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## QUALIFICATION RULING

In the matter of the Department of State Police
Ruling Numbers 2025-5766, 2025-5811
January 16, 2025

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) on whether his grievances initiated on or about August 29, 2024 and November 23, 2024 with the Department of State Police (the "agency") qualifies for a hearing. For the reasons discussed below, the August grievance is qualified for a hearing, but the November grievance is not qualified.

### FACTS

On or about August 29, 2024, the grievant filed a grievance citing "ongoing prohibited sexual misconduct, retaliatory behaviors and [a] hostile and toxic workplace." The grievant alleged that, over the past approximately three years, his Supervisor has engaged in inappropriate and harassing conduct toward him and other direct reports. This conduct, as described in the grievance, included lewd and profane discussions of sexual topics in the workplace, "invasive" personal questions to the grievant and others, undermining subordinates including the grievant when they were teaching courses as part of their job duties, and attempting to intimidate employees that the Supervisor suspected of filing a complaint against him. The grievant also alleges that, since January 2024, his Supervisor has issued him arbitrary and unfounded performance counseling, openly criticized his job performance to other employees, and effectively changed his job expectations in order to support a more negative performance evaluation. In the August grievance, the grievant further claimed that agency management had failed to hold the Supervisor accountable for his inappropriate conduct, thereby condoning it. The grievant requested several forms of relief, including, among other things, removal of the Supervisor from his chain of command, rescission of a counseling memorandum issued by the Supervisor, and amendments to his Employee Work Profile (EWP) and 2023 performance evaluation.

The August grievance proceeded through the expedited process, with the single management step respondent indicating that any complaints against the Supervisor had been investigated and addressed as appropriate. The agency head declined to qualify the grievance for a hearing, and the grievant appealed that determination to EDR.

On November 23, 2024, while the grievant's appeal was pending for a qualification ruling, he filed another grievance via the expedited process. The November grievance challenges a new EWP allegedly presented to the grievant in October 2024, which the grievant alleges increased his inspection duties and reduced his instructional duties. The grievant argues that this change appears to be retaliatory and "undermines the agency's mission to protect public safety and effectively train law enforcement officers." In addition, the grievant alleges that his Supervisor and other supervisor-level employees have continued to undermine his instructional activities and criticize his performance to other employees. As relief, the grievant sought modification of his EWP to include qualitative measures and/or quantitative metrics as applicable, reconsideration of his last three performance evaluations, and "immediate discontinuance of the ongoing pattern or practice of direct retaliatory conduct . . . by [agency] supervision as a whole, due to my current grievance filing . . . ."

The November grievance proceeded from the single management step to the agency head, who declined to grant relief or to qualify the grievance for a hearing. The grievant again appealed 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.[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 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 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."[6] Workplace

[1] *See Grievance Procedure Manual* § 4.1.
[2] Va. Code § 2.2-3004(B).
[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[4] *See, e.g.*, EDR Ruling No. 2022-5309.
[5] *See Grievance Procedure Manual* § 4.1(b); *see* Va. Code § 2.2-3004(A).
[6] *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").

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."[7]

*August Grievance*

The August grievance alleges that the grievant has experienced a hostile and toxic workplace condoned by agency management. Although DHRM Policy 2.35 prohibits workplace harassment[8] and bullying,[9] 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;[10] and (3) imputable on some factual basis to the agency.[11]

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

[7] 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)).

[8] 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."

[9] 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."

[10] 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)); *see* DHRM Policy Guide – Civility in the Workplace ("A 'reasonable person' standard is applied when assessing if behaviors should be considered offensive or inappropriate."). "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23 (1993); *see, e.g.*, Parker v. Reema Consulting Servs., 915 F.3d 297, 304-05 (4th Cir. 2019) (finding that a false rumor that an employee was promoted for sleeping with a manager altered the conditions of her employment because the employee was blamed for the rumor and told she could not advance in the company because of it); *Strothers*, 895 F.3d at 331-32 (holding that a hostile work environment could exist where a supervisor overruled the employee's bargained-for 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).

