JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2025-5899
July 23, 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 April 14, 2025 grievance with the Virginia Department of Transportation (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

On November 25, 2024, the agency issued to the grievant a 30-day Notice of Improvement Needed and accompanying Performance Improvement Plan (NOIN/PIP). The agency subsequently issued a 10-day extension to the NOIN/PIP in January 2025 and held an accompanying meeting with the grievant in February 2025. On or about March 13, 2025, the agency completed the grievant's 2024 annual evaluation. In this evaluation, the grievant's supervisor gave the grievant a rating of "Met Expectations" in the Safety category but a rating of "Unacceptable" for the remaining goals, resulting in an overall rating of "Unacceptable."[1]

On April 14, 2025, the grievant filed a grievance stating that her performance evaluation was arbitrary and capricious. The grievant claims she was not made aware of any performance concerns prior to receiving the November 2024 NOIN/PIP. Additionally, the grievant alleges a hostile work environment, retaliation, and insufficient training and resources to succeed in her position. The grievant claims that management was not acting in "good faith" and she was "set up to fail" by management through the issuance of this NOIN/PIP. The grievant states that although this was a 30-day NOIN/PIP, she only had 12.5 days to complete the tasks assigned to her before she had to go on medical leave. As relief, the grievant requested that the agency's Chief Financial Officer, in conjunction with the Assistant Division Administrator, complete a "thorough and impartial new review" of the grievant's 2024 Evaluation. The grievant also requested that "appropriate corrective action be taken to ensure a fair and transparent evaluation process moving forward."

[1] It is EDR's understanding that this agency's "Unacceptable" rating is synonymous with a "Below Contributor" rating, and any reference to the agency's "Unacceptable" rating can be understood as such.

The Chief Financial Officer (CFO), acting as the single-step respondent, conducted a review of the grievant's performance evaluation. On April 23, 2025, the CFO had a meeting with the grievant and concluded that there was not sufficient evidence to support altering the performance evaluation. Following the single-step management response, the agency head declined to qualify the grievance for a 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.[2] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government, including the establishment of performance expectations and the rating of employee performance against those expectations.[3] Accordingly, for a grievance challenging a performance evaluation to qualify for a hearing, there must be facts 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 the performance evaluation was arbitrary and/or capricious.[4] 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.

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] EDR has consistently recognized that unsatisfactory annual performance evaluations amount to tangible actions affecting the terms, benefits, or conditions of employment.[8] For that reason, EDR will

---

[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).
[5] *See id.* § 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] According to state policy, receiving a "Below Contributor" overall rating on an annual performance evaluation triggers a mandatory re-evaluation process that can potentially conclude with the employee's termination if their

assume, for purposes of this ruling only, that the grievance involves an adverse employment action as there is not a basis to qualify the grievance for a hearing otherwise.

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.[9]

Performance Improvement Plan/Notice of Improvement Needed

Alleged False Statements and Training

The grievant argues that her PIP is based on alleged false statements and inaccuracies – especially alleged false statements relating to whether certain trainings occurred on particular dates. The PIP in question outlines a list of tasks for the grievant to complete, either by the date on which the PIP was reviewed with the grievant or within the coming weeks. The grievant accuses her supervisor of making false statements regarding the training the grievant received for two tasks, the Flex Transfer Program and the Freight Plan, required by the NOIN/PIP. The evidence suggests there was a meeting on May 31, 2023, between the grievant, the current Division Administrator, and a co-worker who was the team expert on the Freight Plan. While the current Division Administrator states Freight Plan training took place during that meeting, the grievant claims that there was no formal training.

The grievant also contends that her supervisor erroneously stated that the grievant received training on a specified date. In the original November NOIN/PIP, the supervisor stated that the grievant received training for the Flex Transfer program on August 18, 2023. The grievant provided evidence documenting she was out on leave on that date, and therefore did not receive the training. The supervisor then amended the NOIN/PIP to reflect that the grievant received the training on August 22, 2023 from the Division Administrator. The grievant claims that the Division Administrator position was vacant at that time.

Additionally, on February 7, 2025, the grievant requested that a coworker provide training on the Freight Plan. The coworker responded that she would not train the grievant on that day. The grievant reached out to her supervisor on February 11, 2025 to follow up on her request that her coworker provide training. The supervisor responded that same day via email and informed the grievant that only group trainings were feasible at the time, and that he would coordinate such trainings and include the entire team. The Supervisor also instructed the grievant to review existing documents regarding the Freight Plan and stated that "[b]ased on the documented training and existing documents/instructions you should be able to accomplish these tasks without complete

performance does not improve within three months. *See* DHRM Policy 1.40, *Performance Planning and Evaluation*; *see, e.g.*, EDR Ruling No. 2017-4413; EDR Ruling No. 2017-4389.

