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QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Numbers 2021-5249, 2021-5255, 2021-5256
June 29, 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 February 22, March 2, and March 19, 2021 grievances with the Department of Behavioral Health and Developmental Services (the "agency") qualify for a hearing. For the reasons discussed below, these grievances are not qualified for a hearing.

FACTS

On or about February 19, 2021, the grievant received a Counseling Memorandum describing concerns about certain aspects of his work performance and setting expectations for improvement going forward. The grievant initiated a grievance on February 22 ("Grievance 1"), alleging that the agency's issuance of the Counseling Memorandum was inconsistent with DHRM Policy 1.60, *Standards of Conduct*, for a number of reasons. The grievant also disputed management's characterization of his work performance in the Counseling Memorandum and raised additional concerns related to alleged discrimination based on sex and disability, as well as poor communication with management generally.

On March 2, 2021, the grievant filed a second grievance ("Grievance 2") alleging an "[e]stablished pattern of abuse" from management. The grievant described examples of alleged "mistreatment and omission" relating to his work assignments, hours of work, telework, and support from management. The grievant initiated a third grievance on March 19 ("Grievance 3") claiming that he does not have a current Employee Work Profile ("EWP") or development plan outlining his performance expectations. In Grievance 3, the grievant also claims that he was expected to train new employees without adequate resources and that management has not provided sufficient communication or meetings concerning his work expectations.

As relief throughout all three grievances, the grievant has requested removal of the Counseling Memorandum, a transfer to different management, and improved "communication and work channels." The grievant has also asked the agency to "[s]top defaming my work," "[s]top the innuendo," and comply with applicable policy. Following the management resolution steps, the

agency head declined to qualify any of the three grievances for a hearing. The grievant now appeals those determinations 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 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, 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]

Counseling Memorandum

In Grievance 1, the grievant argues that the agency's issuance of the Counseling Memorandum was inconsistent with DHRM Policy 1.60. In support of this claim, the grievant alleges that the Counseling Memorandum was not delivered to him privately because several other individuals were present at the meeting in addition to his supervisor, that his supervisor did not give him adequate feedback about the content of the Counseling Memorandum, and that he did not receive a copy of the document or have an opportunity to read it at the meeting. The grievant further asserts that his office director "brought up [his] disability" during the meeting.

The management action challenged in Grievance 1, a Counseling Memorandum, is a form of written counseling. Written counseling is a type of informal corrective action;[8] it is not

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

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]

Regarding the content of the Counseling Memorandum, the grievant may reasonably object to the agency's assessment of his work performance and its decision to address certain matters through informal corrective action. Nonetheless, considering the grievant's allegations about the Counseling Memorandum and the meeting where he received as a whole, EDR finds no basis to conclude that that those actions are "adverse" for purposes of hearing qualification, either individually or collectively. In addition to the grievant's supervisor, a human resources representative and the grievant's office director attended the meeting. These individuals appear to have been involved in addressing the concerns described in the Counseling Memorandum and thus their presence was appropriate. Moreover, the Counseling Memorandum itself contains a detailed description of the supervisor's performance feedback and expectations for the grievant to improve, despite his assertion to the contrary. However, DHRM Policy 1.60 does state that a copy of any written counseling issued "must be given to the employee."[10] Accordingly, if it has not already done so, the agency should provide the grievant with a copy of the Counseling Memorandum for his review as soon as possible.

