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QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2025-5768
October 30, 2024

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether her grievance initiated on or about September 12, 2024 with the Department of Behavioral Health and Developmental Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant alleges that she has experienced a hostile work environment caused by her direct supervisor. Of note, she states that on or about June 12, 2024, she received a Notice of Improvement Needed (NOI) with an accompanying Performance Improvement Plan (PIP) from her supervisor. She alleges that due to this action, she experienced severe health problems resulting from her distress, and had to visit an urgent care clinic that same day. Since this date, the grievant has continued to visit several health care professionals to assist in her health issues stemming from the issuance of the NOI, including a hospital visit on August 2, and weekly visits with a provider since September 3. Additionally, some of her accompanying medical notes included recommendations on how long to stay out of work, including a physician requesting that she is excused from work until October 12, another specialist stating that she must be excused from work "up until [health] work up is completed," and the provider with whom she has been seeing weekly most recently stating on September 19 that "it is [her] clinical recommendation that [the grievant] remain out of work until further notice."

On August 23, the grievant was interviewed by human resources about her hostile work environment claims against her supervisor. Three other agency employees were interviewed about their observations of the same supervisor. In addition to claiming that her issued NOI contained inaccurate information and was overall improperly handled, the grievant also claimed that her supervisor has stated that she would fire people if she was in charge, changed various work practices, has had a confrontation with another employee in public, and has generally engaged in yelling, bullying, intimidating, demanding behavior, and what she describes as "intense micromanaging." The grievant also claims that the supervisor has had her do unspecified work that was not outlined in her Employee Work Profile, and allegedly lied about telling the grievant

to go home when she was suspected to have COVID, when in reality the supervisor allegedly told the grievant to stay and work.

Due to her health issues following the NOI, the grievant ceased working on or about June 13, 2024, and has not returned since that date. Around this time, the grievant applied for short-term disability (STD) benefits via the agency's third-party administrator (TPA) that handles such claims. In a letter dated August 14, the TPA denied the grievant's request for STD benefits. On August 16, the grievant appealed the TPA's decision. Finally, on September 11, the TPA again denied her STD claim on appeal. Following this decision, on or about September 12, 2024, the grievant filed an expedited grievance, contesting the fact that she has not been paid since July as she has used all of her sick and annual leave and was denied STD benefits, and that the agency has not resolved this issue. She adds that "FMLA was not documented." Finally, the grievant also asserts her claims of a hostile work environment that have been perpetuated by her supervisor over the past several months. As relief, she has requested that her supervisor be held accountable for her bullying, retaliation, and harassment, and that her pay issue be resolved, possibly through a workers' compensation claim.

The single step respondent stated that the grievant's claims regarding a hostile work environment were "thoroughly reviewed and handled in strict alignment with [DHRM] policies," and ensured her that her work environment would be safe and supportive upon her return. Additionally, on September 17, a human resources representative reached out to the grievant to help her initiate an incident report that would be submitted as a workers' compensation claim. The grievant has since confirmed that she filed a workers' compensation claim but it was denied. Finally, EDR has since been informed by the agency that it has taken corrective measures concerning the grievant's supervisor. The grievance has proceeded through the management resolution steps and the agency head elected not to qualify the grievance for a hearing. The grievant now appeals the qualification denial 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 solely to the establishment and revision of salaries, wages, and general benefits 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.[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]

[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.

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 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]

Harassment Claims

The basis of the grievant's issues stems from the alleged bullying and harassment the grievant claims she has experienced by her supervisor. 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] 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.[12]

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[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").

[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)). "[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).

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

[12] *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.").

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 . . . ."[13] 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.

