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QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2025-5819
February 7, 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 her August 30, 2024 grievance with the Department of Behavioral Health and Developmental Services (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

On or about August 30, 2024, the grievant initiated a grievance indicating that she has been the victim of discrimination on the basis of genetic information and violations of the *Civility in the Workplace* policy. The grievant alleges that she applied for two positions on August 7, 2024: Nursing Resource Supervisor and Operations/EOCC Manager. The grievant was not selected for an interview for either position. Furthermore, under the category of "workplace bullying," the grievant states that she has been assigned to the "largest patient facility building on campus," which has six wards, whereas her colleagues are assigned to buildings with only two wards each. She asserts that she does twice the amount of work as her colleagues and is not compensated for it. The grievance proceeded through the resolution steps with the agency head ultimately declining to qualify the grievance for 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.[1] Additionally, the grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government.[2] By statute and under the grievance procedure, complaints relating solely to issues such as the hiring, promotion, transfer, assignment, and retention of employees within the agency, as well issues such as the means, methods, and personnel by which work activities are to be carried out, "shall not proceed to a hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or

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

unfair application of policy.[3] Further, 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]

Finally, qualification may not be appropriate even if a grievance challenges a management action that might ordinarily qualify for a hearing. For example, an issue may have become moot during the management resolution steps, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.[6]

DHRM Policy 2.05, *Equal Employment Opportunity*, requires that "all aspects of human resource management be conducted without regard to . . . genetic information . . . ."[7] For a claim of discrimination to qualify for a grievance hearing, the grievance must present facts that raise a sufficient question as to whether the issues describe an adverse employment action that has resulted from prohibited discrimination. However, if the agency provides a legitimate, nondiscriminatory business reason for the acts or omissions grieved, the grievance will not be qualified for hearing absent sufficient evidence that the agency's proffered justification was a pretext for discrimination.[8] In reviewing the grievance materials, there is no information provided that raises a sufficient question as to discrimination on the basis of genetic information. Nevertheless, the grievance could still qualify under a theory of misapplication and/or unfair application of policy.

Recruitment/Hiring

The issue presented by this grievance is whether the agency's failure to interview the grievant for the Nursing Resource Supervisor or EOCC Manager positions qualifies for a hearing. In general, state hiring policy is designed to ascertain which candidate is best suited for the position, not just to determine who might be qualified to perform the duties of the position.[9] Moreover, the grievance procedure accords much deference to management's exercise of judgment, including management's assessment of applicants during a selection process. That said, DHRM Policy 2.10, *Hiring*, provides that agencies may screen applications to reduce the initial applicant pool for a position. If so, screening must proceed according to "the minimum qualifications . . . established for the position" but may also include consideration of "additional

[3] *Id.* §§ 2.2-3004(A), (C); *see Grievance Procedure Manual* §§ 4.1(b), (c).
[4] *See Grievance Procedure Manual* § 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] *See, e.g.*, EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.
[7] DHRM Policy 2.05, *Equal Employment Opportunity*, at 1.
[8] *See* Strothers v. City of Laurel, Md., 895 F.3d 317, 327-28 (4th Cir. 2018); *see, e.g.*, EDR Ruling No. 2017-4549.
[9] *See* DHRM Policy No. 2.10, *Hiring*, at 23.

considerations established for the position," provided the criteria are "applied consistently to all applicants."[10] Once screening is concluded, Policy 2.10 provides that "[a] set of interview questions must be developed and asked of each applicant" who is interviewed, that those "[q]uestions should seek information related to the applicant's knowledge, skills, and ability to perform the job," and that "[i]nterviewers must document . . . applicants' responses to questions to assist with their evaluation of each candidate's qualifications."[11]

EDR has reviewed the screening processes for both the Nursing Resource Supervisor and EOCC Manager positions. With regard to the Nursing Resource Supervisor position, the grievant's application materials did not demonstrate two of the three screening criteria ("knowledgeable of HR and Payroll processes and terminology; experience with Microsoft Office, including Excel"). EDR is unable to discern information from the grievant's application that would have demonstrated these knowledge, skills, and abilities. With regard to the EOCC Manager position, the grievant's application materials did not demonstrate two of the three screening criteria ("knowledge of Federal, State, and Joint Commission requirements; knowledge of large inpatient care facilities, in addition to Environment of Care compliance activities and Emergency management/safety protocols"). EDR is also unable to discern information from the grievant's application that would have demonstrated these knowledge, skills, and abilities. Accordingly, we have not reviewed a basis to suggest that the agency's screening decisions were inconsistent with policy. Additionally, agency decision-makers deserve appropriate deference in making determinations regarding a candidate's knowledge, skills, and abilities. As a result, EDR will not second-guess management's decisions regarding the administration of its procedures absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious. Under the circumstances presented here, the information EDR has reviewed indicates that the agency's screening decisions were a reasonable exercise of discretion based on a good faith assessment of the screening criteria in relation to the candidate's application materials.[12]

Workplace Bullying

The grievant alleges that she has been subjected to workplace bullying in terms of her relative workload and compensation. 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

[10] *Id.* at 9.
[11] *Id.* at 12.
[12] This good faith assessment would appear to represent a non-discriminatory basis for the agency's screening decisions. Therefore, even if we had found that the grievance raised an initial question of discrimination, the agency's explanation provides a rebuttal. As no information has been presented to EDR suggesting that this explanation was pretext for discrimination, the grievant's claim of discrimination would not qualify for a hearing.
[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."

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]

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's allegation is that she is assigned more wards of patients than her colleagues in the same position in different buildings, suggesting that she does twice the amount of work as her colleagues. The grievant has presented little in the way of details to substantiate this allegedly disparate workload other than the number of wards for which she is responsible. EDR inquired of the facility to understand the workload assignments. While the grievant and her colleagues share a common position title, it is apparent that the positions are different and have different responsibilities that are not limited to the number of wards. In addition, it appears that the number of patients per ward varies based on the acuity of the patients' conditions and situations. This acuity also impacts the amount of work for which a Nursing Administrative Assistant such as the grievant is responsible. For example, a principal duty of these positions is tracking patient property. The wards that the grievant oversees are apparently in the maximum-security area where patients have limited rights to property. This situation contrasts with other wards that require the

[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; *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*, 750 F.3d at 421; *see* DHRM Policy Guide – Civility in the Workplace ("A 'reasonable person' standard is applied when assessing if behaviors should be considered offensive or inappropriate.").

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

management and documentation of more property and packages. Furthermore, some of the grievant's colleagues have additional special assignments, such as one who has procurement duties above and beyond the core functions of a Nursing Administrative Assistant. Based on our review of this information, we cannot find that the grievant has raised a sufficient question of a disparate workload that supports a claim of workplace bullying. As such, this issue does not qualify for a hearing.

CONCLUSION

Based on the foregoing, we cannot say that the grievance presents a claim that would qualify for hearing under the grievance statutes. EDR's qualification rulings are final and nonappealable.[19]

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[19] Va. Code § 2.2-1202.1(5).