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QUALIFICATION and CONSOLIDATION RULING

In the matter of the Virginia Community College System
Ruling Numbers 2024-5656, -5679, -5683
April 15, 2024

This ruling addresses whether a dismissal grievance filed with a community college that is part of the Virginia Community College System (the "agency" or "college"), which is currently pending for a hearing, may be consolidated with three grievances dated October 12, 2023 ("First Grievance"), December 1, 2023 ("Second Grievance"), and February 1, 2024 ("Third Grievance"). This ruling also addresses the grievant's requests for each of those three grievances to qualify for a hearing. For the reasons discussed below, the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) finds that while the First Grievance does not qualify for a hearing, the Second and Third Grievances qualify in full, and consolidation of these two grievances with the dismissal grievance for a single hearing is appropriate and practicable. EDR also finds that evidence in relation to the First Grievance can be discussed and considered in the hearing as background information for the other qualified grievances to the extent it is determined relevant by the hearing officer.

FACTS

The grievant worked for the college as an Events and Conferences Coordinator. The grievant initiated a grievance on or about October 12, 2023, challenging a variety of issues and behavior that had occurred in her workplace since early 2022, alleging bullying and a hostile workplace environment against her supervisor, disputing the fact that she was not selected for an interview for a position she applied for in July 2023, and disputing the validity of a Performance Improvement Plan ("PIP") that was issued to her on or about September 13, 2023. While the timeline provided by the grievant includes great detail as to her hostile work environment claim, a substantial portion of the behavior the grievant cites relates to a wedding on May 20, 2023 that the grievant was responsible for helping plan, as well as a transcribed account of a meeting the grievant had with her supervisor following the September 13 PIP. According to her First Grievance, the grievant primarily challenges the September PIP. She argued that she has been subjected to increased scrutiny of her performance, leading to a "Substandard" performance notice, with an accompanying PIP that included situations that had "occurred prior to [her] October 2022 [annual performance evaluation]." As relief, she sought the removal of the September 13, 2023 PIP, a formal apology in writing, and a change in her department's reporting structure. On or about January 4, 2024, the agency head denied qualification for a hearing as to the First Grievance.

On November 1, 2023, the grievant received a "Below Contributor" rating on her 2023 annual performance evaluation. She added that she received "very little coaching or counseling" from her supervisor during the time between her recent PIP and this evaluation. In response to this evaluation, on December 1, she filed her Second Grievance on the basis that the annual evaluation was not done in good faith, while also alleging retaliation by her supervisor in response to the filing of the First Grievance. As relief, she requested her "Below Contributor" rating change to a "Contributor" rating, the ability to receive a state-mandated raise pursuant to the removal of the "Below Contributor" rating, removal from working under her upper management, and reimbursement for attorneys' fees. On or about February 22, 2024, the agency head denied qualification for a hearing as to the second grievance.

On or about February 1, 2024, the grievant filed a Third Grievance with the agency challenging her receipt of a Group II Written Notice for failure to follow instructions or policy, dated January 30, 2024. The January 30 Written Notice claimed that the grievant was assigned to an inventory project dated January 3, but never completed it after several weeks. The grievant argued in her subsequent grievance that she was unable to complete the inventory project due to "safety issues" within the relevant location and that her supervisor knew of this complication, in addition to a variety of other factors, such as her coworker being out of the office for much of the month of January and inclement weather affecting her office's hours of operation. As relief, the grievant requested the removal of the Written Notice, in addition to the outstanding relief requested in the prior two grievances. The agency head partially qualified the Third Grievance for a hearing.

On March 1, 2024, the grievant was given a "Below Contributor" rating on her three-month reevaluation. In that same meeting, the grievant was given a notice of termination and an opportunity to rebut within 36 hours. However, on March 6, 2024, the grievant's employment was terminated. On March 25, the grievant submitted a dismissal grievance to EDR. The agency subsequently submitted to EDR a Grievance Form B, and that grievance is currently pending for the appointment of a hearing officer. (Case Number 12114). The agency has also requested that the previous three grievances, all of which are currently pending qualification, be reviewed to determine if any included items should be consolidated into the same hearing for the dismissal grievance. The grievant likewise wants the previous grievances to be consolidated to the fullest extent possible.

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

[1] *See Grievance Procedure Manual* § 4.1.
[2] Va. Code § 2.2-3004(B).

discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[3] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action in its totality was so unfair as to amount to a disregard of the applicable policy's intent.[4]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] Thus, typically, 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]

Qualification of First Grievance

Non-Selection of Posted Position

As a preliminary matter, the grievant's non-selection for a position she applied for cannot qualify for a hearing due to being untimely. The grievant applied for the Director of the Educational Foundation position on July 15, 2023. It appears that, sometime before the end of August 2023, she found out that she was not selected for an interview. She filed her first grievance on October 12, 2023, well after the 30-calendar-day window for grieving that job application.[9] For that reason, and absent any just cause for delay in the filing of the first grievance, the issue of the grievant's non-selection cannot be considered for qualification in this ruling.