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.[14]

Here, the grievant alleges a variety of claims against her supervisor related to threatening, intimidating, and bullying behavior. However, after a thorough review of the record, EDR is unable to find that such behavior was so severe or pervasive that it would qualify for a hearing. The primary portion of the grievant's claims stem from the incident when her supervisor issued her an NOI and PIP. However, the issuance of the NOI and PIP alone, without more verbal or physical conduct by the supervisor, would likely not fall outside the broader scope of agencies' ability to issue corrective actions to their employees.[15] The grievant has not provided specific examples of the supervisor's behavior outside of the NOI, an incident when the supervisor allegedly lied about telling the grievant to go home pursuant to COVID symptoms, and an incident when the supervisor apparently gave a general threat along the lines of "people would be fired if she was the CEO." While these issues are concerning, if accurate, EDR cannot find that the totality of the specifically identified incidents would rise to the level of severe or pervasive activity such that a hearing is warranted.

Additionally, the agency has shown to EDR that it has not only thoroughly investigated the claims against the grievant's supervisor, but taken corrective measures to address the supervisor's conduct. While the grievant asks that the supervisor be terminated, that is not a remedy that a

[13] DHRM Policy 2.35, *Civility in the Workplace*.
[14] *See, e.g.*, EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.
[15] *See* EDR Ruling No. 2024-5709 ("A Notice of Improvement Needed is an example of an informal supervisory/corrective action that is not equivalent to a written notice of formal discipline. It does not generally rise to the level of an adverse employment action because such an action, in and of itself, does not negatively affect the terms, conditions, or benefits of employment.") (citing DHRM Policy 1.60, *Standards of Conduct*, at 6-7).

hearing officer would have the authority to grant.[16] It should also be noted that the grievant has not worked at the agency since her receipt of the June 12 NOI, and the agency has stated that it would ensure the grievant is working in a safe and supportive environment upon her return. If the grievant returns and is once again met with hostility by her supervisor, this matter can be reassessed through an additional grievance or other avenues, such as an internal complaint with the agency's human resources department, an Equal Employment Opportunity Commission (EEOC) complaint, or a retaliation investigation by EDR if the grievant feels she is being retaliated in response to this grievance.[17] For the foregoing reasons, EDR is unable to qualify this grievance for a hearing with respect to the claims of a hostile work environment.

Short-Term Disability/Workers' Compensation Claims

The grievant contends that she has not received a paycheck since July due to exhausting her available sick and annual leave, combined with the fact that her claim for STD was denied by the agency's TPA. The TPA noted that her claim was denied due to "insufficient objective medical evidence" that shows she is disabled as defined by the Virginia Sickness and Disability Program (VSDP) from June 13, 2024 and beyond. The TPA added that to perfect her claim for benefits, she would need to provide "[p]hysician office notes/ progress notes and/ or other medical information that contains objective medical information to support functional limitations and the inability to work," as well as "[r]ecords that indicate how [her] symptoms were supported by objective medical documentation and causing functional impairments." The grievant has confirmed with EDR that she has not returned to work since the June 12 incident and, based on the recommendation of her current provider, cannot return to work anytime soon. The grievant wishes for the agency to rectify this issue by allowing her STD claim to be properly processed so she can receive paid leave while she continues to manage her health concerns.

Short-Term Disability

A primary purpose of Policy 4.57 is to "[p]rovide[] eligible employees supplemental replacement income during periods of partial or total disability for both non-occupational and occupational disabilities."[18] To that end, the policy explains maximum entitlements based on qualifying disabilities and months of state service.[19] As described by Policy 4.57, a third-party private company acts as the benefits administrator for the VSDP and is responsible for "administer[ing] the daily operation" of VSDP.[20] Under Policy 4.57, agencies are responsible for "[c]oordinat[ing] disability claim[s] and benefits with the TPA, employee, and employee's supervisor," as well as "[e]nsur[ing that the] employee receives appropriate communication regarding VSDP and FMLA."[21] Employees are responsible for "[u]nderstand[ing] the program features of VSDP," including "[c]arefully read[ing] the VSDP handbook . . . in order to understand benefits, personal responsibilities and remedies."[22] Policy 4.57 entitles employees eligible for STD

[16] *Grievance Procedure Manual* § 5.9(b).
[17] *Grievance Procedure Manual* §§ 1.5, 1.7 ("An employee may not pursue both a retaliation investigation and a grievance on the same management action or omission alleged to be retaliatory.").
[18] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 1.
[19] *Id.* at 13-21.
[20] *Id.* at 6.
[21] *Id.* at 31.
[22] *Id.* at 32.

