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QUALIFICATION RULING

In the matter of the Department of Juvenile Justice
Ruling Number 2025-5790
December 16, 2024

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (DHRM) on whether her September 26, 2024 grievance with the Department of Juvenile Justice (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

On June 19, 2023, the grievant grieved a Group II Written Notice, which resulted in a hearing and multiple appeals and reconsideration decisions over the span of several months. In the midst of the remand in that case, on April 8, 2024, the grievant alleges she was subjected to an internal investigation for alleged misconduct due to what the grievant describes as "an illegitimate staff complaint against [her]." On August 29, 2024, the grievant alleges she was subjected to a second internal investigation for alleged misconduct. On or about September 19, the grievant received a written counseling memo as a result of the second investigation. The grievant then filed a grievance on or about September 26, asserting that the staff complaints that led to the investigations did not properly follow the chain of command, in that they should have gone to the agency's Human Resources office and/or her immediate supervisor rather than directly to the agency's Bureau of Investigative Operations (BIO). The grievant also asserts that the investigations were retaliation for the filing of her June 2023 grievance and subsequent appeals. Finally, the grievant adds that she was "told [her] job was in jeopardy of termination" during the period she was on extended medical leave. As relief, the grievant requests (1) "[a]n end to baseless internal investigations and cessation of further interviews," (2) "[r]emoval of the initial written notice reference in the last annual performance," (3) "[a]ssurances of no further retaliation," and (4) "[p]ayment of [her] legal fees for the intentional harassment."

According to the agency in its second/third step response, the BIO Unit investigations determined that both civility complaints were substantiated but the allegation of the grievant retaliating against one of the employees who filed one of the civility complaints was unsubstantiated.[1] The agency further explained that staff complaints "may be reported at several

[1] Reviewing the investigative reports, it appears that the first investigation related to allegations of (1) the grievant violating the DHRM civility policy during an encounter with another coworker and (2) her retaliating against that

levels of management, and investigations may be conducted by several levels of management to include, supervisors, managers, Human Resource staff and BIO Unit investigators." The agency also responded to the allegation about the grievant's job being in jeopardy, stating that the individual who allegedly made that statement to the grievant no longer works at the agency, and that the agency could neither confirm nor deny the statement that was made. Additionally, as to the requested relief regarding the Written Notice mentioned in the grievant's performance evaluation, the agency stated that her evaluation "will be edited as required." After the grievance proceeded through all the management steps, the agency head denied further requested relief and declined to qualify the grievance for a hearing, asserting that no adverse employment action was taken. 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.[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]

Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[5] 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, whether state policy may have been misapplied or unfairly applied, or whether a performance evaluation was arbitrary and/or capricious.[6]

As an initial matter, the grievant's counseling memorandum does not, in and of itself, qualify for a hearing. Such written counseling is an example of informal supervisory action. It is not equivalent to a written notice of formal discipline.[7] Written counseling does not generally constitute an adverse employment action because such an action in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[8] While the

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same coworker due to reporting the encounter. The second investigation concerns the grievant violating the DHRM civility policy during an encounter with another coworker.

[2] *See Grievance Procedure Manual* § 4.1.

[3] *See Grievance Procedure Manual* § 4.1(b); *see also* 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] Va. Code § 2.2-3004(B).

[6] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

[7] *See* DHRM Policy 1.60, *Standards of Conduct*.

[8] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

grievant did also receive a Group I Written Notice on or about October 3 in response to the first investigation, because this Written Notice was issued after the grievance at hand, the grievant would have had to file an additional grievance to contest that Written Notice.

The grievant's primary claim is that the investigations handled by the agency's BIO were a form of retaliation for the filing of her June 2023 grievance. A claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) they engaged in a protected activity; (2) they suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[9] If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[10] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[11]

While courts have held that Internal Affairs (IA) investigations, by themselves, do not rise to the level of an adverse employment action, those holdings are premised on the absence of any related "adverse effect on the terms and conditions of employment …"[12] Here, there is insufficient evidence to suggest such effects. The grievant is primarily contesting the grounds and handling of the investigations themselves rather than the effects of the investigations. Therefore, the remainder of this ruling will discuss whether there is a sufficient question of the two BIO investigations being considered adverse employment actions by way of retaliation.

While EDR understands the grievant's issue with how the civility complaints were taken directly to the agency's BIO, rather than to Human Resources or her chain of command, it appears that the agency has provided a sufficient basis for why the investigations were handled in this manner. Indeed, the agency admitted that the proper process for reporting civility violations used to be for employees to take their concerns to either Employee Relations or their chain of command, but employees would nonetheless sometimes forward their concerns directly to BIO, which is what appears to have happened with the two investigations regarding the grievant. As of September 2024, the agency's new policy is to require employees to forward their concerns to Employee Relations – then, the Employee Relations Manager would communicate with BIO to discuss whether the civility concerns needed to be investigated by BIO or Employee Relations. The agency further elaborated that, pursuant to this new September 2024 policy, Employee Relations would investigate concerns related to interpersonal conflict, discrimination, retaliation, and other claims related to DHRM Policy 2.35, *Civility in the Workplace*. Conversely, BIO would investigate concerns such as those related to allegations against staff, resident-on-resident, resident-on-staff, and staff-on-resident violations. While the investigations against the grievant seem to fall more under Employee Relations discretion based on these parameters, the agency noted that those investigations were conducted before this new September 2024 policy.

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[9] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).
[10] *See*, *e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[11] *Id.*
[12] *See* Handley v. Baltimore Police Dep't, No. DLB-20-1054, 2022 U.S. Dist. LEXIS 154373, at *23 (D. Md. Aug. 26, 2022) (and authorities cited therein).

Based on this explanation, EDR cannot find that the investigations were improperly managed to the extent that a hearing is necessary or that a hearing officer could provide effective relief. It appears that the agency has taken sufficient action to outline the proper procedure for reporting concerns about other employees moving forward. Even if it was found that it was improper for the other employees to report their concerns directly to BIO, there is no effective relief a hearing officer would be able to grant at this point, as the agency has apparently taken necessary action to modify their procedures for reporting civility concerns. Further, EDR can also not find that, but for the grievant's filing of the June 2023 grievance, the investigations would not have occurred. EDR has reviewed the reports for both investigations and it appears that they were conducted appropriately based on complaints made by agency employees in good faith. The matters that were reported should have been the subject of a proper investigation and were not "illegitimate" as the grievant described them. For these reasons, EDR cannot find that there is a sufficient question whether the grievant experienced an adverse employment action by way of the two investigations, nor that the investigations were mere pretext for retaliation.

As a final matter, EDR also cannot find evidence of a sufficient question whether the grievant has experienced an adverse employment action regarding the alleged statement about her job being in jeopardy. The agency noted that the person who allegedly made this statement is no longer with the agency, and while the agency could not confirm or deny whether the statement was actually made, they have also not given any indication that the grievant's position may be in danger in relation to the use of her extended medical leave. If the grievant were to experience any such concerns in the future, she would be free to file an additional grievance on that basis.

CONCLUSION

For the reasons described above, the grievance does not qualify for a hearing under the grievance procedure at this time.[13] This ruling only determines that the grievance does not qualify for a hearing and does not determine that any of the claims asserted were invalid. Further, nothing in this ruling is meant to prevent the grievant from utilizing another appropriate process to challenge the issues raised herein.

EDR's qualification rulings are final and nonappealable.[14]

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[13] *See Grievance Procedure Manual* § 4.1.
[14] *See* Va. Code § 2.2-1202.1(5).