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QUALIFICATION RULING

In the matter of George Mason University
Ruling Numbers 2021-5202, 2021-5227
March 19, 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 21, 2020 and February 5, 2021 grievances with George Mason University (the "university" or the "agency") qualify for a hearing. For the reasons discussed below, the grievances are not qualified for a hearing.

FACTS

The grievant works for the university's police department. On October 23, 2020, the grievant received his annual performance evaluation for 2019-2020, with an overall "Unsatisfactory" rating.[1] The university evaluates employees using a scale that consists of five ratings: "Unsatisfactory," "Developing/Fair," "Proficient," "High Performing," and "Exceptional." Ratings of "Developing/Fair," "Proficient," and "High Performing" are equivalent to a rating of "Contributor" on the DHRM evaluation scale.[2] Also on October 23, the grievant received a Performance Improvement Plan ("PIP") identifying performance standards for a three-month re-evaluation period. Because the grievant received an overall "Unsatisfactory" rating on his evaluation, he was no longer eligible for a "take-home vehicle" to commute to and from work.

The grievant filed a grievance on November 21, 2020, challenging a number of issues relating to his performance evaluation, the PIP, and other alleged university actions. In particular, the grievant contends that both the performance evaluation and the PIP were arbitrary and capricious, that the agency had harassed and retaliated against him based on his past use of the grievance procedure and other protected activity, and that he had received "improper informal discipline" in the form of investigations, "removal of work duties," a "demotion based on false circumstances," and "other mistreatment."

On January 26, 2021, the university issued a written counseling to the grievant describing concerns about his behavior on January 13 and 15. The counseling also provided expectations for

[1] *See* DHRM Policy 1.40, *Performance Planning and Evaluation*.
[2] DHRM Policy 1.40, *Performance Planning and Evaluation*, uses a system with three evaluation ratings: "Below Contributor," "Contributor," and "Extraordinary Contributor."

the grievant's conduct going forward. Several days later, on January 29, the grievant received an overall re-evaluation rating of "Developing/Fair." The university offered to restore the grievant's take-home vehicle privileges following the re-evaluation; he declined based on his understanding that a rating of "Developing/Fair" does not satisfy the eligibility criteria for a take-home vehicle.

The grievant filed a second grievance on or about February 5, 2021, disputing both the January 26 written counseling and his January 29 re-evaluation rating. The grievance alleges that both actions were improper, inconsistent with policy, and retaliatory.

Following the management resolution steps, the agency head declined to qualify both grievances for a hearing. The grievant now appeals those determinations to EDR.[3]

DISCUSSION

Alleged Compliance Issues

While this ruling was pending, the grievant notified EDR that he believes the university is not in compliance with the grievance procedure in relation to his November 21, 2020 grievance.

First, the grievant alleges that the university has repeatedly claimed that certain actions cited in the November 21, 2020 grievance were not timely challenged, repeatedly failed to address his allegations of retaliation in the November 21 grievance, denied his request for a hearing "in bad faith," and "[n]eedlessly delayed [his] procedural guarantees" under the grievance procedure by engaging in these actions. During the management steps, the university noted several times that prior counseling, investigations, and other matters referenced in the November 21, 2020 grievance were not timely. While such points appear to be largely correct, the responses to the grievance appear to only discuss the grievant's claims regarding his take-home vehicle in detail. To the extent management failed to address the grievant's challenges to his October 23 performance evaluation and the PIP or his allegation of retaliation, the step responses do not appear to comply with the grievance procedure.[4] However, the remedy when a grievant disagrees with the content of management's response to a grievance or believes such response is inadequate is to raise that issue during the management steps using the noncompliance process described in Section 6.3 of the *Grievance Procedure Manual*.[5] By advancing the November 21 grievance beyond the agency head's qualification decision, the grievant has waived further objection to the university's alleged noncompliance during the management steps for that grievance.[6]

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[3] The grievant has also indicated that, on March 8, 2021, he received notice that he was being placed on administrative leave pending an investigation of potential misconduct. The grievance procedure does not permit new allegations to be added to an existing grievance after it is filed. *Grievance Procedure Manual* § 2.4. If the grievant wishes to do so, he may raise any concerns with the investigation and future related matters in a new, timely grievance.

[4] Each step response "must address the issues and the relief requested and should notify the employee of their procedural options." *Grievance Procedure Manual* §§ 3.1, 3.2, 3.3.

[5] *Grievance Procedure Manual* § 6.3.

