JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of the Virginia Department of Health
Ruling Number 2024-5649
February 27, 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 July 24, 2023 grievance with the Virginia Department of Health (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On or about July 24, 2023, the grievant initiated a grievance alleging a "hostile and toxic work environment" that was perpetuated or condoned by her managers. According to the grievant, she had been raising concerns to her managers about her role within her department since at least February 2023, if not before. Her concerns included that management assigned her other employees' duties and undermined her ability to supervise her own subordinates. She also alleged that her direct reports engaged in persistent bullying and other inappropriate behavior toward her as well as each other.

The agency had filled the position of the grievant's Supervisor in late February 2023. Over the following months, the Supervisor[1] counseled and reprimanded the grievant regarding her working relationship with her colleagues. This counseling included a written memorandum issued on May 25, 2023. Also in late May, following ongoing discussions about the grievant's workload, the grievant's district director informed the grievant of her intention to reassign her to a position for which the grievant insisted she was not qualified. As tensions increased with respect to the grievant's work assignments, her interactions with the Supervisor, and an investigation into reported civility violations by the grievant, in June 2023 she began a period of short-term disability for "health problems directly relating to [her] job" at the agency. During her disability period, the grievant filed her grievance seeking relief including third-party review, further investigation, protection against retaliation, six-month check-ins, and a return to her former duties.

[1] The individual who was the grievant's "Supervisor" for purposes of the issues raised in the grievance is no longer her direct supervisor. For purposes of this ruling, we will refer to this individual as the "Supervisor" even though they are a now former supervisor.

During the management steps, the agency respondents concluded that the grievant's charges of workplace civility violations had been adequately addressed or were unfounded, and that legitimate operational reasons existed to provide counseling and reassign her duties. The agency head granted relief in the form of conducting interviews with the relevant parties requested by the grievant and providing her the subsequent investigation report, but declined to offer further relief or 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.[2] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] Thus, claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[4] 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.[5]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] 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."[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]

---

[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[5] *See, e.g.*, EDR Ruling No. 2020-4956.
[6] *See Grievance Procedure Manual* § 4.1(b).
[7] 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)).
[8] 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").
[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)).

As an initial matter, EDR concludes that neither the counseling memorandum received by the grievant nor her increased work assignments rise to the level of an adverse employment action at this time. As to the May 25 counseling memorandum, 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]

In addition, EDR cannot find that the grievant's increased responsibilities are so significantly different from her employee work profile that they could constitute an adverse employment action. According to the grievant, the May 2023 plan to reassign her is not moving forward. Instead, the grievant's objections focus on increased workload due to her department's staffing problems, apparently including vacancies in two positions reporting to the grievant as well as the position that would supervise her. Although the grievant's frustration at covering the responsibilities of multiple employees is understandable, lateral reassignments not motivated by disciplinary considerations generally will not rise to the level of an adverse employment action, and subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.[13] Such indications could include a "decrease in compensation, job title, level of responsibility, or opportunity for promotion."[14] In this case, the grievant appears to argue that she is tasked with *more* responsibility than is supported by her employee work profile, characterizing the situation as "performance punishment."[15] Even if the grievant subjectively experiences these increased responsibilities as adverse, the record does not

---

[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 action against the grievant. Based on the grievant's rebuttal, it appears that the counseling memorandum and other management feedback has left her with substantial questions about the types of workplace communications that management considers to be inappropriate. We encourage the parties to continue dialogue on this issue as necessary. Should the counseling memorandum grieved in this instance 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] James v. Booz-Allen & Hamilton, 368 F.3d 371, 377 (4th Cir. 2004); 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).

[14] Cole v. Wake Cty. Bd. of Educ., 834 Fed. App'x 820, 821 (4th Cir. 2021) (quoting *James*, 368 F.3d at 376); *see* Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007); *James*, 368 F.3d at 375-77; *Boone*, 178 F.3d at 255-256; *see also* Edmonson v. Potter, 118 Fed. Appx. 726, 729 (4th Cir. 2004) *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").

[15] As part of her ongoing frustration with the expansive scope of her responsibilities, the grievant has asserted that she sought a promotion to the position supervising hers, but she was unsuccessful. Failure to promote typically would be considered an adverse employment action. However, the grievance does not appear to challenge the agency's failure to promote the grievant, and would likely be untimely to do so in any event (as the position was filled most recently in early 2023 – several months prior to the initiation of the grievance).

suggest an objectively detrimental effect on the terms, benefits, or conditions of the grievant's 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

Although DHRM Policy 2.35 prohibits workplace harassment[16] and bullying,[17] 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;[18] and (3) imputable on some factual basis to the agency.[19]

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

[16] 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."

[17] 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."

[18] 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).

