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QUALIFICATION RULING

In the matter of the Department for Aging and Rehabilitative Services
Ruling Number 2023-5519
April 13, 2023

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether her January 13, 2023 grievance with the Department for Aging and Rehabilitative Services (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On December 7, 2022, a coworker of the grievant woke up not feeling well and tested positive for COVID-19 (COVID). From that day until December 12, she isolated herself from the office, per agency policy. On December 12, she tested negative and was symptom-free. On the afternoon of that day, the coworker apparently came into the office after a “Christmas” luncheon, while wearing a mask, coming in close contact with another employee who knew she recently tested positive for COVID. The next day, December 13, the coworker returned to work while continuing to wear a mask and left items on the grievant’s desk. That same day, the grievant came into the office for the first time that week after teleworking. After seeing the items, she saw the coworker and thanked her for the items, but the coworker did not tell the grievant that she recently tested positive for COVID. On December 14, the grievant was later informed by another employee that the coworker in fact previously tested positive for COVID. On or about December 15, the grievant began feeling ill and soon thereafter tested positive for COVID. The coworker continued to wear a mask through December 17, pursuant to agency policy.

The grievant filed an expedited grievance on or about January 13, 2023, arguing that the agency did not follow Virginia Department of Health (VDH) recommendations for when someone in the office contracts COVID, and that because of this, the coworker with COVID caused an unsafe workplace for employees and ultimately caused the grievant to test positive for COVID. The expedited grievance proceeded through the necessary steps and the agency head determined that the grievance did not qualify for a hearing. The grievant now appeals that denial to EDR.

DISCUSSION

An Equal Opportunity Employer

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 to issues such as the methods, means 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.³

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁴ Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁶

Misapplication/Unfair Application of Policy

In this case, the grievant essentially contends that the agency misapplied or unfairly applied policy by not notifying the grievant that a coworker tested positive for COVID and/or not ensuring that the coworker stayed home for the required amount of time. The grievant alleges that because the agency did not inform her that the coworker had COVID, it was the agency's fault that the grievant ultimately tested positive for COVID herself. The grievant claims that, after speaking with a VDH representative, the applicable VDH policy is to isolate for five days if tested positive, even if the person does not have symptoms, and that the burden of notifying others of one's positive status is on that of the employee who tested positive. The grievant is also arguing that the policies themselves are unfair to employees by fostering an unsafe working environment. 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.⁷

Provided in the meeting between the grievant and the second-step respondent, along with confirmation between the agency and EDR, the applicable agency policy is that "Per the DARS Safe Workplace Plan: employees are required to immediately notify their supervisors upon testing positive [for] COVID." The currently available VDH COVID Guidelines state: "If you have symptoms of COVID-19, stay home and isolate for at least 5 days from the date your symptoms

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 *Grievance Procedure Manual* § 4.1(b).

⁵ *Ray v. Int'l Paper Co.*, 909 F.3d 661, 667 (4th Cir. 2018) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)).

⁶ *Laird v. Fairfax County*, 978 F.3d 887, 893 (4th Cir. 2020) (citing *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007)) (an adverse employment action requires more than a change that the employee finds "less appealing").

⁷ See, e.g., EDR Ruling No. 2022-5309.

began. Day 0 is the day of when symptoms started, regardless of when you tested positive. . . . If you test negative for COVID-19[, you may end isolation.] If you test positive for COVID-19 and have no symptoms – you may end isolation after day 5. . . . Even if you’ve ended isolation, wear your mask through Day 10.”⁸ Finally, the agency states that VDH guidance “does not require employers to notify employees when another employee tests positive or notify others that [an] employee may have been in close contact.”⁹

The grievant argues that, contrary to these findings made in the second-step respondent meeting, the sick coworker did not notify their supervisor that they were sick and the agency did not confirm that the coworker was negative for COVID before allowing them back in the office, alleging that both are violations of the provided VDH guidelines. In support of this allegation, the grievant states that at the “Christmas” luncheon on December 12, a day on which the coworker was supposed to still be in isolation, the coworker’s supervisor asked where the coworker was, implying that the coworker never actually notified her supervisor that she tested positive for COVID. In addition, the grievant claims that the coworker was seen at the office shortly after the luncheon concluded, despite her five days of isolation not yet concluding. In summary, the grievant is alleging that the agency did not properly adhere to agency and VDH guidelines by allowing the coworker to return to the office before the period of isolation was to end.