[6] *Id.* ("All 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."); *see also*, *e.g.*, EDR Ruling No. 2004-752; EDR Ruling No. 2003-042; EDR Ruling No. 2002-036.

Outside of the above-noted issues with the management responses to his November 21, 2020 grievance, EDR has not identified any evidence that the university acted "in bad faith" to intentionally deny him a hearing to which he was automatically entitled or otherwise deprive him of due process, and the grievant's notice of noncompliance to EDR does not support such a conclusion. If the grievant is arguing that he is automatically entitled to a hearing on the matters raised the November 21, 2020 grievance, he is incorrect. Only grievances challenging a formal Written Notice of disciplinary action or dismissal for unsatisfactory performance automatically qualify for a hearing.[7] The grievant is not challenging a Written Notice or a dismissal for unsatisfactory performance. Rather, the November 21 grievance challenges "an arbitrary and capricious performance evaluation and retaliation for participating in the grievance process." These claims are listed among the types of management actions that *may* qualify for a hearing.[8] The grievant may understandably disagree with the university's decision not to offer relief addressing the issues raised in his November 21 grievance. However, an agency's decision not to resolve a grievance during the management steps will not, in most cases, constitute noncompliance with the grievance procedure.

The grievant further argues that the university "[p]rovided false information" to EDR. After receiving the grievant's request for a qualification ruling on the November 21, 2020 grievance, EDR sought additional information from both parties about the matters at issue. A representative from the university's human resources office indicated that, to their knowledge, the grievant had not requested training to obtain a particular certification after June 2020. The grievant responded with evidence that he had in fact requested (and been denied) training for the certification in December 2020 and February 2021, contradicting the university's initial response.[9] It appears that the university's human resources office was unaware of later developments to some of the matters raised in the grievances. Both parties have since offered further clarification about the grievant's requests for training while the November 21 grievance was pending. To the extent the university initially provided EDR with inaccurate information about the grievant's requests for training, that issue has now been corrected. EDR has thoroughly reviewed the parties' submissions found no evidence of bad intent on the university's part that warrants a finding of noncompliance at this time.

Finally, the grievant argues that the university "[c]ontinued to discipline and retaliate against" him while the November 21, 2020 grievance was pending. According to the information offered by the grievant, all acts of alleged continuing discipline or retaliation that have occurred since he initiated the November 21, 2020 grievance have been challenged in his February 5, 2021 grievance. All matters presented in both grievances are fully addressed below.

The grievant appears to assert that the appropriate remedy to correct the above instances of alleged noncompliance is for the university to acknowledge the merits of his claims regarding many of the underlying management actions he is challenging in the November 21, 2020 grievance and agree that qualification for a hearing is warranted. Viewed in that light, his arguments could broadly be interpreted as a claim that the university has engaged in substantial noncompliance

[7] *Grievance Procedure Manual* § 4.1(a).
[8] *Id.* § 4.1(b).
[9] The grievant's requests for training and access to training opportunities are discussed in greater detail below.

warranting relief on the merits of the November 21 grievance by EDR. Although the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party in cases of substantial noncompliance with the grievance procedure,[10] we favor having grievances decided on the merits rather than procedural violations. Thus, EDR will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. The agency's actions here, if they can be considered noncompliance, do not rise to the level that would justify a finding of substantial noncompliance or the extreme sanction of awarding substantive relief in favor of the grievant at this time.

Qualification

State employees with access to the grievance procedure may generally grieve anything related to their employment, but only certain grievances qualify for a hearing.[11] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[12] 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 whether discrimination, retaliation, or discipline may have improperly influenced management's decision, whether state policy may have been misapplied or unfairly applied, or whether a performance evaluation was arbitrary or capricious.[13]

Further, and although grievances that allege retaliation or other misapplication of policy may qualify for a hearing, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[14] 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."[15] Adverse employment actions include agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[16] 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."[17]

Challenged management actions

In his grievances, the grievant describes a number of alleged improper actions taken by the university. For example, the November 21, 2020 grievance identifies a "pending dismissal" based

[10] Va. Code § 2.2-3003(G).
[11] *See Grievance Procedure Manual* § 4.1.
[12] Va. Code § 2.2-3004(B).
[13] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[14] *See Grievance Procedure Manual* § 4.1(b).
[15] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[16] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[17] 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)).

on his expected termination following his re-evaluation at the conclusion of the PIP. However, the grievant received a "Developing/Fair" rating on his re-evaluation in January 2021, and his employment was not in fact terminated. The grievant also lists numerous instances of alleged informal disciplinary action that he claims the university refused to address during the management steps. These include previous counseling and investigations dating from February 2017 to July 2020.

