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***Department Of Human Resource Management***

***Office of Employment Dispute Resolution***

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## QUALIFICATION RULING

In the matter of the Virginia Employment Commission
Ruling Number 2024-5697
June 21, 2024

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) on whether her February 22, 2024, grievance with the Virginia Employment Commission (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

### FACTS

On or about February 22, 2024, the grievant initiated a grievance alleging a "hostile and divisive work environment" that was perpetuated by her supervisor. She alleged that her supervisor made false accusations about her in a Letter of Intent (initially intending a Group II Written Notice) and a subsequent Written Counseling Memorandum. She also alleged that her supervisor has intimidated her, refused to provide her necessary support, and hampered and interfered with her while doing her job.

Specifically, the basis of the Letter of Intent revolved around the supervisor's finding that the grievant continued to email a former coworker ("Coworker") about work-related duties against her supervisor's directions. The supervisor states that the grievant was told on December 5, 2023, that beginning January 1, 2024, Coworker would no longer work in the grievant's unit. Despite this, the grievant continued to email Coworker about a unit report that needed to be completed. The supervisor met with the grievant on February 1, which allegedly led to the grievant "repeatedly raising [her] voice to [her supervisor], repeatedly yelling while meeting with [her]."[1] The Letter adds that after the meeting, the grievant apparently called a meeting with several staff, including Coworker, to discuss the unit report without first notifying the Coworker's manager.

[1] The supervisor mentioned in her step response that after this one-on-one meeting with the grievant, because the door was open, "[n]umerous … employees came to [her] afterwards to see if [she] was ok and to share that they could hear the conversation between [them] and they found the way [the grievant] spoke to [the supervisor] very disrespectful." However, EDR cannot find documentation of this in the step responses, and it does not appear that these employees were further questioned in any way.

Conversely, the grievant argued in her rebuttal to the Letter of Intent that she never sent any emails to Coworker related to the unit reports after January 1 – only emails related to transition meetings and "some work-related information." She argued that because of severe staff shortages within her department, coupled with the supervisor not assisting her with the shortage, she felt it necessary to meet with Coworker and other unit staff extensively to assist in Coworker's transition out of the unit. Among these meetings was one set for February 1, the same meeting that the supervisor mentioned in the Letter of Intent. That same day, before the staff meeting, the grievant decided to meet with her supervisor to discuss how she would be able to provide any staffing support to help the unit get through the transition.

In the meeting, among other suggestions for assistance, the grievant asked the supervisor if she would let Coworker assist in the transition "a couple hours a day within the next couple of weeks" so that the mentioned report could be completed on time. When the supervisor denied this request and the grievant then suggested consulting the Commissioner's office, the grievant stated that her supervisor "became extremely angry with [her], and [they] both started to talk loudly."

The supervisor ultimately issued the grievant a Written Counseling Memorandum, instead of a Group II Written Notice, primarily based on mitigating circumstances of length of service, performance, past conduct, and the nature of the offense. Following this, the grievant filed the grievance at issue in this ruling in which she reiterated most of her arguments in her Letter of Intent rebuttal, arguing that she never sent emails to, or instructed Coworker to, complete any reports for the unit after January 1, that the February 1 staff meeting was scheduled ahead of time, and that her supervisor has been contributing to a hostile work environment by making false statements and making "inappropriate and disrespectful remarks" during their February 1 meeting. She added that during the February 1 meeting, her supervisor entered without knocking and had Coworker leave with her, and that the other staff members in the room questioned her supervisor's actions.[2]

During the management steps, the agency respondents concluded that the grievant's charges of workplace civility violations had been adequately addressed or were unfounded. The supervisor, acting as the first step respondent, stated that she "did not yell at [her] during the meeting, nor did [she] make inappropriate or disrespectful remarks to [her]." The consolidated second and third step response also stated that the grievant and the supervisor were interviewed and Human Resources was consulted, that the Counseling Memorandum would be reconsidered in 90 days (no later than June 29, 2024), that Human Resources was asked to offer mediation to the grievant and supervisor, and that the agency would continue to address staffing shortages "to the extent [they] can within [their] limited resources." The agency head declined to offer further relief or to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

[2] The supervisor responds in her step response that she knocked on the grievant's door and respectfully told the grievant that she needed something from the Coworker.

## 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] The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action that could be remedied by a hearing officer. An adverse employment action involves an act or omission by the employer that results in "harm" or "injury" to an "identifiable term or condition of employment."[5] 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."[6]

Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[7] 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 or agency policy may have been misapplied or unfairly applied.[8] 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.[9]

As an initial matter, the counseling memorandum received by the grievant does not rise to the level of an adverse employment action. Such written counseling is an example of informal supervisory action. It is not equivalent to a written notice of formal discipline.[10] Written 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.[11] Because the counseling memorandum does not raise a sufficient question as to whether the grievant has experienced an adverse employment action, the grievance does not qualify for a hearing on this basis.[12]

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[3] *See Grievance Procedure Manual* § 4.1.
[4] *See id.* § 4.1(b); *see* Va. Code § 2.2-3004(A).
[5] *See* Muldrow v. City of St. Louis, 144 S. Ct. 967, 974 (2024) (addressing a required element of a Title VII discrimination claim); *see, e.g.*, Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998) (defining adverse employment actions under Title VII to include "tangible" acts "such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits").
[6] 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)).
[7] Va. Code § 2.2-3004(B).
[8] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[9] *See, e.g.*, EDR Ruling No. 2020-4956.
[10] *See* DHRM Policy 1.60, *Standards of Conduct*.
[11] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[12] Because the issue before EDR is whether this grievance qualifies for a hearing, our ruling does not address the merits of the counseling memorandum. We observe that, although the counseling memorandum has not had a tangible adverse effect on the grievant's employment at this time, it could be used to support a future adverse employment

In the absence of any other alleged adverse employment action, this grievance may qualify for a hearing only if it raises a sufficient question as to whether the grievant has experienced a hostile work environment that meets the threshold qualification requirement.

