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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Numbers 2021-5233, 2021-5263, 2021-5264
July 13, 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 her June 18, 2020, February 7, and March 8, 2021 grievances with the Department of Corrections (the "agency") qualify for a hearing. For the reasons discussed below, these grievances are not qualified for a hearing.

FACTS

On or about June 18, 2020, the grievant filed a grievance ("Grievance 1") alleging she was experiencing a "hostile work environment" and "unprofessionalism." The grievant stated that upon arrival to the front yard at her institution, she noticed that her canine "wasn't acting himself" and "was heavily breathing and kept wanting to lay down." She alleges that she wanted to check on the status of her canine and asked the "property door to give him water and monitor him." Then the grievant stated that one of the lieutenants walked over to her, saying that she needed to "follow [his] rules and do what [he] says" and "be between 1 and 2 building" She responded to the lieutenant, asking "who are you talking to, why [are you] being disrespectful and unprofessional?" As the grievant attempted to leave in an effort to "deescalate the situation," the lieutenant yelled "if you're not gonna do your job and do as I say when I say it then you can get your dog and get out." The grievant also alleged that the lieutenant used profane language towards her during this conversation. Consequently, the grievant "called for [her] relief to come in immediately so that she could escape [his] wrath and a hostile work environment."

After the grievant reviewed the responses from the witnesses to the encounter, she alleged that she was experiencing racial discrimination since both witnesses were white males and the grievant is a black female. As relief, the grievant sought to have the lieutenant demoted, removed from post, transferred to another facility, and for the lieutenant to attend additional cultural diversity classes or training. During the management steps, the agency stated that "[a]ll witness statements were reviewed as well as in person interviews were conducted with all witnesses." The agency's investigation determined that there was a verbal exchange between the grievant and the lieutenant "regarding [her] timeliness in reporting to the recreation yards for duty." The lieutenant "denied using profanity during his verbal exchange with [the grievant], but stated that he was very

firm and direct in giving [her] instructions. During a meeting regarding the encounter, the grievant stated that the "entire . . . situation could have been handled differently" and that she "did not feel that [the lieutenant's] actions were so egregious that it warranted a demotion, transfer or removal from his assigned work duties." The grievant added that she "would not have any issues or concerns with working with or for [the lieutenant] in the future." Following the management resolution steps, the agency head declined to qualify this grievance for a hearing. The grievant now appeals to EDR.

On February 7, 2021, the grievant filed a second grievance ("Grievance 2") alleging she did not receive COVID-19 documentation. She alleged that she was not provided documentation by Human Resources ("HR") that she was "in close contact with someone who was COVID-19 positive." The grievant stated that she had yet to receive any type of documentation and believed that HR "never intended to send [her] any type of COVID-19 documentation." Following the management resolution steps, the agency head declined to qualify the grievance for a hearing. In the qualification determination, the agency admitted that it was not timely with providing written notification, but that the grievant was provided with verbal notification. As a result, the agency placed the grievant out of work for quarantine for fourteen days; her return to work date was January 6, 2021. The grievant has appealed the agency head's qualification decision to EDR.

On March 8, 2021, the grievant filed a third grievance ("Grievance 3") alleging that her leave balances were not being used appropriately and her pay was docked every day that she was scheduled to work out of the 28-day period from January 4 through January 31, 2021. On December 22, 2020, the grievant was informed by the agency that she was in close contact with a colleague who was exposed to COVID-19. Upon providing documentation, HR responded that they "[found] it hard to believe that [she] has been unable to schedule a test until 01/13/2021." HR added that the grievant's 14-day quarantine had ended and that her return to work date was January 6, 2021. The grievant stated that she sent HR a copy of her doctor's note on January 14, 2021 that took her out of work until further notice. She stated that she felt this was "medical discrimination due to the fact [she] has sent in all documentation of [her] being out of work medically and none of the benefits of being a state employee were used in this manner." As relief, the grievant requested that the HR officer be removed from the facility and "for all of legal and lawyers' fees to be covered in full regarding this manner."[1] Following the management resolution steps, the agency head declined to qualify the grievance for a hearing. The agency head stated that the grievant's short-term disability claim was approved on March 3, 2021 and she was compensated accordingly. As a result, according to the agency, the grievant's leave was correctly applied retroactively to cover the 28-day period from January 4 through January 31, 2021. Notwithstanding, the grievant has appealed that determination to EDR.

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[1] Under the grievance procedure, attorneys' fees are available as relief at hearing only in a grievance that involves a termination. *See Grievance Procedure Manual* § 7.2(e). As no termination is involved in Grievance 3, attorneys' fees would not be available to her as relief.