The only timely and discrete management actions EDR has identified in the grievances are the October 23, 2020 "Unsatisfactory" performance evaluation, the October 23 PIP, the January 26, 2021 written counseling, and the January 29 "Developing/Fair" re-evaluation. Those matters are discussed further below. To the extent the grievant is attempting to directly challenge other management actions that occurred more than 30 days before the initiation of either grievance, those matters are no longer susceptible to relief through the grievance procedure.[18] Nonetheless, because those actions are part of the pattern of retaliation and harassment the grievant has alleged in both grievances, they will be considered as such in this ruling.

October 2020 performance evaluation and PIP

The grievant's overall "Unsatisfactory" rating on his October 23, 2020 performance evaluation and an accompanying PIP are the primary management actions challenged in the November 21 grievance. The grievant argues that the evaluation and the PIP were arbitrary and capricious.[19] A performance rating is arbitrary or capricious if management determined the rating without regard to the facts, by pure will or whim. An arbitrary or capricious performance evaluation is one that no reasonable person could make after considering all available evidence. If an evaluation is fairly debatable (meaning that reasonable persons could draw different conclusions), it is not arbitrary or capricious. Thus, mere disagreement with the evaluation or with the reasons assigned for the ratings is insufficient to qualify an arbitrary or capricious performance evaluation claim for a hearing when there is adequate documentation in the record to support the conclusion that the evaluation had a reasoned basis related to established expectations. However, if the grievance raises a sufficient question as to whether a performance evaluation resulted merely from personal animosity or some other improper motive—rather than a reasonable basis—a further exploration of the facts by a hearing officer may be warranted.

DHRM Policy 1.40, *Performance Planning and Evaluation*, states that, to receive a "Below Contributor" rating on their annual evaluation, an employee must have received "[a]t least one documented Notice of Improvement Needed/Substandard Performance form" during the evaluation cycle.[20] In addition, "[a]n employee who receives a rating of 'Below Contributor' [on their annual evaluation] must be re-evaluated and have a performance re-evaluation plan

[18] *Grievance Procedure Manual* § 2.2 ("An employee's grievance must be presented to management within 30 calendar days of the date the employee knew or should have known of the management action or omission being grieved.").
[19] The grievant further contends that the documents, along with the other management actions discussed in this ruling, were retaliatory. The grievant's claim of retaliation is discussed in greater detail below.
[20] DHRM Policy 1.40, *Performance Planning and Evaluation*.

developed . . . ."[21] A re-evaluation plan "that sets forth performance measures for the following three (3) months" must be developed within ten workdays of the employee's receipt of their annual evaluation.[22] If the employee's performance does not improve during the three-month re-evaluation period and they "receive[] a re-evaluation rating of 'Below Contributor,'" the agency must "demote, reassign, or terminate the employee by the end of the . . . re-evaluation period."[23]

On or about February 21, 2020, the grievant received a Notice of Improvement Needed/Substandard Performance ("NOIN") identifying specific deficiencies in his work performance and directing actions necessary for improvement. The NOIN described concerns about the grievant's ability to communicate effectively with the public and demonstrate effective decision-making skills.[24] The grievant later received a written counseling arising out of an incident that occurred on March 17, 2020 for similar performance issues relating to communication and decision-making.[25] The same overall performance concerns that were addressed in the NOIN and the written counseling are cited in the grievant's annual evaluation as support for the overall "Unsatisfactory" rating.

In support of his position that the university did not properly evaluate his work performance, the grievant strenuously argues that management's assessment of his performance was arbitrary and capricious. Although the grievant challenges the conclusions stated in the evaluation and areas for development noted in the PIP, he has not provided evidence to contradict many of the basic facts relating to his performance during the evaluation cycle. As noted above, a grievant must present evidence raising a sufficient question whether challenged management action was improper in some way for their grievance to qualify for a hearing.[26] In this case, there may be some reasonable dispute about comments and ratings on individual core responsibilities and competencies in the grievant's performance evaluation. Nonetheless, the record before EDR does not support a conclusion that the evaluation, as a whole, is without a basis in fact or otherwise arbitrary or capricious.

