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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Numbers 2023-5444, 2023-5445, 2023-5446, 2023-5447
October 17, 2022

The grievant seeks a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) as to whether four grievances that she initiated with the Department of Corrections (the "agency") on April 20, 2022, qualify for a hearing. For the reasons set forth below, three of the grievances are qualified for a hearing.

FACTS

On or about April 20, 2022, the grievant initiated four grievances alleging, respectively, that four managers at her Facility had taken retaliatory actions against her for attempting to escalate personnel concerns to the agency's upper management. Until March 2022, the grievant, who held the rank of lieutenant, had served as the Facility's Institutional Training Officer (ITO), or the head of its training department. As such, she was responsible for administering and coordinating all required and discretionary training for the Facility's security employees. However, on March 23, 2022, the grievant was reassigned to work as a watch commander for security staff on night shifts, apparently on a permanent basis. Three of her four grievances challenge this reassignment. The fourth grievance relates to a two-week medical leave that the grievant began on March 24, 2022 – the day after her reassignment. According to the grievant, her need for leave was caused by the sudden reassignment, as immediately upcoming medical appointments she had scheduled around her ITO schedule now conflicted with her new night-shift schedule. On the same day that her leave period began, the Facility's human resources staff apparently arranged for the deactivation of her agency email, which the grievant alleges is not consistent with policy or practice. She claims that this action, too, was taken for retaliatory reasons.

The management resolution step respondents indicated they found no evidence of retaliation and that the grievant's lateral reassignment was consistent with agency policy and Facility staffing needs. The agency head declined to qualify the grievances for a hearing, and the grievant appealed that determination to EDR.

Since her appeal, the grievant informed EDR that she has left the Facility for another position within the agency as a probation and parole officer. She has asserted that the new position represents a demotion and pay cut from her former position, but she found these costs necessary

in order to leave the retaliatory environment at the Facility. However, the grievant claims that she has nevertheless applied to work voluntary shifts at the Facility to cover its staffing shortages and to earn extra pay on an ad hoc basis; yet Facility management has categorically rejected her application to cover short shifts on grounds that probation and parole officers are not eligible. But the grievant asserts that coverage by probation and parole officers is common and, thus, her rejection is evidence of ongoing retaliation. Although the grievant apparently does not seek a return to the Facility, she has requested relief in the form of: (1) restoration of leave she depleted to cover medical absences after her sudden reassignment, (2) a pay increase to offset the lower salary she accepted in order to leave a retaliatory work environment, (3) letters of apology, and (4) an end to any ongoing retaliation.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[1] The grievance procedure limits grievances that qualify for a hearing to those that involve "adverse employment actions."[2] An adverse employment action is defined as a "tangible employment action" constituting "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."[3] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[4] 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."[5]

Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[6] 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.[7]

Finally, qualification is not always appropriate even if a grievance challenges a management action that might ordinarily qualify for a hearing, such as when a hearing officer would not have the authority to grant the relief requested by the grievant and no other effectual relief is available.[8]

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[1] *See* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.
[2] *See id.* § 4.1(b).
[3] Ray v. Int'l Paper Co. 909 F.3d 661, 667 (4th Cir. 2018) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).
[4] Laird v. Fairfax County, 978 F.3d 887, 893 (4th Cir. 2020) (citing Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007)) (an adverse employment action requires more than a change that the employee finds "less appealing").
[5] 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)).
[6] Va. Code § 2.2-3004(B).
[7] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[8] *See*, *e.g.*, EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.

Adverse Employment Action

In general, a lateral transfer not motivated by disciplinary considerations will not rise to the level of an adverse employment action.[9] In addition, subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.[10] On the other hand, a transfer or reassignment may constitute an adverse employment action if a grievant can show that there was some significant detrimental effect on the terms, conditions, or benefits of her employment, to include effects on "opportunities for promotion or professional development."[11] Based on this standard, EDR concludes that the totality of the grievant's allegations raises a sufficient question whether she experienced an adverse employment action, satisfying the threshold requirement for hearing qualification.

In this case, there is no indication that the grievant's reassignment to a security night shift came with any changes to her rank of lieutenant, her pay, or her work facility. However, other aspects of the change appear to have constituted significantly different responsibilities and arguably did adversely affect the terms, conditions, and/or benefits of her employment. As her Facility's ITO, the grievant was a department head and member of the management team reporting to the Facility's Assistant Warden. She was responsible for overseeing the training curriculum for all new hires and current employees at the Facility, including maintaining documentation for required, pending, and completed training for corrections staff. In that role, she had two permanent direct reports in the training department, and she also served as the direct supervisor of all new hires until their initial training was complete; she also supervised the work of temporary adjunct instructors. As a requirement of the ITO position, the grievant had earned a general instructional certification, gradually added several specialized instruction certifications, and participated in ongoing continuing education to maintain those certifications.