In addition, the agency denies that the grievant's disability was a topic of discussion at the meeting. From EDR's review of the grievance record, the grievant does not appear to allege that he identified a disability or requested reasonable accommodation to perform the essential functions of his position either before or during the meeting. While this ruling was pending, the agency indicated that the grievant has provided information related to a request for reasonable accommodation that is currently under consideration. We encourage the parties to communicate about any request(s) for reasonable accommodation to address the grievant's disability-related concerns. Nothing in this ruling prevents the grievant from challenging any future management action or omission related to issues with disability or reasonable accommodation.[11]

For these reasons, the grievant's claims relating to the Counseling Memorandum do not qualify for a hearing.[12] We additionally note that the Counseling Memorandum has not had an adverse impact on the grievant's employment, but it could be used later to support an adverse employment action against the grievant. Should the Counseling Memorandum grieved in this

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[9] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[10] DHRM Policy 1.60, *Standards of Conduct*, at 7.
[11] The grievant may file a complaint alleging disability discrimination with the agency's human resources office, the federal Equal Employment Opportunity Commission, and/or another appropriate entity. These matters could also be the subject of a grievance initiated with the agency.
[12] 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.*

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

Hostile Work Environment

Broadly read, the grievant alleges in his grievances that agency management has engaged in workplace harassment that 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 Grievance 2, the grievant claims his supervisor has engaged in a "pattern of abuse" through various instances of "mistreatment and omission." As examples of this conduct, the grievant describes certain communications from his supervisor about task assignments, working extra time outside of normal business hours, a lack of "work procedures" when he is teleworking, and lack of mental health support.[17] In Grievance 3, the grievant explains that a meeting on March 9, 2021 brought several new issues to light. In particular, the grievant contends that he "does not

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[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] In Grievance 2, the grievant also raised concerns about whether he was being permitted to use the grievance procedure to address issues related to his employment. The evidence before EDR indicates that the agency has not interfered with the grievant's rights in this regard.

have a current EWP" or employee development plan, that his supervisor provided instructions about his responsibility for training for new employees, and that communication with his supervisor about work expectations and assignments is limited. The grievant appears to argue that, without a current EWP, a current development plan, and access to training, he does not have an adequate understanding about his role in assisting new employees or performing certain other duties. Apparently in response to these grievances, the agency states that it conducted an investigation of the grievant's concerns and determined that the grievant's allegations of workplace harassment were unfounded.

EDR has reviewed the grievance record in its entirety, including a written submission from the grievant providing additional information about the nature of his claims.[18] The grievant's primary complaints appear to center around his perception that communication with his supervisor is ineffective. For example, the grievant claims that his supervisor has changed his work procedures several times without giving him written documentation of those changes. In addition, the grievant contends that his supervisor asked him to assist with training several new employees; he argues that he was not involved in the hiring of the employees and that he did not receive sufficient training, support, or resources to assist with this task.[19] The grievant has further explained that the difficulties in communication may result from his supervisor's lack of understanding about the nature of his work and a lack of consistent meetings to discuss work-related matters.

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, the grievant's supervisor has authority to determine, among other things: the grievant's performance expectations, the substance and scope of the grievant's work assignments, the level of communication and information necessary to complete those assignments, and the appropriate manner of substantive feedback to address identified performance deficiencies. 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 grievances qualify for a hearing.[20]

Regarding the grievant's EWP and development plan specifically, the parties seem to agree that the grievant had not received updated copies of those documents for the current performance evaluation cycle at the time he initiated Grievance 3. Nonetheless, the grievant would still have

[18] While this ruling was pending, EDR contacted the grievant for additional information about the matters raised in his grievances. The grievant preferred to provide a written response by email instead of conducting a telephone interview with an EDR staff member. We have carefully considered the grievant's written response along with the evidence in the grievance record for each of the three grievances.

[19] At least some of the training described by the grievant appears to have been available through the agency's information technology office. During the management steps, the agency explained to the grievant that it made a business decision to remove access the training platform for the agency as a whole, not solely the grievant.

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

been subject to the same performance standards as described in the most recent EWP he had received at that time – in this case, from the 2019/2020 evaluation cycle.[21] Neither party appears to allege that the grievant was expected to perform tasks outside the scope of his 2019/2020 EWP; to the extent that may have been the case, the agency also has the discretion and authority to direct the grievant's work assignments, which could include additional duties as needed.[22] As a result, the grievant's specific concern that he could not reasonably be expected to assist new employees or perform other assigned work without guidance in the form of an EWP, a development plan, or training does not appear to be reasonable under the circumstances presented in this case, based on the record before EDR. However, employees should generally receive an updated EWP at the beginning of each performance cycle outlining their job responsibilities, performance expectations, and an employee development plan for the evaluation cycle.[23] The agency should therefore provide the grievant with an updated EWP and development plan for the current evaluation cycle as soon as possible, if it has not done so already.