It is understandable that the grievant is frustrated by what he believes is the university's failure to consider his performance as a whole. However, it was within management's discretion to determine that the instances of deficient performance described above – which were also addressed in the NOIN and a separate written counseling – were of sufficient significance that an "Unsatisfactory" rating was warranted on his annual performance evaluation. Regarding the PIP, DHRM Policy 1.40 requires agencies to institute a three-month re-evaluation plan when an employee receives an overall "Below Contributor" rating on their annual evaluation.[27] Under the circumstances present here, the university issued the PIP consistent with policy. Indeed, it

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[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] The university later revised the NOIN in August 2020, though it addressed the same core issues as the original February document.
[25] The grievant appears to have originally received two separate written counselings for the March 17, 2020 incident. These matters were the subject of a previous grievance that led the university to rescind one of the counselings.
[26] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[27] As noted above, an "Unsatisfactory" rating on the university's evaluation scale is equivalent to a "Below Contributor" rating on DHRM's evaluation scale.

describes areas for improvement that are based on the performance deficiencies noted in the evaluation itself, as well as the NOIN and written counseling. Accordingly, EDR finds that the grievance does not raise a sufficient question whether the grievant's annual evaluation and PIP were without a basis in fact, resulted from anything other than management's reasoned evaluation of his performance in relation to established performance expectations, or were otherwise improper. As a result, the November 21 grievance does not qualify for a hearing on these grounds.

January 2021 re-evaluation and counseling

In his February 5, 2021 grievance, the grievant challenges his receipt of a written counseling on January 26, along with his January 29 re-evaluation rating of "Developing/Fair." The grievant contends that the allegations in the written counseling are "completely false" and resulted from a "self-started investigation" orchestrated by university management with the intent of punishing him. As with the October 23, 2020 evaluation and PIP discussed above, the grievant argues that his re-evaluation on January 29 was arbitrary and capricious.

The January 26, 2021 written counseling challenged here 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.[28] Moreover, the university has provided information confirming that several employees who witnessed the conduct addressed in the counseling reported the grievant's behavior to management, which led to the matter being addressed with him.[29] For these reasons, the grievant's claims relating to his receipt of the written counseling do not qualify for a hearing. Though 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 January 26 written counseling later serve to support an adverse employment action against the grievant, 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.[30]

The grievant received an overall rating of "Developing/Fair" on his January 29, 2021 three-month re-evaluation following the PIP. As noted above, a "Developing/Fair" rating on the university's evaluation scale is equivalent to a "Contributor" rating on DHRM's evaluation scale. EDR has consistently held that a satisfactory performance evaluation is not an adverse employment action.[31] Thus, where the grievant presents no evidence of an adverse action relating to the evaluation, such a grievance does not qualify for a hearing. In this case, the grievant disagrees with some of the information contained in his performance evaluation, but he received ratings of

[28] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[29] The university has also indicated that it provided these same documents to the grievant at his request.
[30] A related adverse employment action could include, for example, a formal Written Notice or a future "Below Contributor" annual performance rating.
[31] *E.g.*, EDR Ruling No. 2013-3580; EDR Ruling No. 2010-2358; EDR Ruling No. 2008-1986; *see also* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377-378 (4th Cir. 2004) (holding that although his performance rating was lower than his previous yearly evaluation, there was no adverse employment action where the plaintiff failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment).

"Proficient" and "Developing/Fair" on each of the individual factor ratings and his overall performance rating was "Developing/Fair." The re-evaluation described "notable" improvements in the grievant's performance since the issuance of the PIP and identified several areas for continued development. Significantly, the grievant has presented no evidence that the performance evaluation itself or any procedural abnormalities in the creation and/or filing of the performance evaluation have detrimentally altered the terms or conditions of his employment.

Moreover, even assuming for purposes of this ruling only that the "Developing/Fair" re-evaluation is an adverse employment action,[32] EDR finds no misapplication or unfair application of policy that supports qualification for a hearing. As with his claims about the October 2020 performance evaluation that are addressed above, the grievant challenges the conclusions stated in the re-evaluation. However, he has not provided evidence to contradict the basic facts relating to his performance during the re-evaluation period. The grievant continues to vigorously dispute the university's assessment of his work performance, but the record before EDR does not support a conclusion that the re-evaluation is without a basis in fact or otherwise arbitrary or capricious.