According to the grievant, her reassignment to a security night shift meant that she was no longer a department head and, as such, no longer reported to the Assistant Warden. Instead, her new supervisor was a Major, under the Assistant Warden. Whereas she previously worked a "5-and-2" shift with more standard/regular hours as ITO, her new post as a night shift commander required her to work 12-hour overnight shifts. The grievant asserts that, because of this change and its sudden timing, immediately upcoming medical appointments she had previously scheduled around her ITO hours now conflicted with her work shifts. As a result, she had to miss work and deplete her leave balances in order to receive her medical care as scheduled. As a shift commander, she supervised any sergeants (usually four) who were also assigned to her shift, and her

[9] *See, e.g.*, Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996).
[10] Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999) (the "trivial discomforts endemic to employment" do not rise to the level of an adverse employment action); *see*, *e.g.*, Jones v. D.C. Dep't of Corr., 429 F.3d 276, 284 (D.C. Cir. 2005); James v. Booz-Allen & Hamilton, 368 F.3d 371, 377 (4th Cir. 2004); Edmonson v. Potter, 118 Fed. App'x 726, 729 (4th Cir. 2004) ("[R]equests for accommodation based on personal convenience are not actionable under Title VII.").
[11] *See Boone*, 178 F.3d at 256 ("a change in working conditions may be a factor to consider in assessing whether a reassignment qualifies as an adverse employment action"); *see, e.g.*, Maine v. Azar, No. GLR-16-3788, 2021 U.S. Dist. LEXIS 153835, at *38-422 (D. Md. Aug. 16, 2021) (reassignment could be an adverse employment action where the new position was less complicated and did not utilize the employee's professional certifications, removed the employee from their team, and changed their schedule); Fawley v. Layman, Diener, & Bontrager Ins. Agency, Inc., No. 5:17cv44, 2018 U.S. Dist. LEXIS 101896, at *10-11 (W.D. Va. June 19, 2018) (employee's transfer to a different worksite could constitute an adverse employment action where it dramatically increased their commute time, "effectively act[ing] as a schedule change").

management duties were focused on the immediate needs of the particular shift. In addition, the grievant claims that she was prohibited from conducting any further trainings at the Facility, which meant that she would not be able to meet continuing requirements to maintain her various instructional certifications. The agency has consistently confirmed that disciplinary considerations motivated this reassignment.

While a lateral reassignment would not typically constitute an adverse employment action, we must conclude that the totality of the alleged circumstances in this case raise a sufficient question whether the grievant's reassignment was more tangibly adverse than a typical lateral transfer. The change was an apparently disciplinary decision that had the effect of removing the grievant from the management team and from her area of professional expertise, lowering the rank of her supervisor, preventing her from maintaining the professional qualifications she had earned, and significantly changing her work schedule with little notice. Although none of these factors is necessarily determinative, taken together they plausibly illustrate a significant adverse change to the terms, benefits, and conditions of the grievant's employment. Accordingly, the three grievances challenging the grievant's reassignment meet the threshold standard for hearing qualification.

However, we cannot find that the fourth grievance, which challenges the deactivation of the grievant's agency email while she was on medical leave, similarly satisfies the threshold. Even assuming that the manner in which her human resources representative administered her email access was contrary to agency policy, the record does not reveal any tangible effect of the temporary email deactivation on the grievant's employment.[12] Accordingly, the fourth grievance challenging the grievant's loss of access to her agency email does not allege an adverse employment action and thus is not independently qualified for a hearing. The remainder of this ruling will address only the three grievances challenging the reassignment.

Retaliation/Discrimination

The grievant maintains that her management's reason for removing her from her position as the ITO/department head was that she attempted to escalate concerns about her staff in the training department to the regional director overseeing her Facility. She has also alleged that her removal as a department head was discriminatory, as the successor ITO chosen by her management was a male employee with less experience and fewer qualifications.

A qualifiable retaliation claim must be based on evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[13] (2) the employee suffered an adverse

[12] As the grievance proceeded through the management steps, the grievant asserted that, since filing her grievance, she again went out on medical leave for approximately four weeks. According to the grievant, her email remained activated during the entire period until three days before her scheduled return; she then lost access and was unable to use her email upon returning to work. The record does not demonstrate a justification for the agency human resources representative's action to deactivate the grievant's email in this manner, nor do we find that the action was consistent with the agency's written policy. Although the grievant's frustration about these events is understandable, we cannot find, without more, that her intermittent inability to access her agency email would constitute a significant change to the terms, benefits, and/or conditions of her employment. EDR would recommend that the agency review the conduct of the human resources representative's actions of deactivating the grievant's email account in both circumstances described in the grievance record.