to receive income "for up to 125 workdays when the employee is unable to work due to an illness or injury that has been qualified by the TPA."[23]

To the extent the grievant asserts that the agency has improperly handled her STD claims for paid leave by not considering her medical documentation, EDR cannot find that such matters qualify for a hearing. The handling of STD claims, and any supporting medical documentation, would properly be within the purview of the TPA under the VSDP. While the grievant's STD claim and appeal were both denied, she may be able to appeal those determinations through the TPA and/or through appropriate legal action.[24] EDR cannot determine matters as to whether the grievant was denied STD benefits, and the agency similarly does not have the authority to grant STD benefits, regardless of whether the agency itself finds the grievant's medical documentation sufficient. For these reasons, with respect to the grievant's STD claims submitted to the TPA, this issue cannot qualify for a hearing.

Workers' Compensation

In a similar manner, the grievance process is not the proper forum in this particular context for the grievant to address her claims related to workers' compensation. The grievant expressed in her grievance that, following the TPA's denial of her STD claim, she wished to apply for a workers' compensation claim. The agency subsequently assisted her in the process of filing that claim. The grievant has notified EDR that her claim was denied.

EDR observes that state policy provides that employee absences may be designated as workers' compensation when the absence "has been determined to have resulted from an injury or occupational disease such that the employee is entitled to benefits required by the [Workers' Compensation Act]."[25] Furthermore, "[i]f the absence is accepted as compensable and the employee is eligible to receive indemnity benefits for the period under a Workers' Compensation [Virginia Workers' Compensation Commission (VWCC)] award time will be reinstated to the employee based on the amount paid under the VWCC award."[26] In theory, if an agency has failed to designate an employee's absence consistent with these provisions and restore an employee's leave properly, there may be a basis to qualify a grievance for hearing contesting such a matter. However, under these facts, there is no indication that the grievant has received an award from the Commission concerning any absence addressed in her grievance. As such, EDR is unable to find that there has been any misapplication of policy such that this grievance would qualify for a hearing. Thus, it would appear that the proper forum would be the VWCC who has exclusive authority over such questions.[27]

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[23] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 13.

[24] While the grievant has already appealed the TPA's denial, it is unclear whether the medical documentation submitted as part of this grievance was submitted to the TPA previously or could now be submitted pursuant to some form of additional appeal. For this reason, EDR has recommended to the grievant that she submit an additional appeal(s) accompanying the necessary documentation mentioned by the TPA and any successive documentation stemming from her future medical provider visits. However, the determination of successive appeals' approval is ultimately left to the discretion of the TPA.

[25] DHRM Policy 4.60, *Workers' Compensation*.

[26] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 19.

[27] *See, e.g.*, Va. Code §§ 65.2-307, 65.2-700, 65.2-702; *see also* DHRM policy 4.57, *Virginia Sickness and Disability Program* (describing workers' compensation benefits for state employees and the role of the Commission in approving a claim for benefits).

FMLA

DHRM Policy 4.20, *Family and Medical Leave* provides "guidance regarding the interaction of the Family Medical Leave Act [FMLA] and the Commonwealth's other Human Resource policies."[28] An employee is generally "eligible" for FMLA leave if they meet minimum requirements for length of employment and hours of work for the Commonwealth during the past 12 months.[29] According to the FMLA and Policy 4.20, eligible employees are entitled to "up to 12 workweeks (480 hours) of unpaid family and medical leave during a 12-month rolling period" for reasons including "a serious health condition which renders the employee unable to perform the functions of their position."[30]

Under the FMLA's implementing regulations:

> when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. . . . Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period.[31]