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.[2] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] 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 and/or capricious.[4]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] 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."[6] Adverse employment actions include agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

Finally, qualification may not be appropriate even if a grievance challenges a management action that might ordinarily qualify for a hearing. For example, an issue may have become moot during the management resolution steps, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.[8]

Grievance 1 – Hostile Work Environment

Although DHRM Policy 2.35 prohibits workplace harassment[9] and bullying,[10] alleged violations must meet certain requirements to qualify for a hearing. Like discriminatory workplace

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[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[5] *See Grievance Procedure Manual* § 4.1(b).
[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[8] *See*, *e.g.*, EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.
[9] 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."
[10] 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."

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.[11] 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.[12] "[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."[13]

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. Thus, while these terms must be read together with agencies' broader authority to manage the means, methods, and personnel by which agency work is performed, management's discretion is not without limit. Policy 2.35 also 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.[14] Accordingly, where an employee reports that work interactions have taken a harassing or bullying tone, Policy 2.35 requires agencies to determine in the first instance whether such perceptions are supported by the facts. Where an agency fails to meet these obligations, such failure may constitute a misapplication or unfair application of Policy 2.35 such that the harassing or bullying behavior is imputable to the agency.

Having thoroughly reviewed the grievance record and the information provided by the parties, EDR cannot find that the grievant has alleged facts sufficient to qualify for a hearing at this time. None of the grievant's timely allegations described in Grievance 1 involve adverse employment actions. Further, although the grievant unquestionably found the lieutenant's conduct to be subjectively offensive, the facts as alleged do not describe conduct that rises to a sufficiently severe or pervasive level to qualify for a hearing. However, nothing in this ruling prevents the

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The policy specifies that bullying behavior "typically is severe or pervasive and persistent, creating a hostile work environment."

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

[12] 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.").

[13] *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).

[14] 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 . . . ."

grievant from filing a further grievance or other complaint if the allegedly unprofessional treatment continues and/or worsens.

Grievance 2 – COVID-19 documentation

The grievant had understandable concerns with how the situation described in Grievance 2 unfolded. Nevertheless, EDR is unable to identify any adverse employment action in this case such that the matter qualifies for a hearing under the grievance statutes. Furthermore, the primary content of this grievance concerns matters that cannot be remedied, such as fixing an untimely notification or documentation. Therefore, a hearing officer would be unable to provide any effective relief if this grievance were qualified for a hearing. For example, a hearing officer does not have authority to issue disciplinary action against another employee.[15] As such, the grievance does not qualify for hearing under the grievance procedure. EDR is hopeful that because the grievant raised this concern that the agency will examine the circumstances to make any necessary improvements to notification procedures.

Grievance 3 - Misapplication/Unfair Application of Leave Policy

In Grievance 3, the grievant has essentially alleged that the agency misapplied and/or unfairly applied policy by not applying her leave balances appropriately to cover her absence from work from January 4 through January 31, 2021. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was particularly unfair as to amount to a disregard of the intent of the applicable policy.

This matter was brought to the grievant's attention when she noticed that for the period of January 4 through January 31, 2021, she was in a leave without pay status. The grievant stated that she informed HR that her doctor had taken her out of work until further notice and that she was also quarantined due to a possible exposure to COVID-19. The grievant stated that she was never contacted by HR about her leave balances and felt that when leave balances were reset on January 10, 2021,[16] they should have been applied during her absence. During this time-period, the grievant applied for short-term disability and was later informed that the administrator of the disability program needed additional documentation from the grievant's physician to approve her claim. Her short-term disability claim was approved on March 3, 2021 and her absence from January 4 through January 31, 2021 was updated to reflect the use of Public Health Emergency Leave and short-term disability. A few days later, the grievant was remunerated accordingly once the issue was rectified.

Although the grievant disagrees with the agency's handling of the matter, she has not raised a sufficient question as to whether the agency misapplied and/or unfairly applied policy or was

[15] *Grievance Procedure Manual* § 5.9(b).

[16] Pursuant to DHRM policy, a "leave year" runs from January 10 of one year through January 9 of the following year and thus certain leave balances are restored each January 10. *See*, *.e.g.*, DHRM Policy 4.52, *Public Health Emergency Leave*, at 1, 8; DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 1, 3.

otherwise arbitrary or capricious. Upon review of the circumstances presented in this case, the agency's actions regarding the grievant's leave balances and short-term disability claim were consistent with the discretion granted by policy. Accordingly, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.[17]

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[17] *See* Va. Code § 2.2-1202.1(5).