[9] *See, e.g.*, EDR Ruling No. 2021-5261; EDR Ruling No. 2017-4477.

walk throughs." The Supervisor also instructed the grievant to reach out if she had specific questions regarding the Freight Plan.

After a thorough review of the documents submitted in support of the grievance, EDR does not find evidence raising a sufficient question of intentional or material false statements regarding whether the grievant received training for the Flex Transfer and Freight Plan tasks. The documents provided by the grievant show what appear to be miscommunications or mistakes regarding specific dates, which appear to have been resolved by management**.** EDR is unable to conclude that management violated a mandatory policy provision, or that the issuance of the NOIN/PIP and performance review was so unfair as to amount to a disregard of the applicable policy's intent. Therefore, EDR must defer to the agency management's expertise in the amount of training required for the tasks in question.

Grievant's Work Activities

Similar to the grievant's basis for contesting the NOIN/PIP, the grievant also contests the "Unacceptable" rating on the basis that the agency made false statements regarding the work activities that the grievant had been carrying out. According to the grievant, management made false statements regarding her work and to cover up mistakes made by supervisors. Specifically, the grievant claimed that she completed tasks in her PIP that her supervisor marked incomplete. For one task, the grievant claims that while "there may have been some inaccuracies" in her work, they were not present "throughout" and therefore her task was completed. She further states that her direct supervisor "does not know what he is looking at, looking for, etc." The grievant also asserts that another NOIN/PIP task the supervisor stated was "inaccurate" was done correctly; the grievant supports this claim by stating that her coworker who was the "expert/trainer" verified that the task was completed correctly.

Additionally, the grievant claims that on December 20, 2024, the Supervisor failed to move files into their correct location while the grievant was out on medical leave. The grievant stated this failure to move the files impacted her performance review. However, there was no mention of these files included in the performance review.

Regarding alleged false statements to cover up mistakes made by supervisors, the grievant provides email correspondence from December 2, 2024, between herself and the Assistant Division Administrator regarding files that the Supervisor allegedly moved to the wrong location. The Assistant Division Administrator states that the files were moved into the correct location on November 27, 2024. The grievant claims this correspondence shows that the Assistant Division Administrator "falsified documents" to hide the Supervisor's mistake. The grievant provided screenshots of the file locations, but it is unclear how this proves the Assistant Division Administrator falsified documents or what impact this had on her performance evaluation.

For similar reasons as stated before, EDR does not find evidence raising a sufficient question of intentional or material false statements relating to the work activities the grievant carried out in response to the issued PIP. While the grievant asserts that certain tasks were completed with at least some inaccuracies, the agency has discretion to determine whether such tasks were properly completed. For these reasons, EDR must defer to the agency management's

expertise in whether the grievant satisfactorily completed the assigned tasks outlined in the PIP, and EDR declines to qualify the grievance for a hearing on this basis.

Arbitrary or Capricious

For claims relating to a "Below Contributor" rating to qualify for a hearing, there must be facts raising a sufficient question as to whether the grievant's performance rating, or an element thereof, was "arbitrary or capricious."[10] A performance rating is arbitrary or capricious if management determined the rating without regard to the facts, by pure will or whim. An arbitrary or capricious performance evaluation is one that no reasonable person could make after considering all available evidence. If an evaluation is fairly debatable (meaning that reasonable persons could draw different conclusions), it is not arbitrary or capricious. Thus, mere disagreement with the evaluation or with the reasons assigned for the ratings is insufficient to qualify an arbitrary or capricious performance evaluation claim for a hearing when there is adequate documentation in the record to support the conclusion that the evaluation had a reasoned basis related to established expectations. However, if the grievance raises a sufficient question as to whether a performance evaluation resulted merely from personal animosity or some other improper motive—rather than a reasonable basis—a further exploration of the facts by a hearing officer may be warranted.

The primary purpose of the greivant's position was "to provide analysis and support through planning, developing, monitoring, and evaluating projects and programs." In support of the "Unacceptable Rating" in the performance evaluation, the grievant's supervisor lists the following general deficiencies in the grievant's performance: failure to "take ownership of processes," "frequent and repeated" errors in her work, and failing to "independently identify, define, or solve problems related to projects and processes." The grievant's supervisor's basis for the "Unacceptable" rating includes the grievant's inability to explain the reporting process for the Annual Obligations Report (AOR), failure to verify district compliance with distributing the AOR which put the agency at risk for non-compliance, failure to demonstrate a proactive approach to continued learning or proficiency of the Flex Apportionment and Freight Investment Plan, frequent errors in Funding Verifications, failure to proactively learn and practice the STIP/TIP program, and failure to fully analyze projects that require action.