*Hostile Work Environment*

Alleged Inappropriate Behavior by Supervisor

Although DHRM Policy 2.35 prohibits workplace harassment[13] and bullying,[14] 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;[15] and (3) imputable on some factual basis to the agency.[16] As to the second element, the grievant must show that they perceived, and that an objective reasonable person would perceive, the environment to be abusive or hostile.[17]

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action against the grievant. We encourage the parties to continue dialogue on the issues brought about in the memorandum and the grievance as necessary. Should the counseling memorandum later serve to support an adverse employment action, such as a formal Written Notice or an annual performance rating of "Below Contributor," this ruling does not prevent the grievant from contesting the merits of these issues through a subsequent grievance challenging such a future related adverse employment action.

[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."

[15] 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).

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

[17] 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

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 . . . ."[18] 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.

The grievant argues that her supervisor acted in an inappropriate manner towards her in a one-on-one meeting that took place on February 1, followed by acting in a similar manner when she allegedly interrupted a staff meeting held by the grievant later that day. After a thorough review of the facts, EDR cannot find that an objective reasonable person would perceive the described environment to be abusive or hostile. While it is certainly concerning, if true, that the supervisor raised her voice and acted in a rude, disrespectful, or inappropriate manner towards the grievant, a singular instance under these facts would not be a sufficient basis to find that the supervisor's conduct is severe and pervasive. Regardless, the agency seems to have satisfied its affirmative obligations to intervene, express strong disapproval of any forms of prohibited conduct, and take immediate action to eliminate any hostile work environment. The agency has affirmed in its step responses that it interviewed both the grievant and the supervisor and consulted Human Resources on the matter, resulting in no findings of a hostile work environment. The agency also requested that Human Resources offer mediation as a method to resolve the hostility between the parties. Although we strongly encourage the agency to appropriately investigate any current and future claims of a hostile work environment by a supervisor, we cannot conclude at this time that the grievant's allegations, without more, are so severe or pervasive to exceed management's discretion and rise to the level of a hostile work environment or other harm or injury to an identifiable term or condition of her employment such that they qualify for a hearing under the grievance statutes.

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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).

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

Alleged False Statements by Supervisor

The grievant also states that her supervisor is contributing to a hostile work environment by making false statements in the Letter of Intent and subsequent Written Counseling Memorandum, specifically statements about the communications between the grievant and Coworker about unit-related tasks. It appears, after a review of the record, that the grievant did indeed email Coworker on multiple occasions after January 1, against the supervisor's directions. However, the grievant argues that the subject of the emails sent did not involve requesting Coworker to complete unit-related tasks, as her supervisor claimed. In her first step response, the supervisor stated that the grievant was in fact involving Coworker in unit meetings and work assignments, against her specific directions. Conversely, the grievant argued in her subsequent response that her emails to Coworker were sent "to facilitate and coordinate the effort to ensure continuity and smooth transition of the work from [Coworker's] old job." The grievant emphasized the circumstance of the agency's staffing shortage, coupled with Coworker leaving her department, and how it was necessary to request aid in the transition, given that she allegedly requested aid from her supervisor and was denied.

Although EDR sympathizes with the grievant's position, given the staffing shortages of the agency along with Coworker's absence adding to the grievant's workload, EDR must defer to the agency's broader authority to manage the means, methods, and personnel by which agency work is performed. While this authority is not without limit, Policy 2.35 is not intended to constrain agency management's general discretion to determine, among other things, the duties assigned to specific staff to complete, or its judgment and preferred approach to how staffing shortages and transitional work should be handled and dispersed. Accordingly, even if the grievant is correct in clarifying that she is only asking Coworker to indirectly assist in the transition, the grievant's supervisor nonetheless has the authority to dictate to whom the grievant may send emails and what tasks the grievant may ask of other agency employees. For the foregoing reasons, EDR concludes that this grievance does not raise a sufficient question as to whether the grievant has experienced an adverse employment action and, thus, it does not qualify for a hearing.

*Recommendations*

This ruling determines only that the grievance does not meet the statutory requirements to qualify for an administrative hearing. That said, EDR observes that the grievant is uncomfortable with the perceived hostility by her supervisor in this matter, and nothing in this ruling should be read to foreclose the grievant's ability to file a subsequent grievance addressing new developments related to any of these issues in the future. To the extent that these continuing issues give rise to an adverse employment action, a subsequent grievance could qualify for a hearing on that basis. Conversely, EDR encourages the agency to engage in continuing discussions with the grievant regarding the issues of staffing shortages, assignment of duties, and any concerns of a hostile work environment, consistent with the commitment required by DHRM Policy 2.35.

EDR's qualification rulings are final and nonappealable.[19]

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[19] *See* Va. Code § 2.2-1202.1(5).