Performance Improvement Plan/Notice of Improvement Needed

The grievant also claims that her September PIP was based on metrics that are "not measurable" and that increased scrutiny was placed on her PIP compared to other coworkers' performance evaluations, and for that reason, the PIP was unjustified and must be removed from

[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[4] *See, e.g.*, EDR Ruling No. 2020-4956.
[5] *See Grievance Procedure Manual* § 4.1(b).
[6] 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)).
[7] 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").
[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 Grievance Procedure Manual* § 2.2.

her file. The PIP in question outlines a list of tasks for the grievant to complete, either by the date on which the PIP was reviewed with the grievant or within the coming weeks. The record also appears to show that an updated PIP was provided to the grievant sometime after the original PIP was reviewed with the grievant, with much of the original tasks for improvement remaining the same.

A performance improvement plan (in the form presented here) is an example of informal supervisory action, similar to written counseling.[10] Written counseling would generally not constitute an adverse employment action because such management actions, in and of themselves, do not have a significant detrimental effect on the terms, conditions, or benefits of employment. Because there is no adverse employment action regarding the issue of the grievant's September PIP, the First Grievance does not qualify for a hearing on this basis.

Bullying/Hostile Work Environment

The First Grievance also encompasses claims of bullying and a hostile work environment created by the grievant's supervisor. Although DHRM Policy 2.35 prohibits workplace harassment[11] and bullying,[12] alleged violations must meet certain requirements to qualify for a hearing. Harassment, bullying, or other prohibited conduct 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;[13] and (3) imputable on some factual basis to the agency.[14]

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[10] *See* DHRM Policy 1.60, *Standards of Conduct*, at 6-7 (distinguishing between "counseling" such as written memoranda or notices of improvement needed and "disciplinary actions," typically via formal Written Notice).

[11] 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."

[12] 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."

[13] The grievant must show that he or she perceived, and an objective reasonable person would perceive, the environment to be abusive or hostile. 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)). "[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).

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

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. 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. Specifically, "[a]gency managers and supervisors are required to: [s]top any prohibited conduct of which they are aware, whether or not a complaint has been made; [e]xpress strong disapproval of all forms of prohibited conduct; [i]ntervene when they observe any acts that may be considered prohibited conduct; [t]ake 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 . . . ."[15] When 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.

In support of her claims of bullying and a hostile work environment, the grievant described a wide range of previous management and supervisory actions that she believes were improper, including alleged irregularities with her performance evaluations and feedback, usually involving claims and evidence of micromanaging, and being reprimanded for not adequately performing certain aspects of her duties. The grievance record cites events that primarily occurred throughout 2022 and 2023 as examples of management actions that the grievant asserts are part of the pattern of allegedly harassing behavior.

While much has occurred since the filing of the First Grievance, qualification of the First Grievance can be based only on events that occurred prior to that First Grievance being filed. Upon review of the allegations up to October 12, 2023, EDR cannot conclude that the status quo at that time could reasonably rise to the level of a hostile work environment that may qualify for a hearing. In summation, EDR concludes that the First Grievance does not raise a sufficient question whether the grievant had experienced an adverse employment action as of that date and, thus, it does not qualify for a hearing. However, due to the overlapping nature of the facts of each of the three grievances, the relevant facts as to the First Grievance may still be considered, regardless of non-qualification, by the hearing officer as to those matters that do proceed to the hearing based on this ruling.

Qualification of Second Grievance

The Second Grievance hinges primarily on the assertion that the November 1, 2023 annual evaluation, which resulted in a "Below Contributor" rating, was not implemented in good faith. According to the grievant, the annual evaluation presented was "almost identical" to the PIP she was given on September 13. Similar to her complaints regarding the September PIP, she alleges that much of the basis for the "Below Contributor" rating relies on assertions regarding the grievant's work that she does not find accurate. The grievant also alleges that this evaluation and

[15] DHRM Policy 2.35, *Civility in the Workplace.*

rating demonstrate ongoing retaliation in response to the filing of the First Grievance, and that she received "very little coaching or counseling from her supervisor" during the time between the September PIP and the annual evaluation. Conversely, the agency attests that there is no evidence of bad faith, supported by the fact that her supervisor identified areas where she improved since the September PIP, that the grievant's performance over the entire year was considered, and that "[s]ub-par work identified in an employee's [PIP] does not exempt the information in the [PIP] from being considered in a review of the employee's overall performance for the year."