[13] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the agency's grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a

employment action; and (3) a causal link exists between the adverse employment action and the protected activity – in other words, whether management took an adverse action because the employee had engaged in the protected activity.[14] If the agency presents a non-retaliatory business reason for the adverse employment action, the grievance may qualify for a hearing only if the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[15]

In this case, the three reassignment grievances present a sufficient question of whether the grievant engaged in a protected activity, because she claims she attempted to contact a director in her chain of command to express concerns related to her department and Facility management.[16] As explained above, the grievances also sufficiently allege that the reassignment was an adverse employment action. Therefore, the grievances may qualify for a hearing if they allege facts to support a sufficient causal connection between the grievant's protected activity and the subsequent adverse employment action.

To summarize the grievant's allegations of retaliation, she had been attempting to manage continuing performance issues with both of her direct reports for more than a year. One supervisee in particular consistently failed to follow her supervisory instructions. The grievant kept her superiors apprised of her concerns during this time, verbally and via emails and texts. The grievant claims that, in February 2022, she heard a rumor that she was going to be removed from the training department. She expressed concern about the rumor to the Warden, who told her it was baseless because she was "doing a great job." In March 2022, the grievant prepared three notices of improvement needed and one Written Notice to issue to her staff. The documents required review and approval by her supervisor, the Assistant Warden. Beginning on March 3, 2022, she attempted several times to obtain the Assistant Warden's signature, but each time he told her they would meet later. Beginning on March 4, 2022, the grievant also sought the assistance of the Warden in processing the disciplinary actions, but he deferred to the Assistant Warden.

On March 17, 2022, having been unable to meet with her Facility managers, the grievant alleges she called the Regional Operations Director overseeing her Facility to request a "confidential meeting" regarding the ongoing disciplinary issues with her staff. The Director's secretary informed the grievant that the Director was in a meeting and would call her when he was available. The grievant alleges that, within minutes, the Assistant Warden – who was personally in the meeting with the Director – called her to inquire if she needed anything. The Assistant Warden said they would arrange to meet the following week.

The grievant alleges that, on March 23, 2022, the Assistant Warden called her to a meeting with himself and the Major. The grievant believed the meeting would be about the disciplinary

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governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).

[14] *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 raise a sufficient question as to whether, but for the grievant's protected activity, the adverse action would not have occurred. *Id.*

[15] *See id.*

[16] State law mandates that employees of the Commonwealth "shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Va. Code § 2.2-3000.

documents she had been attempting to finalize. However, the Major informed the grievant that he would be leading the meeting. He announced that she would now be under his direct supervision and that, as her new supervisor, he was reassigning her to a security shift effective March 28 because he had heard negative reports about her performance as head of the training department. However, the Major did not share further specifics. According to the grievant, the managers also declined to approve the disciplinary documents she had prepared.

The grievant claims that, in a later discussion about her reassignment, the Major offered a vague statement that he had made a "rash decision" to remove the grievant based on a complaint by a "vindictive employee," who the grievant understood to be the subordinate against whom she had been seeking disciplinary action. Nevertheless, the Major indicated that the grievant's assignment was not within his control to change. Meanwhile, the grievant alleges, the Assistant Warden began to avoid interacting with her (*e.g.* walking the other way when she approached, making a point to greet every lieutenant in a room except for her).[17]

The agency has disputed the grievant's claims of retaliation and discrimination.[18] Management at the grievant's former facility maintains that, due to "complaints" about the grievant, she was reassigned "in lieu of discipline," and also because her level of experience was needed as a watch commander on security shifts. In addition, the Warden and Assistant Warden have both disclaimed any knowledge of the grievant's concerns about her subordinates' performance. As to ongoing volunteer staff coverage opportunities, the agency asserts that probation and parole officers such as the grievant are called upon as staffing support only as a last resort.

Although the disciplinary and operational reasons the agency has offered for the grievant's reassignment are facially legitimate, we conclude that the grievant has articulated sufficient allegations to call those reasons into question. First, although the grievant's managers have consistently indicated that some form of disciplinary action against the grievant was warranted, the agency has not described any specific performance concerns that might have justified discipline and/or reassignment. Second, the timing of the grievant's reassignment arguably supports her claim of retaliation: it occurred shortly after an incident where Facility managers apparently became aware that the grievant was attempting to meet independently with the Regional Director – their own manager. Third, the reassignment occurred shortly after the Warden allegedly reassured the grievant that she would not be reassigned because she was doing "a great job."[19] Fourth, the grievant was apparently succeeded as ITO by an employee with less experience and fewer qualifications. Fifth, the grievant alleges that she was prohibited from any further participation in training at the Facility, which prevented her from maintaining her instructor certificates. Although these allegations may be in dispute, the totality of circumstances they describe raises a sufficient question whether the grievant would not have been removed from her specialized management role as ITO, but for her attempt to raise concerns to upper management outside the Facility.