In addition to the notice requirement, Policy 4.20 provides that "[m]edical certification is required except in the case of birth, adoption, or foster placement."[32] When the need for FMLA leave arises from the employee's own serious health condition, Policy 4.20 indicates that federal Form WH-380-E (linked in the electronically-available version of Policy 4.20) should be used to certify the employee's qualifying need.[33] "Medical certification shall be obtained by the employee and returned to their agency within 15 calendar days of the [FMLA] request . . . . If an employee fails to provide certification . . . in a timely manner then the agency may deny FMLA leave until the required certification is provided."[34]

DHRM Policy 4.57, *Virginia Sickness and Disability Program* makes clear that agencies remain "responsible for determining employee eligibility, notifying employees of FMLA rights and tracking FMLA."[35] As part of these responsibilities, agencies "should notify employees of the designation of leave as FMLA at the time employers are informed of the VSDP claim."[36] By state

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[28] DHRM Policy 4.20, *Family and Medical Leave*, at 1.
[29] 29 U.S.C. § 2611(2); DHRM Policy 4.20, *Family and Medical Leave*, at 3.
[30] *Id.* at 3-4; 29 U.S.C. § 2612(a)(1) ("an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period" for reasons including "a serious health condition that makes the employee unable to perform the functions of the position of such employee").
[31] 29 C.F.R. § 825.300(b)(1).
[32] DHRM Policy 4.20, *Family and Medical Leave*, at 6; *see generally* 29 C.F.R. § 825.305(a) ("An employer may require that an employee's leave . . . due to the employee's own serious health condition . . . be supported by a certification issued by the health care provider of the employee.").
[33] DHRM Policy 4.20, *Family and Medical Leave*, at 6; *see* 29 C.F.R. 825.306(b) (approving form WH-380E for certification when the employee's need for leave is for their own serious health condition).
[34] DHRM Policy 4.20, *Family Medical Leave*, at 6.
[35] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 29.
[36] *Id.* Such designation can be provisional to the extent more information is needed to verify a qualifying reason. *See* DHRM Policy 4.20, *Family and Medical Leave*, at 7 ("Agencies must make a determination on a family and medical leave request within five business days of receiving sufficient information to make a determination" and, in the meantime, can indicate on federal Form WH-382 that more information is needed prior to official designation).

policy, the grievant's need for leave was required to be certified as FMLA-qualifying, either by (1) her own medical provider, using Form WH-380-E, or (2) the TPA handling her disability claim.[37] Typically, such certification includes information about the type of qualifying condition for which leave is sought, sufficient to determine whether FMLA designation is appropriate, and the amount of leave needed.

Upon leaving work after the June 12 incident, the grievant first used the entirety of her paid sick and annual leave, and after that paid leave was exhausted, she began using unpaid leave. Federal courts have long held that the FMLA "provides no relief unless the employee has been prejudiced by the violation."[38] Here, the record indicates that the grievant may have been entitled to up to 12 weeks of job-protected leave beginning on or about June 13, 2024 – which it appears she may have effectively received as the grievant remains, to EDR's understanding, employed but on leave without pay to the date of this ruling. It appears that the agency applied the grievant's paid leave balances to her extended absence until those benefits were depleted, and upon exhaustion of her paid-leave benefits, allowed the grievant the opportunity to utilize unpaid leave for her absence.

Finally, the grievant has recently made EDR aware that the agency has requested updated FMLA paperwork. It is unclear at this time why the agency is requesting updated paperwork for her FMLA protections. However, upon review of the information presented, EDR has not been able to identify facts that would suggest the agency has misapplied the FMLA such that a grievance hearing is warranted at this time.

CONCLUSION

For the reasons expressed in this ruling, the facts presented by the grievant in her September 12, 2024 grievance do not constitute a claim that qualifies for a hearing under the grievance procedure.[39]

EDR's qualification rulings are final and nonappealable.[40]

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[37] *See* DHRM Policy 4.20, *Family and Medical Leave*, at 6; DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 29.
[38] Adkins v. CSX Transp., Inc., 70 F.4th 785, 796 (4th Cir. 2023) (quoting Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 89 (2002)).
[39] *See Grievance Procedure Manual* § 4.1.
[40] Va. Code § 2.2-1202.1(5).