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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2022-5299
September 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 April 6, 2021 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On or about April 6, 2021, the grievant initiated a grievance alleging that he was the target of "workplace harassment and retaliation from senior administrators and high-level security supervisors."[1] The third-step respondent stated that he "investigated [the] issues" and "could not find any factual evidence [that] these policies have been violated by the Administrative Staff noted in your grievance."[2] The agency head subsequently declined to qualify the grievance for a hearing. The grievant now appeals that determination 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.[3] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[4] Thus, claims relating to issues such as the 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.[5]

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[1] Additional facts regarding the specifics of the situation are included in the Discussion section below.
[2] EDR requested the findings from the investigation. However, the documentation provided does not show whether or to what extent an actual investigation took place.
[3] *See Grievance Procedure Manual* § 4.1.
[4] Va. Code § 2.2-3004(B).
[5] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

Further, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."[6] 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8] 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."[9]

The grievant alleges that both he and his team have been the targets of "workplace harassment and retaliation" leading the grievant to experience an "emotional breakdown." Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment[10] and bullying,[11] 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.[12] 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.[13]

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[6] Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).
[7] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[9] 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)).
[10] 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."
[11] 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."
[12] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[13] 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

In support of his claims, the grievant cites "an incident on June 10, 2020, which marked the first overt targeting of me and members of the Intelligence team." It appears that this incident began when the Major sent a mass email instructing: "Anytime that video visits are going on it is mandatory that a member of the investigation/intelligence team must be monitoring the visits. In the event that the investigation/intelligence team is not available or during holiday or weekend times the watch commander on duty will provide an officer to accomplish this task." The grievant responded to the email explaining that an Officer had stepped away from monitoring duties only momentarily. In response, the Assistant Warden disputed the grievant's account: "I was in there way over 20 minutes so that is not briefly. I watched it myself until the computer locked up. If someone is going to be away please notify someone from training or the Watch Commander can get it covered." The Major added: "I understand that everyone has a tremendous workload. The shifts are extremely short, and with the all the offenders admitted at the hospitals if necessary some of the intelligence officer's schedules may have to be adjusted to assist with this coverage if necessary to ensure that it is done." Then, the grievant separately emailed the Warden, saying he wanted to give an "accurate report" of what occurred and that nothing had been reported to him until he received the "heavy handed email from [the Major]." The grievant elaborated: "[the Officer] initially told me he went to the restroom and then said he went earlier around that time and looked confused. With his medical issues, I expect that is normal.… After reviewing the footage, it was not exactly as reported."

The following day, the grievant met with the Assistant Warden. According to the grievant's notes, the Assistant Warden called the meeting to explain why he was "lied to" and to discuss what happened the day before regarding the "video visit situation." When the Assistant Warden "insinuated lightly that [the Officer] was being dishonest," the grievant replied that the Officer's account of events seemed truthful. The grievant also informed the Assistant Warden that he had contacted the Warden separately, at which point the grievant claims the Assistant Warden became "visibly upset" and expressed that the grievant's action showed disrespect. The grievant assured the Assistant Warden that was not his intention and stated that the meeting ended on "civil terms with both parties expressing the desire to have a good working relationship." However, the grievant alleges that, following this incident, the Warden, Assistant Warden, and others appeared to undervalue his team's work by assigning them to other operational needs and/or posts and by failing to notify his team of information necessary for their mission. The grievant felt these actions were intended to humiliate his team.

The incident that the grievant alleges preceded his "emotional breakdown" began on March 11, 2021. In an email, the grievant explained to members of management "that the facility was behind in completing . . . investigations due to post related charges that [were] out of [his] control." In response, the Assistant Warden "mandated a meeting" to "discuss additional resources for [the grievant] as well as approving overtime […] to get these investigations caught up." During the meeting, the Assistant Warden allegedly communicated that "he was not against [the grievant's team] and made [the Warden] out to be the source of all the problems." When the Assistant Warden offered to provide additional resources for the grievant's team, the grievant responded that the

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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).