In conclusion, because the grievant has not raised a sufficient question as to the existence of severe or pervasive harassment or bullying at this time, the grievances does not qualify for a hearing on these grounds.[24] If the grievant experiences any further incidents of alleged harassing conduct, he should report those matters 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.[25] 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.

Discrimination

Finally, the grievant appears to allege that his receipt of the Counseling Memorandum, along with many of the other actions discussed above, were motivated by discrimination based on his sex. In particular, the grievant believes that, because his supervisor and his office director are both female, they do not appreciate or understand his perspective. DHRM Policy 2.05, *Equal*

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[21] The performance evaluation cycle typically runs from October 25 of one year through October 24 of the following year. DHRM Policy 1.40, *Performance Planning and Evaluation*

[22] *See* Va. Code § 2.2-3004(B) (reserving to management the right to manage the affairs and operations of state government).

[23] *See* DHRM Policy 1.40, *Performance Planning and Evaluation*. In addition, DHRM's "Instructions for Completing Employee Work Profile (EWP)," available at https://www.dhrm.virginia.gov/docs/default-source/hrpolicy/assets/pol140_b.pdf?sfvrsn=2, state that employees should receive those sections of their EWP describing work expectations, a performance plan, and a development plan at the beginning of the evaluation cycle.

[24] 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.

[25] 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 . . . ."

Employment Opportunity, requires that "all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability." For a claim of discrimination on any of these grounds to qualify for a hearing, the grievance must present facts that raise a sufficient question as to whether the issues describe an adverse employment action that has resulted from prohibited discrimination.[26] However, if the agency provides a legitimate, nondiscriminatory business reason for the acts or omissions grieved, the grievance will not be qualified for hearing absent sufficient evidence that the agency's proffered justification was a pretext for discrimination.[27]

EDR has not reviewed anything to suggest that the grievant's sex was a factor in the agency's decision to issue the Counseling Memorandum or in any of the other management actions discussed above. Although the grievant clearly disagrees with the agency's assessment of his work performance and his supervisor's decisions regarding communication, work assignments, and performance expectations, such disagreement alone does not establish that these actions were motivated by discrimination, and there is otherwise insufficient evidence to show that the agency's stated business reasons were pretextual. To qualify for a hearing, a grievance must present more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. There are no such facts here, and, accordingly, the grievances do not qualify for a hearing on this basis.

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.[28]

In closing, we note that the agency has indicated the grievant recently initiated a fourth grievance challenging his receipt of a Written Notice. This fourth grievance is currently proceeding through the management steps. Although the three grievances discussed in this ruling do not qualify for a hearing as discussed above, the facts presented in the grievances could be relevant to the grievant's arguments regarding the Written Notice or other matters raised in the fourth grievance. Nothing in this ruling prevents the grievant from offering evidence about Grievances 1, 2, and 3 as background information in relation to the issues challenged in the fourth grievance, to the extent such evidence is relevant to the fourth grievance. This would extend to both the remainder of the management steps as well as a hearing on the merits of the Written Notice, should the fourth grievance advance to that stage.[29]

EDR's qualification rulings are final and nonappealable.[30]

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[26] *See* Strothers v. City of Laurel, 895 F.3d 317, 327-28 (4th Cir. 2018).
[27] *See id.*; *see*, *e.g.*, EDR Ruling No. 2017-4549.
[28] *See Grievance Procedure Manual* § 4.1.
[29] *See id.* § 4.1(a) (stating the grievances challenging formal disciplinary action automatically qualify for a hearing)
[30] *See* Va. Code § 2.2-1202.1(5).

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