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

investigation; [and t]ake immediate action to eliminate any hostile work environment when there has been a complaint of workplace harassment . . . ."[20] 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's description of workplace conduct she has experienced since at least February 2023, if accurate, is concerning. She has provided specific examples of bullying by multiple coworkers, such as excluding the grievant from office parties, making berating and "baiting" comments toward her in group settings, and falsely reporting misconduct by the grievant. Some of these allegations are supported by an internal investigation that was completed in 2023. The grievant further alleges that there is a long-standing pattern of her coworkers ignoring her requests for information necessary for her work, with her Supervisor refusing to assist. Despite these issues, the grievant claims that her Supervisor tasked her with coordinating his own direct reports and performing other duties for which he was responsible, and she alleges he consistently sided against her in issues with her colleagues. The grievant recounts an incident in which one coworker reported that another had made threats about the grievant and was "waiting in the parking lot." The grievant reported the situation to her Supervisor, and the threatening coworker was briefly put on leave. However, the grievant claims her Supervisor blamed her for causing the coworker to be unavailable for work.

The grievant also describes a one-on-one meeting with her Supervisor in May 2023 in which he unexpectedly called in a coworker so that the two of them could confront the grievant about certain critical statements the grievant had allegedly made to the coworker, which the grievant vehemently denied. Following this meeting, the Supervisor issued a counseling memorandum to the grievant instructing her to stop making such statements and improve her working relationship with her peers. Over the following month (June 2023), it appears that tension in the grievant's interactions with her Supervisor continued to escalate, and on June 23, 2023, she notified human resources staff that she would be initiating a medical leave of absence to begin the next workweek. On June 24, the grievant submitted a detailed rebuttal to the May 25 counseling memorandum. On June 26, the grievant worked with human resources staff to coordinate her leave with supporting documents, noting her wish to keep human resources as the direct point of contact during her absence. On June 27, she emailed her Supervisor to notify him of her status and update him on her "pending and on-going work" for continuity of operations in her absence. In response, the Supervisor wrote that it was "completely unacceptable" for the grievant to coordinate her medical leave through human resources staff and not notify him. He further asserted that the "issues you perceive have risen between you and I are moot" and emphasized the grievant's "responsibility for your role in the degradation of our working relationship."

We acknowledge that at least some of these various allegations, if true, could constitute prohibited conduct under DHRM Policy 2.35 and, as such, would likely have triggered the agency's affirmative obligations to intervene, express strong disapproval of any forms of prohibited conduct, and take immediate action to eliminate any hostile work environment. Particular allegations by the grievant are notable in this regard, such as open criticism of the

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

grievant in group settings with management present, the Supervisor's involvement of the grievant's coworker in a counseling meeting, and the Supervisor's seemingly combative email sent to the grievant while she was on medical leave. However, we also acknowledge the agency's assertions that it did take multiple affirmative actions in response to the grievant's complaints, including corrective personnel actions with respect to the grievant's coworkers who allegedly engaged in prohibited behavior against the grievant. The agency emphasizes that management informed the grievant that the incidents were addressed even though the details of other employees' performance management could not be shared with her.

Although the grievant nevertheless maintains that policy violations remain unaddressed, EDR cannot conclude that the current status quo could reasonably constitute a hostile work environment that may qualify for a hearing. We note that the extent to which the agency addressed potential civility violations by the Supervisor is unclear. Of particular concern is the Supervisor's refusal to assist the grievant when she sought information from her coworkers (who also reported to him) and his reprimands to the grievant for her work-related inquiries and for coordinating her medical leave through human resources staff. Nevertheless, according to the grievant, the Supervisor has since been promoted and is no longer supervising her. As a result, her interactions with him are now minimal. In addition, the grievant currently works fully remotely as a disability accommodation, which has reduced her interactions with coworkers that have led to conflict in the past. Moreover, it appears the reassignment challenged in the grievance is not effective at this time, and the agency continues to consider options for organizational changes that could potentially reduce the grievant's workload. While there is evidence to suggest that tensions continue to arise in connection with the grievant's high workload and interactions with certain individuals, such evidence cannot reasonably support a continuing hostile work environment.

For the foregoing reasons, EDR concludes that this grievance does not raise a sufficient question whether the grievant has experienced an adverse employment action and, thus, it does not qualify for a hearing.

That said, EDR observes that the grievant's work situation appears to be subject to considerable ongoing tension and uncertainty. In addition to the responsibilities assigned to her pending the agency's recruitment efforts, the grievant has expressed her understanding that, once it fills the positions reporting to the grievant, the agency will no longer grant full-time telework as a reasonable disability accommodation, on grounds that the grievant's position requires her to be present onsite for in-person supervision. The grievant has further shared evidence of ongoing tension arising from intradepartmental communications. Therefore, 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.

Should the parties wish to address these issues via other conflict resolution services offered by EDR, information about such services is available on our website and by phone or email inquiry to our office.

EDR's qualification rulings are final and nonappealable.[21]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[21] *See* Va. Code § 2.2-1202.1(5).