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QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2025-5755
September 23, 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 June 24, 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 June 24, 2024, the grievant initiated a grievance alleging instances of bullying, harassment, and discrimination.¹ Specifically, the grievant mentions an incident on May 29, 2024, where she was not provided Americans with Disabilities Act (ADA) accommodations despite allegedly being granted approval, and that she has experienced retaliation and further discrimination for her requests for accommodations, particularly by two named agency representatives. Because her claims of retaliation and discrimination relate to the appropriate first-step respondent in her chain of command, and because she apparently did not have an assigned supervisor at the time of filing, the grievant forwarded her grievance to her Human Resources Office. As relief, the grievant requested “reassignment to an agency with a comfortable position,” in addition to the opportunity to speak with someone to discuss her concerns via the grievance process.

Despite the grievant’s concern regarding the appropriate step respondents, the grievant received a first-step response from one of the agency representatives whom the grievant alleges engaged in the retaliatory and discriminatory behavior. The grievant expressed her concern with the step respondent and their response in the appropriate comment box on the Grievance Form and subsequently emailed the agency further expressing these concerns. The grievant continued to email the agency, stating that she was contemplating resignation if they did not respond, but

¹ The record shows an inconsistent accounting of the date the grievance was initiated, as the grievance itself is dated June 24, the grievance was originally emailed to the agency on June 21, and the agency’s notice of receipt states it was initiated on May 29. Ultimately, this discrepancy has no bearing on the analysis and decision of this ruling. However, because the grievant resent the grievance with the proper form and attached letter on June 24, EDR will refer to the grievance being initialized on or about June 24, 2024.

allegedly did not receive any response outside of acknowledgement of receipt. Ultimately, on or about July 22, 2024, the grievant submitted to the agency her letter of resignation with an effective date of that same day. Apparently, after the agency accepted the resignation, the grievant requested to rescind the resignation, but the agency chose to deny this request. The grievant has since affirmed to the agency that she accepts the agency's denial but wants the grievance to continue in order to challenge the issue with the first-step respondent.

Continuing with the management steps, the second and third-step responses stated that relief was unavailable because of her resignation and because the agency did not have the authority to move her to another agency. The third-step respondent added that the grievant's complaints about her supervisor's actions were investigated and ultimately unfounded. The agency head declined to qualify the grievance for a hearing and the grievant has now appealed that determination to EDR.

DISCUSSION

Step Respondents

The primary matter brought forth in the grievant's request for qualification is that the agency improperly allowed an agency representative directly involved in the grievant's discrimination and retaliation claims to act as the first-step respondent. Under the grievance procedure, each agency must designate individuals to serve as respondents in the resolution steps. A list of these individuals shall be maintained by the agency's Human Resources Office and is also available on EDR's website. Each designated step respondent shall have the authority to provide the grievant with a remedy, subject to the agency head's approval.² Pursuant to its statutory responsibilities, EDR has long collected and maintained each agency's designated step respondents. This assures that each agency's management resolution step respondents are appropriate and known to employees and to EDR, and that this phase of the grievance process is administered consistently and fairly.

An agency's careful designation of step respondents, and consistent adherence to those designations, is crucial to an effective grievance process. Step respondents have an important statutory responsibility to fulfill and should decline to serve only in extenuating circumstances, such as extended illness or serious injury. Further, if a step respondent cannot serve in that capacity pending a particular grievance, management should seek an agreement with the grievant on a substituted step respondent and should put any agreement in writing. Absent an agreement between the parties, the agency must adhere to the designated list of step respondents. However, there are times when modification from the default steps is necessary and appropriate, such as when there are fewer layers of management in a grievant's reporting line.³

Another such instance of when modification is necessary is when a grievance is alleging discrimination or retaliation by someone who would otherwise act as a step respondent. Indeed, the *Grievance Procedure Manual* provides that if the grievant is alleging such prohibited conduct

² See Va. Code § 2.2-3003(D).