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[17] Such actions, if they occurred, could fall within the scope of conduct prohibited by DHRM Policy 2.35, *Civility in the Workplace*. The grievant alleges that the work environment she experienced after attempting to contact upper management was consistently hostile, leading to stress-induced medical problems and ultimately to her decision to seek a new position at a different worksite.

[18] The extent to which the agency investigated the grievant's allegations is not apparent from the record.

[19] The grievant's most recent annual performance evaluation noted an overall rating of Exceeds Contributor.

For similar reasons, we conclude that the grievant's related claim of discrimination also qualifies for a hearing. DHRM Policy 2.05, *Equal Employment Opportunity*, requires that "all aspects of human resource management be conducted without regard to race (or traits historically associated with race including hair texture, hair type, and protective hairstyles such as braids, locks, and twists), sex, color, national origin, religion, sexual orientation, gender identity or expression, age, veteran status, political affiliation, disability, genetic information, and pregnancy, childbirth, or related medical conditions." For a claim of discrimination on any of these grounds to qualify for a hearing, the grievance must present facts that raise a sufficient question the agency's proffered justification for taking an adverse employment action was a pretext for discrimination.[20]

As described above, the grievances raise several questions about the agency's proffered reasoning for the grievant's removal as a department head. In addition, it is undisputed that the grievant was permanently replaced as ITO by a male employee with less experience and fewer qualifications. Even assuming that, due to staffing shortages, the grievant's experience was more valuable on security shifts than that of the male employee, it is not apparent from the record why the grievant's reassignment was permanent, such that she was prohibited from conducting trainings to maintain her certifications. Because the agency's motive for reassigning the grievant is not clear from the record and because her membership in a protected class cannot be excluded from the analysis, a hearing officer would be best positioned to evaluate evidence on that issue and determine whether the grievant's protected status as a female employee was a motivating factor in her reassignment.

Finally, although the grievant has now left the Facility due to the retaliation she perceived, the issues raised by the grievances are not necessarily moot. To remedy proven claims of discrimination and/or retaliation, hearing officers have authority to "order the agency to create an environment free from discrimination and/or retaliation, and to take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence."[21] Although she now works in a different role, she continues to be an agency employee and has indicated that she seeks to restore certain terms, conditions, and benefits of her employment to what they would have been absent the alleged retaliation. For example, she seeks restoration of leave benefits that she would not have had to use but for her reassignment. In addition, she seeks pay at the level she earned as an ITO at the Facility. She has also requested an end to ongoing retaliation, including any retaliatory exclusion from the Facility's pool of volunteers for staffing coverage. As these categories of relief would be within the hearing officer's authority to grant if the grievant prevails, the issues in the grievances would appear to be susceptible to remediation at a grievance hearing, even if the grievant does not return to her former position at the Facility.

CONCLUSION

In sum, the three grievances challenging the grievant's reassignment present a sufficient question whether the Facility's managers removed the grievant from her role as a department head for retaliatory and/or discriminatory reasons. Thus, those grievances qualify for a hearing. The grievances qualify in full, including any alternative related theories raised by the grievant to challenge her reassignment as a retaliatory, discriminatory, or other unfair application of policy.

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[20] *See Strothers*, 895 F.3d at 327-28; *see*, *e.g.*, EDR Ruling No. 2017-4549.
[21] *Rules for Conducting Grievance Hearings* § VI(C)(3).

At the hearing, the grievant will have the burden to prove that her reassignment was improper and also to establish the appropriateness of any applicable remedies.[22] Although the fourth grievance relating to deactivation of the grievant's email is not independently qualified for a hearing, that determination does not prevent the grievant from presenting evidence regarding those allegations to the hearing officer, if relevant to the issues in the three qualified grievances.

Within **five workdays** of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear the claims qualified for hearing, using the Grievance Form B. The parties are advised that this ruling is not intended to prevent or discourage them from resolving the underlying issues outside the context of a hearing. Should the parties wish to pursue resolution of the issues herein prior to a hearing date, EDR is available to assist in such any efforts as desired and appropriate.

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

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[22] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(C).
[23] *See* Va. Code § 2.2-1202.1(5).