Assistant Warden "had no real resources to offer and [they] could only catch up by completing each case." In a similar meeting the following day, the grievant alleges, the Major "suggested that [he] curtail [his] investigations to complete them faster" and "became more aggressive and obviously felt that [the grievant] was challenging him." The grievant then suggested involving human resources staff. Upon their arrival to the HR department, the grievant expressed that he was uncomfortable with an immediate discussion "because [the Major] was very angry and needed to calm down." The Major left; however, when the grievant then tried to share what happened during the meeting, his hands were shaking and he became "emotionally overwhelmed and began to cry." The grievant retreated to his office where he "sat down to begin sobbing," and he could not catch his breath. The Human Resource Officer followed the grievant to his office to attempt to calm him down, but became concerned and called for a Medic. The grievant continued to have breathing difficulty and "thought [he] was having a heart attack." Eventually the grievant's breathing improved, and he "left the facility and visited [his] medical provider." His medical provider removed the grievant from work. During the grievant's absence, he alleges that administrators have made changes to his team without his input and have openly discussed plans to remove him as Institutional Investigator in front of other employees.

The grievance record reflects the grievant's description of a contentious relationship with his managers in the context of work that is both difficult and stressful. However, EDR is unable to address through the grievance process the best practices of how such work is to be accomplished or whether it should be handled differently.[14] As stated above, grievances only qualify for a hearing if they raise an adverse employment action, which, in the context of a hostile work environment, means objectively "severe or pervasive" harassment, bullying, or retaliatory conduct against the grievant.[15] As a matter of state policy, 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.[16] 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 assignment of work tasks, the grievant's performance expectations, and the appropriate manner of communicating and enforcing these expectations. While Policy 2.35 requires that management exercise this authority in a civil and professional way, an employee's disagreement with the substance or tone of these communications, even if reasonable, does not in itself suggest a policy violation.

Based on EDR's review of the grievance record, the grievant has not raised a sufficient question as to the existence of such "severe or pervasive" conduct at this time. Although the grievant's account suggests significant tensions with certain members of management related to

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[14] The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government. Va. Code § 2.2-3004(B).

[15] The grievant has also alleged numerous incidents of managers harassing or otherwise mistreating the grievant's coworkers. Although management's treatment of other employees may in some circumstances be relevant to whether a hostile work environment exists for the grievant, an adverse employment action for grievance qualification purposes will generally be defined by events that "[p]ertain[] directly and personally to the employee's own employment." *See Grievance Procedure Manual* § 2.4.

[16] *See, e.g.*, EDR Ruling No. 2020-4956.

current work requirements, the record does not contain allegations that would rise to the level of severe or pervasive harassment or bullying of the grievant such that the grievance qualifies for a hearing under the grievance statutes.[17] To the extent the grievant contends that the agency is planning to officially remove him from his duties as Institutional Investigator in retaliation for his complaints about work conditions, nothing in the record indicates that the agency has actually put this change in motion or communicated with the grievant about it.[18] As a result, EDR cannot conclude that the grievant's claim of retaliation implicates an adverse employment action that has occurred at this time.[19]

Accordingly, the grievance does not qualify for a hearing on any of these grounds.[20] However, if the grievant experiences any further incidents of harassing or retaliatory conduct, he should report the information 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.[21] Lastly, this ruling in no way prevents the grievant from raising these matters in a later grievance if the alleged pattern of conduct continues or worsens.

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.[22] EDR's qualification rulings are final and nonappealable.[23]

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[17] *Compare Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.

[18] Should the grievant be removed from his duties as Institutional Investigator, such an action could be the subject of a future grievance.

[19] 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. *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). Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred. *Id.* However, the grievant's allegations regarding management's actions during his absence – *e.g.* disabling the grievant's email account in contravention of usual practices, discussing with other employees that the grievant may be removed from his role – are concerning even if they do not appear to amount to an adverse employment action. EDR encourages the agency to investigate these allegations and address them if necessary, if it has not done so already.

[20] 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.

[21] 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 . . . ."

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

[23] *See* Va. Code § 2.2-1202.1(5).

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