³ See EDR Ruling No. 2013-3583. In addition, Number 16 of EDR's Grievance FAQs, which are available at <http://www.dhrm.virginia.gov/employmentdisputeresolution/grievancefaqs>, discusses this type of situation.

against their immediate supervisor, they may initiate the grievance with the next level supervisor.⁴ Here, the grievant appears to have sought to skip the appropriate first-step respondent as a respondent, citing to Section 2.4 of the *Grievance Procedure Manual*.⁵ The grievant first made this issue known when she sent the grievance to the agency's Human Resources Office, and continued to voice this concern in the comment boxes below each subsequent step response. However, it does not appear in the record that the agency ever addressed this particular issue.

Given the allegations brought forth in the grievance, it would appear that there is a satisfactory reason to determine that the particular first-step respondent may not be an ideal choice for a step respondent in this case. Accordingly, it would have been proper for the agency to allow for the grievant to initiate the grievance with the next level supervisor who was not directly involved in the claims of discrimination or retaliation. EDR emphasizes the necessity of the agency to properly allow for grievants to initiate grievances with those who are not directly involved in prohibited conduct such as discrimination or retaliation. EDR also recognizes that the grievant properly brought forth the claim of the agency's noncompliance immediately after the agency allowed for the named step respondent to provide their response.⁶ However, because the grievance has fully proceeded through each management step, all other step respondents have had the opportunity to provide their own responses. Of the two names the grievant mentioned as being involved in prohibited conduct, one was the first-step respondent, and the other was not listed as a step respondent. Thus, even if the first-step response was improper, the agency allowed for all other step respondents who were not involved in the claims of prohibited conduct to review the grievance. Further, absent just cause, EDR generally disfavors back-tracking in the steps of grievances, as repeating steps would normally only serve to waste time, duplicate effort, and needlessly delay the grievance process.⁷ Consequently, if the grievance were still proceeding through the step-respondent stages, the most appropriate approach would be for the grievance to proceed beyond the first step that was provided by the improper step respondent. In the matter before us, however, the management resolution stage of the grievance has concluded, and there is consequently no effective remedy still available. For these reasons, this grievance does not qualify for a hearing on the basis of the agency's noncompliance of the grievance procedure.

Relief Available

The grievance itself concerns claims of bullying and harassment, as well as discrimination and retaliation due to the grievant's disability. Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.⁸ The grievance procedure generally limits grievances that qualify

⁴ *Grievance Procedure Manual* § 2.4. A similar provision appears as to the second-step respondent, with options to designate a different second-step respondent or waive the meeting with the second-step respondent. *Id.* at § 3.2.

⁵ The grievant noted in her grievance that the agency representative at issue is not her assigned supervisor. The record does not provide much clarity on this matter, but this question ultimately has no bearing on the decision of this ruling. Regardless of whether this agency representative is in fact the grievant's supervisor, the agency has designated them as the proper first-step respondent, and the grievant contests this designation because they are directly involved in her claims of discrimination and retaliation.

⁶ See *Grievance Procedure Manual* § 6.3 ("All claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time.").

⁷ See, e.g., EDR Ruling No. 2017-4475; EDR Ruling No. 2014-3902.

⁸ See *Grievance Procedure Manual* § 4.1.

for a hearing to those that involve “adverse employment actions.”⁹ 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.”¹⁰ 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.”¹¹

However, 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.¹²

While the grievant’s claims of bullying, harassment, retaliation, and discrimination on the basis of disability are concerning if accurate, the grievant has since voluntarily resigned from the agency. Thus, even if the alleged hostile behaviors in the grievant’s former working environment were found to be sufficiently severe or pervasive, there is no effective relief that could be granted by a hearing officer. Similarly, even if it were found that the agency engaged in discrimination on the basis of the grievant’s disability or retaliated against her in response to her request for ADA accommodations, there is effectively no relief that a hearing officer could provide that would remedy such findings. Accordingly, EDR cannot say that the grievance presents a claim that would be susceptible to relief via a grievance hearing. This ruling determines only that the grievance does not qualify for an administrative hearing. It does not address whether other remedies may be available to the grievant through other processes.

EDR’s qualification rulings are final and nonappealable.¹³

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⁹ See *id.* § 4.1(b); see Va. Code § 2.2-3004(A).

¹⁰ 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”).

¹¹ *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)).

¹² See, e.g., EDR Ruling No. 2021-5261; EDR Ruling No. 2017-4477.

¹³ Va. Code § 2.2-1202.1(5).