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QUALIFICATION RULING

In the matter of Norfolk State University
Ruling Number 2022-5292
September 16, 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 28, 2021 grievance with Norfolk State University (the "university" or the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

The grievant works in the university's testing center. On or about June 24, 2021, the university issued to the grievant a Group II Written Notice with a five-workday suspension for alleged failure to follow instructions and/or policy arising out of two separate incidents of alleged misconduct. Specifically, the Written Notice charged that (1) on or about June 15, 2021, the grievant violated the university's ethics policy by sharing confidential information with other university personnel via email, and (2) on or about April 15, 2021, the grievant failed to obtain approval for outside employment as required. The grievant initiated a grievance on June 28, arguing that she had been "falsely accused" of both instances of misconduct described on the Written Notice. As relief, the grievant sought removal of the Written Notice, a transfer to a different supervisor, a "career opportunity . . . commensurate with my skills, abilities, and career experience," and appropriate "compensation for that career opportunity."[1]

The second-step respondent rescinded the Group II Written Notice and recommended verbal counseling for the grievant about the importance of following instructions from management. The agency head subsequently declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

[1] According to the evidence in the grievance record, the grievant also received a Group I Written Notice in January 2021 and a Group II Written Notice in March 2021. It is unclear whether the grievant is requesting removal of these prior Written Notices in her current grievance. To the extent she is, such relief is not available through the grievance procedure because these Written Notices do not appear to have been challenged in a timely grievance. *See 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.").

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 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.[4]

Further, while grievances that allege retaliation or other misapplication of policy may qualify for a hearing, the grievance procedure generally limits grievances that qualify 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 any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7] 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."[8]

Verbal Counseling

The grievant originally received a Group II Written Notice, but the second-step respondent rescinded the discipline during the management steps. It is unclear whether the verbal counseling recommended by the second-step respondent was intended to replace the Written Notice or to be a separate management action. However, even considering the verbal counseling as a reduction of the original disciplinary action, it is a type of informal corrective action.[9] Verbal counseling is not equivalent to a Written Notice of formal discipline. A verbal 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.[10]

In her request for qualification, the grievant asserts that the university has not rescinded the Written Notice, that it does not intend to do so, and that she did not receive adequate due

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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] Va. Code § 2.2-3004(A); *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] 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)).
[9] *See* DHRM Policy 1.60, *Standards of Conduct*, at 6.
[10] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

process.[11] She also reiterates her position that she did not engage in the misconduct originally charged on the Written Notice and disagrees with the second-step respondent's description of her behavior in the second step response. While this ruling was pending, EDR contacted the university about the status of the Written Notice. The university confirmed that the Written Notice has been rescinded as directed by the second-step respondent. Though the grievant may disagree with the university's decision to issue the Written Notice, management's characterization of her behavior, and other related matters, the evidence before EDR indicates the Written Notice has been rescinded and, at most, replaced by a verbal counseling. Moreover, EDR has considered the grievant's allegations about the events that led to the issuance of the Written Notice, along with the university's subsequent decision to reduce the discipline to a verbal counseling, and finds no basis to conclude that that those actions are "adverse" for purposes of hearing qualification, either individually or collectively.

For these reasons, the grievant's claims relating to the verbal counseling do not qualify for a hearing.[12] Although the verbal counseling has not had an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against her. Should the verbal counseling grieved in this 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 the related adverse employment action.

Hostile Work Environment

In addition, the grievant alleges that the corrective action she received is part of a larger pattern of harassing and retaliatory conduct that has 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

[11] The grievant also argues that the university rescinded the Written Notice to "obstruct justice" and "allow continued harassment and bullying."

[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 they wish to challenge, correct, or explain information contained in their 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 their 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.*

[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."

(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 support of her claim, the grievant argues that her supervisor has repeatedly directed her to engage in conduct that violates university policy, and then accused the grievant of insubordination for questioning or failing to comply with the supervisor's instructions.[17] As an example, the grievant argues that the June 15, 2021 incident described on the Written Notice as a violation of the university's ethics policy actually arose out of the supervisor's allegedly improper request for confidential information, which the grievant declined to provide. The grievant further contends that other university managers have shared "misleading information," "falsely accused" her of misconduct, and made "fraudulent" statements about her behavior.