The grievant argues that the performance evaluation was the result of retaliation because of the First Grievance. 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.[16] If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[17] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[18]

The "Below Contributor" rating alone qualifies as an adverse employment action. EDR has consistently recognized that unsatisfactory annual performance evaluations amount to tangible actions affecting the terms, benefits, or conditions of employment.[19] We further find that there is a sufficient question raised as to the grievant's retaliation claim. The grievant's allegations accompanied by the record do suggest that the workplace environment had worsened since the filing of the First Grievance. While the agency asserts that the grievant's supervisor has continued to attempt to work and communicate with her in a productive manner, the responses via the management steps offer little to no feedback as to the grievant's specific allegations, nor does it appear that the college conducted an investigation into the matter. Also, much of the alleged retaliation overlaps with the facts regarding the re-evaluation leading to the grievant's termination, which automatically qualifies for a hearing by itself. EDR therefore finds that it would be best for this issue of ongoing retaliation to proceed to the hearing for a full consideration of the evidence related to the grievant's claims and defenses. For the foregoing reasons, EDR qualifies the second grievance for a hearing in full.

Qualification of Third Grievance

The Third Grievance, filed on or about February 1, 2024, challenges a Group II Written Notice issued to her on January 30, 2024, for failure to follow instructions or policy. She alleges

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[16] *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).
[17] *See*, *e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[18] *Id.*
[19] According to state policy, receiving a "Below Contributor" overall rating on an annual performance evaluation triggers a mandatory re-evaluation process that can potentially conclude with the employee's termination if their performance does not improve within three months. *See* DHRM Policy 1.40, *Performance Planning and Evaluation*; *see*, *e.g.*, EDR Ruling No. 2017-4413; EDR Ruling No. 2017-4389.

that the Written Notice is further evidence of ongoing retaliation by her supervisor in response to the First and Second Grievances. Specifically, she argues that she was not able to complete the inventory project at issue because of "safety issues" within the location of the project, in addition to other factors that inhibited her ability to follow her supervisor's instructions.

Per the Grievance Procedure Manual, grievances based on formal discipline, such as Written Notices, automatically qualify for a hearing.[20] While the agency head appears to have qualified this portion of the grievance for a hearing, the other "issues" the grievant listed in her grievance were not qualified for a hearing. However, EDR's review of these "issues" indicates that they are not independent claims, but rather reasons why the grievant is challenging the Group II Written Notice. When a grievance about a disciplinary action proceeds to a hearing, the grievant is entitled to raise all claims and arguments as to that Written Notice. On that basis, EDR concludes that the Third Grievance qualifies for a hearing in full.

Consolidation

Approval by EDR in the form of a compliance ruling is required before two or more grievances may be consolidated into a single hearing. Moreover, EDR may consolidate grievances for a hearing without a request from either party.[21] EDR strongly favors consolidation and will consolidate grievances when they involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.[22]

EDR finds that consolidation of the Second and Third Grievances with the pending dismissal grievance (Case Number 12114) is appropriate. These grievances involve the same grievant and appear likely to share common themes, claims, and witnesses. The grievances relate to conduct by the grievant that resulted in similar and/or related disciplinary actions leading to her termination. Further, we find that consolidation is not impracticable in this instance and is more efficient than requiring all participants to prepare for three separate hearings. As the matters have also occurred relatively closely in time, we conclude that these considerations are well within the "limited circumstances" that may merit consolidation after a hearing officer has been appointed.[23]

While the First Grievance does not qualify for a hearing and therefore will not be consolidated with the other grievances for resolution by the hearing officer, EDR finds that due to the significant overlap in relevant facts and evidence between all of the grievances, evidence from the First Grievance may still be considered at the hearing as background information to the extent the hearing officer deems such evidence relevant to the matters qualified as independent issues.

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[20] *Grievance Procedure Manual* § 4.1(a).
[21] *Id.* § 8.5.
[22] *See id.*
[23] *See Grievance Procedure Manual* § 8.5.

For the reasons described above, the pending dismissal grievance is consolidated with the Second (December 1, 2023) and Third (February 1, 2024) grievances, which are both qualified in full, for a single hearing.[24]

EDR's rulings on qualification and consolidation are final and nonappealable.[25]

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[24] Pursuant to the fee schedule established by EDR's Hearings Program Administration policy, consolidated hearings shall be assessed a full fee of $5,000 for two consolidated grievances, and an additional fee of $500 for each additional consolidated grievance. *See* EDR Policy 2.01, *Hearings Program Administration,* Attach. B.
[25] *See* Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).