After review, EDR does not find that the grievance raises a sufficient question that the agency misapplied or unfairly applied policy regarding COVID guidelines. As the guidelines suggest, it is the responsibility of the employee, not the agency, to report a positive COVID status or COVID symptoms. As such, the agency did not fail to follow VDH guidelines by not informing the grievant of her coworker’s positive COVID status. Whether the agency handled the situation with the coworker’s behavior adequately is somewhat unclear. If the coworker did not notify their supervisor that they were positive, that would seem to be a matter the agency should address with the coworker. The guidelines require that the coworker must isolate for five days after symptoms appear, and the record shows that they isolated from the day they experienced symptoms, December 7, through December 12, the day on which they were symptom-free and tested negative. However, the coworker’s negative test may also have permitted an end to isolation per the guidelines. To the extent the coworker did not adhere to isolation guidelines, the agency may seek to address the matter with the coworker and/or the coworker’s supervisor, if warranted by the facts. On the other hand, it also appears that the coworker took appropriate cautions upon returning to the office by wearing a mask through December 17, ten days after symptoms arose, as VDH guidelines require. Therefore, the policy violations, to the extent they occurred, appear to concern how and whether the agency should address the behavior of the coworker, which are not matters that qualify for a hearing under the facts of this case.

Adverse Employment Action

Furthermore, there is no evidence in the record that supports a claim that the grievant suffered an adverse employment action. Although the grievant’s concerns about COVID in the workplace and the agency’s policies regarding it are understandable, EDR cannot conclude that

⁸ Virginia Dep’t of Health, *Coronavirus, If You Are Sick*, <https://www.vdh.virginia.gov/coronavirus/protect-yourself/infected/>; see also *If You Have Been Exposed*, <https://www.vdh.virginia.gov/coronavirus/protect-yourself/exposure/>.

⁹ EDR can also find no provision of VDH guidance that requires the employer to notify of an employee’s positive test, and the grievant has cited to no such guidance.

the impact of the agency's response to the coworker contracting COVID had an adverse impact on the terms, conditions, or benefits of the grievant's employment at the time the grievance was filed. EDR also cannot find any outside authority that suggests that a grievant contracting COVID from a coworker, as is alleged in this case, amounts to an adverse employment action. While the grievant is arguing that the workplace is unsafe because she cannot know for sure when a coworker has COVID before it is too late to take appropriate action, EDR has not been presented with evidence suggesting that the grievant's working conditions rise to the level of an unsafe working environment, especially in light of the VDH guidelines being in place. For the foregoing reasons, EDR cannot find any evidence in the record that shows the agency's response to the coworker's COVID status created an adverse employment action on the grievant. Accordingly, the grievance does not qualify for a hearing.

Recommendations

While the second-step respondent met with the grievant for their required meeting, the findings from that meeting do not suggest that the agency attempted to consider potential ways to mitigate the grievant's concerns. EDR is not aware of any information that the grievant may have or could present to suggest that she herself has any medical condition in need of accommodation. However, it does appear that the grievant lives with a family member who is susceptible to COVID. It would be beneficial if the agency would take the time to more thoroughly talk through these concerns with the grievant and attempt to address any potential ways to handle potential COVID issues in the future that would address the grievant's concerns (to the extent this has not already occurred). Such a discussion would also help clarify if there are any requests for accommodation from the grievant.¹⁰

CONCLUSION

For the reasons expressed in this ruling, the facts presented by the grievant in her January 13, 2023 grievance do not constitute a claim that qualifies for a hearing under the grievance procedure.¹¹

EDR's qualification rulings are final and nonappealable.¹²

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¹⁰ For example, the grievant has raised a question in the grievance materials about telework and how that could be incorporated.

¹¹ See *Grievance Procedure Manual* § 4.1.

¹² Va. Code § 2.2-1202.1(5).