Regarding the grievant's take-home vehicle and its connection with his evaluation, the PIP, and the re-evaluation, EDR similarly finds no misapplication or unfair application of policy that qualifies for a hearing. The university's policy on take-home vehicles states that eligible employees must have received an evaluation rating of "Proficient," "High Performing," or "Exceptional" to qualify for a take-home vehicle. When the grievant originally received an "Unsatisfactory" evaluation rating in October 2020, he was no longer eligible for a take-home vehicle. Following his re-evaluation rating of "Developing/Fair," the university offered the grievant a take-home vehicle, apparently on the basis that his performance had improved during the re-evaluation period. However, the grievant declined a take-home vehicle because his rating of "Developing/Fair" does not meet the eligibility criteria in the university's policy.

The grievant appears to be correct that the university offered to depart from its policy on take-home vehicles following his re-evaluation. However, any departure from policy was to the grievant's benefit, *i.e.*, providing him a take-home vehicle to which he would not ordinarily have been entitled based on his re-evaluation rating of "Developing/Fair." The grievant may be raising legitimate questions about the reason for the university's decision here and its application of the take-home vehicle policy, and he is free to accept or decline a take-home vehicle as he chooses. Nonetheless, these events do not demonstrate that the university misapplied or unfairly applied policy in a manner that resulted in an adverse employment action against the grievant at this time.

Accordingly, the February 5 grievance does not qualify for a hearing on these grounds.

Retaliation/hostile work environment

In addition to alleging that his performance evaluation, the PIP, and the re-evaluation were arbitrary and capricious, the grievant further argues that they, along with the written counseling,

[32] As discussed further below, the university appears to have denied at least one of the grievant's requests for training based on his current work performance as noted in the re-evaluation. It has therefore at least arguably affected his employment.

are the latest examples in a long-standing pattern of retaliation and workplace harassment that have created a hostile work environment. Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment[33] and bullying,[34] 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.[35] As to the second element, the grievant must show that he or she perceived, and an objective reasonable person would perceive, the environment to be abusive or hostile.[36] "[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."[37]

In support of his claims, the grievant describes a number of previous management actions that he believes were improper, primarily alleging irregularities with past instances of counseling and performance management. The grievant has provided a detailed timeline of events over a period of several years, arguing that the substance of past management actions as well as the university's method of addressing such matters with him is suspect. The grievant contends that his receipt of his annual performance evaluation and the PIP on October 23, 2020, as well as the January 26, 2021 counseling and January 29 re-evaluation, are the most recent actions in this pattern of alleged harassment and retaliation.

As discussed above, the grievant may reasonably object to the university's assessment of his work performance and decision to address those matters through performance evaluations and counseling. Considering the grievant's claims as a whole, however, 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 his current work environment such that the

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[33] 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."

[34] 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."

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

[36] 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)).

[37] *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).

grievance qualifies for a hearing at this time.[38] 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 level of substantive feedback to address performance deficiencies. Such substantive feedback includes management actions such as the performance evaluations and counseling that are the subject of the grievant's two current grievances.

The grievant further contends that the actions described above were retaliation for his previous use of the grievance procedure and other protected activity. The grievant filed a grievance in May 2020 challenging previous instances of alleged harassment and retaliation;[39] he also indicates that he has engaged in protected activity by reporting various concerns to university management since at least 2017. He argues that his performance evaluation and re-evaluation, along with the other management actions described above, are part of a retaliatory campaign intended to silence and intimidate him. For example, the grievant claims that university management encouraged him to withdraw a prior grievance and issued the October 2020 evaluation and PIP because he declined.[40] 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.[41] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[42]

An agency may not take punitive action against an employee for pursuing a grievance, even if management disagrees with the employee's decision to do so.[43] Though the grievant's claim that the university pressured him to withdraw his prior grievance is concerning if true, many of the allegedly retaliatory acts described in the grievance record that followed his prior grievance activity (discussed already in this ruling) cannot be considered adverse employment actions for the reasons discussed above. Additionally, for those actions that are potentially adverse – in particular, the grievant's October 2020 performance evaluation and January 2021 re-evaluation – EDR's review of the information presented by the parties demonstrates that the university's actions were based on legitimate, nonretaliatory business reasons, and the grievant has not offered evidence to demonstrate that those reasons were merely a pretext for retaliation. Finally, even if DHRM Policy 2.35 establishes a lower standard for acts that may be considered retaliatory, the grievant has not identified acts or omissions that could reasonably be viewed as exceeding managerial discretion

[38] *See, e.g.,* EDR Ruling No. 2014-3836; *cf. Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.
[39] *See* EDR Ruling No. 2021-5131.
[40] The grievant has not identified any other specific management action(s) that followed his decision to continue with his prior grievance and were allegedly taken because of that decision.
[41] *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).
[42] *Id.*
[43] *See* Va. Code § 2.2-3004(A).

and approaching the level of reprisal, interference, restraint, penalty, discrimination, intimidation, or harassment as specified by the policy.[44]

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, neither the November 21, 2020 grievance nor the February 5, 2021 grievance qualify for a hearing on any of these grounds.