The record suggests at least some grounds to support the grievant's frustration with her supervisor's expectations. The grievant expressed her feeling that she was not prepared to undertake the tasks assigned to her and she requested training regarding those tasks. Furthermore, it is noted in the grievant's performance review that training was limited due to staffing. It is understandable that the grievant feels her performance evaluation was unfair considering the perceived lack of training she received even after requesting assistance.

Nevertheless, having reviewed the information provided by the grievant, EDR finds that, although the grievant challenges the conclusions stated in the evaluation, she has not provided evidence to contradict the primary basis supporting her "Unacceptable" rating during the

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

evaluation cycle. Although the grievant argues she was not provided with formal training to complete the Flex Transfer and Freight Program tasks, there is insufficient evidence to demonstrate that the grievant was unable to meet agency expectations due to the lack of training. EDR cannot find that this performance evaluation as a whole is without a basis in fact or otherwise arbitrary or capricious. While it is understandable that the grievant is frustrated by what she believes to be insufficient training and an overall lack of support from management, it was within management's discretion to determine that the instances of deficient performance described above were of sufficient significance that an "Unacceptable" rating was warranted. Accordingly, EDR finds that there is insufficient evidence to support the grievant's assertion that her performance evaluation was without a basis in fact or resulted from anything other than management's reasoned evaluation of her performance in relation to established performance expectations. As a result, the grievance does not qualify for a hearing on this basis.

Hostile Work Environment

The grievance also encompasses claims of bullying and a hostile work environment created by the grievant's supervisor. Although DHRM Policy 2.35 prohibits workplace harassment[11] and bullying,[12] 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;[13] and (3) imputable on some factual basis to the agency.[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

[11] 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."

[12] 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."

[13] 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 (1993); *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).

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

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 . . . ."[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.

The grievant alleges that "[t]hroughout this period, [she] ha[s] experienced an increasingly hostile work environment marked by undue scrutiny, inconsistent expectations, and a lack of the necessary training and resources to perform new or complex tasks." She adds that she was denied requested leave for her future medical appointments. She argues that this treatment amounts to harassment. However, EDR has not reviewed any evidence in the record to suggest that the agency has improperly denied leave requests. The grievant also points to several portions of her performance evaluation as evidence of a hostile work environment, especially giving attention to the alleged false statements made by her supervisor and the alleged lack of training that she received. For example, the grievant points to an alleged failure to complete a PIP task as "a clear representation of management's continuous actions and behavior inflicted intentionally towards [her] that has created this toxic and hostile work environment." The grievant also points to alleged inconsistent expectations, recalling verbal instructions to not complete certain reports.

Upon review of the allegations relating to the grievant's performance evaluation, as discussed previously, EDR cannot conclude that the status quo at that time could reasonably rise to the level of a hostile work environment that may qualify for a hearing. The majority of the alleged instances of a hostile work environment seem to all be related to the grievant's performance evaluation, which as discussed previously, does not sufficiently contain evidence of being arbitrary or capricious.

Alleged Retaliatory Motive

Finally, in communication with EDR after the initial grievance was filed, the grievant claimed the assignment of the NOIN/PIP was based on improper motives, i.e., retaliation. Specifically, the grievant alleges that the Division Administrator retaliated against her for requested ADA accommodations. The grievant states that she received her revised ADA Determination letter on Friday, November 22, 2024, and she was issued her NOIN/PIP on Monday, November 25, 2024.

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

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

employment action; and (3) a causal link exists between the protected activity and the adverse action.[16] 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.[17] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[18]

Here, the grievant states she has engaged in protected activity by requesting ADA accommodations. However, EDR finds no causal connection between the protected activity and the assignment of the NOIN/PIP and "Unacceptable" performance rating. Additionally, EDR finds that the agency has provided legitimate, nonretaliatory business reasons for its assessment of her work performance. As discussed above, the information provided shows that the grievant's performance evaluation was based on management's evaluation of her performance in relation to established performance expectations. Furthermore, there are no facts that would indicate the grievant's protected activity was a but-for cause of her allegedly retaliatory NOIN/PIP and subsequent performance evaluation. Accordingly, EDR concludes that the grievant has not raised a sufficient question as to whether retaliation has occurred, and the grievance does not qualify for a hearing on this basis.[19]

EDR's rulings on qualification and consolidation are final and nonappealable.[20]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[16] *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).
[17] *See*, *e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[18] *Id.*
[19] It should be noted that the grievant has provided EDR with hundreds of pages of documents attempting to dispute her performance evaluation, including several screenshots of various agency correspondence, as well as her own notes in relation to her performance evaluation and PIP. While this ruling has attempted to address the core arguments found in such documents, to the extent the grievant's request for qualification raises any arguments not explicitly addressed in this ruling, EDR has thoroughly reviewed the provided evidence and concludes that no basis for qualification is apparent.
[20] *See* Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).