The Written Notice charged the grievant with sharing a test candidate's name through email with university personnel outside the testing center, without the candidate's permission. The university described this conduct as a violation of its ethics policy, which addresses maintaining confidentiality and security of information. The Written Notice further alleged that the grievant failed to properly complete an outside employment form after notifying her supervisor of the outside employment. Although the grievant asserts that she was falsely accused of this behavior, the second-step respondent determined that these allegations were not false. In reviewing the grievance record and in consideration of the grievant's explanations, there seems to have been a legitimate basis for the university to address at least a portion of the grievant's behavior. For example, the grievant appears to have refused to complete an outside work form when requested. The grievant also disclosed the name of a potential test-taker to a number of individuals outside of the testing center of her own volition. The grievant feels she was justified in doing so, but the university's viewpoint that there was not a business need for the disclosure is at least equally valid as well.

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[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 addition, the grievant claims that her supervisor "harasses and retaliates against . . . students and other faculty/staff," describing a situation in 2019 when the supervisor allegedly questioned students about their religious beliefs and instructed staff to assist her. Although it is unclear how this particular allegation relates to the grievant's claims about her own employment, the allegation is concerning. The grievant indicates that her supervisor directed students who wore burkas to complete a "proof of religion form" the supervisor created. It is unclear whether the university is aware of this allegation. If the university has not looked into this allegation to determine its veracity, it should do so as appropriate given that this incident allegedly occurred two years ago.

The grievant has identified two other incidents that appear to have occurred after she initiated her grievance, which she believes constitute additional harassment and retaliation. In particular, the grievant describes a situation in July 2021 when her supervisor allegedly directed her to proctor an exam for an individual who the grievant claims possessed drugs in violation of university policy;[18] the grievant states that she refused to comply with the supervisor's instruction. Similarly, the grievant states that, in August 2021, the supervisor instructed her to participate in a task that the grievant claims was "a breach of IT security," which she also refused to do. EDR has contacted the university for further information about these matters. According to the university, in July 2021, the supervisor conducted the required pre-test screening for the individual in question, found no evidence of drugs, and does not recall any conversation with this grievant about this issue. The university also clarified that the August 2021 incident described by the grievant involved the installation of assistive technology for individuals with disabilities, performed by staff with the authority to install such software.

EDR has reviewed the grievance record in its entirety, including written submissions from the grievant with additional information about the nature of her claims.[19] The grievant's primary complaints appear to center around her perception that her supervisor has instructed the grievant to violate university policy, and that the supervisor has engaged in conduct that violates university policy. The grievant seems to further argue that university management has targeted her for reporting or attempting to address these concerns involving the supervisor. Some of these events, if they occurred as described by the grievant, could constitute legitimate concerns about the supervisor's conduct. For example, it would not be appropriate for a supervisor to knowingly direct employees to engage in conduct that violates state or university policy. To the extent such issues have affected the grievant's employment through the issuance of the Group II Written Notice, that matter has been addressed as discussed above.

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 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 grievance qualifies for a hearing at this time.[20]

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[18] Nothing presented in the grievance record indicates how the grievant allegedly knew the individual possessed drugs.
[19] While this ruling was pending, the grievant contacted EDR to provide additional information about the matters raised in her grievance. The grievant provided several written responses by email instead of conducting a telephone interview with an EDR staff member. We have carefully considered the grievant's written responses along with the evidence in the grievance record.
[20] *See*, *e.g.,* EDR Ruling No. 2014-3836; *cf. Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.

In addition, the grievant appears to contend that many of the actions described above were retaliation for her raising concerns about her supervisor's conduct. A claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) they engaged in a protected activity; (2) they suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[21] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[22] Even assuming that the grievant engaged in protected activity by attempting to address alleged concerns about her supervisor's behavior,[23] the grievance record does not reflect that she has suffered an adverse employment action as described above. Further, the grievant has not identified acts or omissions that could reasonably be viewed as exceeding managerial discretion or would not have occurred but for a retaliatory motive.[24]

Accordingly, because the grievant has not raised a sufficient question as to the existence of severe or pervasive harassment, bullying, or retaliatory conduct or other adverse employment action at this time, the grievance does not qualify for a hearing on any of these grounds.[25] If the grievant experiences additional incidents of harassing or retaliatory conduct, she should report the information to the university's human resources department or another appropriate authority. DHRM 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.[26] Moreover, this ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.

Mediation

Finally, although the grievance does not qualify for a hearing at this time, mediation may be a viable option for the parties to pursue. EDR's Workplace Mediation Program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. The parties may contact

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[21] *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).

[22] *Id.*

[23] *See* Va. Code § 2.2-3000(A).

[24] 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.

[25] 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.

[26] 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 . . . ."

EDR at 888-232-3842 for more information about EDR's Workplace Mediation Program. To request mediation, an employee can contact the university's workplace mediation coordinator.

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.[27] EDR's qualification rulings are final and nonappealable.[28]

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[27] *See Grievance Procedure Manual* § 4.1.
[28] *See* Va. Code § 2.2-1202.1(5).