Training Opportunities

In addition to the actions discussed above, the grievant has persistently argued that the university improperly demoted him from the rank of Corporal to Master Police Officer in June 2020 and has continued to deny him opportunities to attend the training necessary for holding a Corporal position.[45] As support for this claim, the grievant has presented evidence that he sought approval in December 2020 and February 2021 to attend training to obtain a certification needed for the Corporal position.[46] The university appears to have denied both of those requests.

In December 2020, the grievant was in the process of completing the three-month re-evaluation PIP discussed above following his initial "Unsatisfactory" performance rating in October 2020. According to the university, it denied the grievant's request for training at that time because the grievant was focused on improving his performance and successfully meeting the requirements of the re-evaluation plan. Throughout this time, the grievant attended skill-building training courses for that very purpose.[47] The grievant's February 2021 training request came just days after the grievant had received his "Developing/Fair" re-evaluation on January 29. The re-evaluation stated that the grievant "needs to be consistent and work on growing [in his current position] to higher levels of performance before seeking to serve in an instructor/trainer capacity." The re-evaluation does not specifically discuss the Corporal position, but the university has indicated that the Corporal position is responsible for providing instruction and training to other university employees. The re-evaluation's reference to "serv[ing] in an instructor/trainer capacity" therefore appears to refer to the grievant's desire to obtain the additional certification needed for the Corporal position.

As a general matter, an agency may not deny an employee access to training and development resources for an improper reason. Although the grievant's January 2021 re-evaluation rating was satisfactory overall, it is clear that the university still has concerns about some aspects of his performance. Indeed, the issues addressed in this ruling confirm that the university has notified the grievant of identified performance deficiencies and provided him with

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[44] 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.

[45] EDR previously addressed some of the grievant's claims regarding the demotion in a qualification ruling for a prior grievance. *See* EDR Ruling No. 2021-5131 at 6.

[46] The grievant appears to argue that other such denials occurred, but has not presented any evidence to support that assertion.

[47] These skill-building courses were not related to the certification needed for the Corporal position.

resources to address those issues over a period of many months, from at least February 2020 through January 2021. To the extent the re-evaluation has been used as a justification for denying the grievant's request to attend training, it has arguably adversely affected his employment and may continue to do so in the future if the university cites the grievant's developing performance as a basis for denying training requests going forward.

Nonetheless, while the university is addressing those aspects of the grievant's work performance that it has identified for improvement as noted above, it is not necessarily unreasonable for management to deny his requests to obtain the training certification needed for the Corporal position until it determines that further development outside the core responsibilities of his position is appropriate. Significantly, the evidence before EDR does not presently support a conclusion that the university's assessment of the grievant's work performance in the October 2020 evaluation and January 2021 re-evaluation is without a basis in fact or otherwise arbitrary or capricious, as noted above. In addition, we note that there is no evidence in the grievance record to suggest that the grievant has been treated differently than other similarly situated employees who have also sought to meet the certification requirements for the Corporal position in comparable circumstances. Accordingly, EDR has no basis to conclude that the university's exercise of discretion regarding the grievant's requests for training is inconsistent with management's authority to direct the affairs and operations of state government.[48] Should the grievant's work performance continue to improve, or if there are other changes in the conditions surrounding his requests for training, a future grievance raising this issue could qualify for a hearing if the university is unable to identify a legitimate business reason for its decision to deny the grievant's training request(s) or if such a grievance raises a sufficient question that the denial of training is retaliatory.

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.[49] Nothing in this ruling prevents the grievant from raising future concerns about the matters discussed in this ruling in a future timely grievance if the alleged conduct continues or worsens.[50]

EDR's qualification rulings are final and nonappealable.[51]

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[48] *See* Va. Code § 2.2-3004(B).
[49] *See Grievance Procedure Manual* § 4.1.
[50] 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.
[51] *See* Va. Code § 2.2-1202.1(5).