was untimely and contained clerical errors. The grievant also contends that the agency head's qualification decision was untimely, requiring her to send a notice of noncompliance to correct the issue. Though the grievant's concerns about these matters are understandable, EDR has reviewed the grievance package and concludes that the responses issued to the grievant were adequate. Further, the *Grievance Procedure Manual* states that "[a]ll claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time."¹ From the evidence before EDR, it is unclear whether the grievant notified the agency about all of her concerns regarding noncompliance; to the extent the grievant did notify the agency about the untimeliness of the qualification decision, that issue was apparently corrected. Moreover, the grievant did not request a ruling from EDR or otherwise halt the grievance process to correct any matters of alleged noncompliance at the time they occurred.² Based on these facts, EDR finds that the alleged issues of noncompliance described in the grievant's request for qualification were either corrected during the management steps or have been waived at this point, based on her continuation of the grievance beyond the agency head's qualification decision.

Qualification

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.³ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁴ Thus, claims relating to issues such as the methods, means 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 or agency policy may have been misapplied or unfairly applied.⁵ The grievant has not alleged discrimination, retaliation, or discipline.⁶ Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

¹ *Grievance Procedure Manual* § 6.3.

² *See id.*

³ *See id.* § 4.1.

⁴ Va. Code § 2.2-3004(B).

⁵ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁶ The subject of the February 17 grievance is not the disciplinary action that was issued afterward.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁷ Thus, typically, 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

In her grievance, the grievant primarily challenges the content of a due process notification she received on February 16, 2021. The grievant alleges that the due process notice erroneously alleged that she had engaged in criminal conduct, with the result that the document failed to comply with agency policy and violated her legal rights. Although the grievant’s concerns about the February 16 due process notice are understandable, EDR cannot conclude that the document is, in itself, an adverse employment action. After the grievant initiated her grievance on February 17, the agency revised and reissued the due process notice on February 18, removing references to alleged criminal conduct from the document. However, there nothing to indicate that any of the management actions described in the February 17 grievance had an adverse impact on the terms, conditions, or benefits of the grievant’s employment. At that time, the agency had not taken any corrective action (such as formal discipline, demotion, or transfer). Significantly, the grievant has filed a separate grievance challenging her receipt of a Group III Written Notice that was later issued for the misconduct described in the due process notice, and that grievance will proceed to a hearing.

The grievant also notes that she was required to provide a response to the due process notice by February 19, 2021 and claims she did not have sufficient time to respond to the charges in the corrected document she received on February 18. However, the grievant received the original notice of due process on February 16. The agency also provided the grievant with an attachment describing in detail the allegations against her on the same date. DHRM Policy 1.60, *Standards of Conduct*, provides that 24 hours is normally a sufficient time for an employee to respond after receiving a pre-disciplinary due process notice.¹¹ Here, the agency originally notified the grievant that it was considering issuing disciplinary action three days before the deadline for her response was due. Even though the initial due process notice inaccurately described alleged criminal conduct as a potential basis for discipline, that error was corrected on February 18. Under these circumstances, EDR cannot find that the agency failed to provide the grievant with sufficient information about the nature of the charge against her such that she was unable to respond by February 19.

In addition, the grievant claims that the agency’s description of her conduct as allegedly criminal in nature was a “fear and intimidation tactic” that was harassing in nature. Although

⁷ 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)).

¹¹ DHRM Policy 1.60, *Standards of Conduct*, at 15-16.

DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment¹² and bullying,¹³ 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.¹⁴ 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.¹⁵

In support of her claim, the grievant argues that the agency's use of the phrase "criminal conduct" in the February 16, 2021 due process notice was "intimidating, denigrat[ing], and offensive" to her. 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

In summary, it is clear that the grievant disagrees with the agency's decision to issue the February 16, 2021 due process notice following its investigation of alleged workplace misconduct. Indeed, she identified legitimate concerns with the original description of alleged criminal conduct that were corrected in the February 18 revision of the due process document. Nonetheless, her arguments concerning the content of the February 16 due process notice do not raise a sufficient question whether she experienced an adverse employment action affecting the terms, conditions, or benefits of her employment, as discussed above. Accordingly, the grievance does not qualify for a hearing. However, as described further below, the grievant may present her allegations regarding the due process notice and its alleged impact on her employment as part of the hearing on her March 27 grievance.

¹² 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."

¹³ 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."

¹⁴ See *Gilliam v. S.C. Dep't of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

¹⁵ *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).

¹⁶ See, e.g., EDR Ruling No. 2014-3836; cf. *Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.

CONCLUSION

For the reasons expressed above, the facts presented by the grievant in her February 17, 2021 grievance do not constitute a claim that qualifies for a hearing under the grievance procedure at this time.¹⁷ However, as noted above, the grievant filed a second grievance on March 26, challenging the Group III Written Notice that was issued following her receipt of the due process notice that is the subject of the February 17 grievance addressed in this ruling. The February 17 and March 26 grievances describe similar concerns with the agency's disciplinary process, which ultimately resulted in the issuance of the Written Notice. The agency qualified the March 26 grievance for a hearing, and it is currently pending assignment to a hearing officer. EDR will include a copy of the February 17 grievance with the appointment file for the March 26 grievance to ensure that any arguments raised in both grievances that are relevant to the challenged Written Notice will be before the hearing officer for consideration.

EDR's qualification rulings are final and nonappealable.¹⁸

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¹⁷ See *Grievance Procedure Manual* § 4.1.

¹⁸ Va. Code § 2.2-1202.1(5).