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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2025-5783
December 18, 2024

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether his grievance initiated on or about June 10, 2024 with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant alleges that he experienced threatening, intimidating behavior and retaliation by Manager A in relation to a previous grievance. On September 29, 2023, the grievant was removed from the agency's Special Response Team (SRT) due to an altercation between him and Captain A. On May 10, 2024, the grievant met with Captain A and Manager A to discuss the issue of Captain A not allowing him back onto SRT. According to the grievant, Manager A did not know anything about the altercation at issue, and the goal of the meeting was for him to find out what happened, take the information back to his chain of command, and decide on whether the grievant could return to SRT. Apparently, towards the end of the meeting, Manager A told the grievant that he was not going to be allowed to return to SRT, but the grievant responded by saying he would still be grieving the decision anyway. In response, according to the grievant, Manager A said the grievant "should take the weekend to consider what was discussed and how high [the grievant] decide[s] to take the issue will determine how much of what happened he would disclose to the people above him." The grievant perceived this as a threat to not file a grievance, or else Manager A would disclose information about the issue to upper management.

On May 14, the grievant emailed Manager A to inquire about the intent behind the statement he made at the meeting. Manager A responded by stating he likes to "handle things on the lowest level possible when at all possible," and that he "apologize[s] if [the grievant] felt that [he] meant something different." He added that he would still need to discuss the grievant's return to SRT with "the RA and ROC." The grievant responded by asserting Manager A had still not answered his question about the meaning behind the statement, to which he did not apparently receive an additional response. Ultimately, the grievant opted to file a grievance on or about May 16, 2024, contesting the agency's decision to not allow him to return to SRT. Shortly after the grievant received the first-step response from Manager A, he filed his second grievance on or about

June 10 to contest the perceived intimidating, threatening statement Manager A made at the May 10 meeting.

As relief for both grievances, the grievant requested that he be reinstated with SRT, and as an additional form of relief mentioned in the second grievance, he has requested that disciplinary action be taken against Manager A "for violation of DOP 145.3." Each grievance proceeded through their respective management steps, and at the qualification stage, the agency opted to consolidate the grievances into one, with the agency head issuing a single qualification denial letter that addressed both grievances. Since the grievant has appealed the grievance to EDR for a qualification ruling, he has been reinstated with SRT and no longer wishes to pursue his first grievance.[1] However, the grievant still wishes to pursue his second grievance, asserting that the agency has yet to properly address his claims of intimidation and retaliation by Manager A. Accordingly, this ruling will discuss only the merits of the second grievance (initiated on or about June 10) and whether it, by itself, qualifies for a hearing.

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] The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] 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."[4] 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."[5]

Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[6] 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 or agency policy may have been misapplied or unfairly applied.[7] 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.[8]

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[1] The first grievance should be reflected by the agency as concluded by the grievant.
[2] *See Grievance Procedure Manual* § 4.1.
[3] *See id.* § 4.1(b); *see* Va. Code § 2.2-3004(A).
[4] *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").
[5] 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)).
[6] Va. Code § 2.2-3004(B).
[7] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[8] *See, e.g.*, EDR Ruling No. 2020-4956.

This grievance asserts that the grievant's supervisor, Manager A, engaged in prohibited conduct by intimidating and/or threatening the grievant by suggesting he would disclose information about the grievant's September 2023 incident to upper management if the grievant chose to file a grievance. The grievant further asserts that each of the step respondents did not find anything wrong with Manager A's statement. To support these claims, the grievant cites multiple portions of the agency's own civility policy – [Agency] Operating Procedure 145.3 – which defines 'bullying' to include intimidating behavior "that is intended to force the person to do what one wants . . . ." He states that another portion of the same policy provides that "any employee who engages in conduct determined to be . . . bullying . . . or who encourages or ignores such conduct by others will be subject to disciplinary action . . . ." The grievant also contends that the statement made by Manager A should be considered retaliation for participating in the grievance process. The grievant cites another portion of Agency Operating Procedure 145.3, which includes threats and intimidation as forms of retaliation.[9]

Although DHRM Policy 2.35 prohibits workplace harassment[10] and bullying,[11] 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;[12] and (3) imputable on some factual basis to the agency.[13] 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.[14]

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

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[9] The Code of Virginia also prohibits retaliation for participation in the grievance process. *E.g.*, Va. Code § 2.2-3000.

[10] 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."

[11] 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."

[12] 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).

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

[14] *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.").

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 . . . ."[15] 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 consideration of the events alleged, EDR is unable to find that Manager A's statement, by itself, was so severe or pervasive that it would meet the "adverse employment action" requirement to qualify for a hearing under the grievance procedure. Even though the statement could be considered a threat to not file a grievance or potentially retaliatory, there is no other evidence of intimidation, bullying, or harassment by Manager A before or after this meeting, at least of which EDR is aware. If the grievant were to experience further prohibited conduct by Manager A or other agency employees in the future, he would be able to file an additional grievance on that basis. While a perceived threat is concerning, EDR cannot find that this specifically identified incident would rise to the level of severe or pervasive activity such that a hearing is warranted. Nonetheless, EDR encourages the agency to ensure that employees are free to file grievances without being faced with verbal conduct that makes them feel unable to do so.

CONCLUSION

For the reasons expressed in this ruling, the facts presented by the grievant in his June 10, 2024 grievance do not constitute a claim that qualifies for a hearing under the grievance procedure.[16]

EDR's qualification rulings are final and nonappealable.[17]

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Office of Employment Dispute Resolution

[15] DHRM Policy 2.35, *Civility in the Workplace*.
[16] *See Grievance Procedure Manual* § 4.1.
[17] Va. Code § 2.2-1202.1(5).