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

has been a complaint of workplace harassment . . . ."[12] 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 this case, the grievant's initial grievance submissions to the agency included several allegations of conduct by his Supervisor that, if accurate, would likely have violated DHRM Policy 2.35 and, arguably, could rise to the level of a hostile work environment. As it related to the grievant himself, this alleged conduct included explicit sexual and/or profane comments in the grievant's presence, telling other employees that the grievant's work performance was substandard, trying to elicit information about which employees (including the grievant) may have filed a complaint against him, counseling the grievant for arbitrary reasons, and purporting to ban the grievant from an agency facility within his work area.

According to the grievant, he reported these allegations both independently and during an interview for a separate investigation the agency was already conducting. As reported, the allegations would have triggered the agency's obligations under Policy 2.35 to determine whether the allegations were founded and, if so, take appropriate corrective action to stop any prohibited conduct and prevent retaliatory behavior. However, although the agency claims that "each of the [allegations of prohibited conduct] have been investigated and disposed of in accordance with law and policy," the agency has declined EDR's request to provide evidence or information that might substantiate its generalized assertions of policy compliance. Therefore, the record presents a sufficient question whether the grievant's allegations are true and, more importantly for purposes of this ruling, whether the agency's response to the allegations was reasonably appropriate under Policy 2.35. Because the pattern of behavior described by the grievant could arguably support a hostile work environment as an adverse employment action, and because the agency has declined to provide substantive information about the nature of its response, the August grievance is qualified for a hearing to the extent it alleges a hostile work environment.

*November Grievance*

Unlike the August grievance, we cannot find that the November grievance sufficiently articulates an adverse employment action to meet the threshold requirement to qualify independently for a hearing. Primarily, the November grievance takes issue with a new EWP presented to the grievant on October 24, 2024, which states that vehicle-inspection activities will account for 50 percent of the grievant's job duties, while instructional activities will account for approximately 26 percent. It appears that that the grievant's previous inspection responsibilities were set at 40 percent of his core duties.

The grievant objects to the new EWP on grounds that it does not adequately state quantitative metrics for his inspection responsibilities and reduces the extent to which he will use his specialized instructional expertise. Although the grievant may reasonably disagree with his management's articulation of his job responsibilities, we cannot say based on the available facts that the modest change in duties reflected in his EWP amounts to a "harm" or "injury" to an "identifiable term or condition of employment."[13] Although the grievant alleges his new EWP is not in compliance with DHRM Policy 1.40, *Performance Planning and Evaluation*, we also find

[12] DHRM Policy 2.35, *Civility in the Workplace*.
[13] *See Muldrow*, 144 S. Ct. at 974; *Ellerth*, 524 U.S. at 761.

nothing in the record to suggest that the grievant's new EWP violates a mandatory policy requirement or is so unfair as to amount to a disregard of the policy's intent.

That said, we note that the November grievance also alleges a continuation of the pattern of prohibited conduct described in the August Grievance. For example, the grievant alleges that his Supervisor engaged in intimidating and disruptive behavior during a course the grievant was teaching in September 2024. He also alleges that other supervisor-level individuals have inappropriately discussed the grievant's job performance and personal associations with other employees. Although we cannot conclude that these allegations rise to the level of an adverse employment action on their own, we note that evidence regarding such allegations could be relevant to the grievant's qualified claims of a hostile work environment articulated in the August grievance. Moreover, to the extent a hearing officer finds that the agency has failed to address a hostile work environment, retaliation, or other prohibited conduct, the hearing officer presumably would order the agency to create a work environment that is free from such prohibited conditions going forward.[14] Thus, to the extent it is determined that any change in the grievant's job duties was motivated by the same prohibited conduct, that change could potentially be within the scope of the remedy to be implemented.

## CONCLUSION

For the reasons expressed in this ruling, the November grievance is not qualified for a hearing. However, the August grievance is qualified for a hearing to the extent it alleges a hostile work environment created or condoned by agency management. At the hearing, the grievant will have the burden to prove that he has experienced a hostile work environment imputable to the agency.[15] If he prevails, the hearing officer will have authority to order remedies in accordance with the *Rules for Conducting Grievance Hearings*.[16]

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. However, this ruling is not intended to prevent or discourage the parties 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.[17]

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Office of Employment Dispute Resolution

[14] *Rules for Conducting Grievance Hearings* § VI(C)(3).
[15] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(C).
[16] *Rules for Conducting Grievance Hearings* § VI(C)(1).
[17] Va. Code § 2.2-1202.1(5).