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QUALIFICATION RULING

In the matter of the Department of Social Services
Ruling Number 2023-5534
May 8, 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 February 13, 2023 grievance with the Department of Social Services (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

The grievant is currently employed as an Interstate Compact on the Placement of Children ("ICPC") Program Consultant at the agency. The grievant was previously employed as a Hotline Specialist but was reassigned to the ICPC Consultant position as of January 25, 2023. The grievant argues that the reassignment to her new position was done for retaliatory and/or discriminatory reasons. She also argues that her previously-granted accommodations were rescinded due to the reassignment. The most recent accommodations were approved on January 29, 2020, when she was a Hotline Specialist, with all requested accommodations approved, including work hours between 10:00 AM and 8:00 PM, a consistent 8-hour work schedule, no shifts on weekends, and frequent breaks as needed. Because these accommodations interfered with the agency-asserted essential functions of the Hotline Specialist position, the agency decided to reassign the grievant to her current position. The grievant also alleges that based on the Employee Work Profile ("EWP") that was forwarded to her on February 8, 2023, the ICPC Consultant position is actually a Pay Band 6 position, compared to the Pay Band 5 position she filled for the Hotline. She further argues that the skills required for the ICPC Consultant position exceed those required for the previous Hotline Specialist position. Following the management resolution steps, the agency head determined that the grievance record did not contain evidence supporting the grievant's allegations of discrimination and retaliation. As a result, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the hiring, promotion, transfer, assignment, and retention of employees within the agency "shall

not proceed to a hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[1] Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve an "adverse employment action."[2] Thus, typically, a 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."[3] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[4]

Although we observe that the record is far from clear as to whether the reassignment constitutes an adverse employment action, EDR declines to draw a conclusion on that complex issue, as we ultimately conclude that the grievance does not qualify for a hearing in any event. Therefore, the foregoing analysis assumes only for the sake of argument that the reassignment rises to the level of an adverse employment action.

Discrimination/Retaliation

The grievant primarily alleges that the reassignment was a form of discrimination and/or retaliation. DHRM Policy 2.05, *Equal Employment Opportunity*, requires that "all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity or expression, age, veteran status, political affiliation, genetics, or disability." For a claim of discrimination on any of these grounds to qualify for a hearing, the grievance must present facts that raise a sufficient question as to whether the issues describe an adverse employment action that has resulted from prohibited discrimination.[5] However, if the agency provides a legitimate, nondiscriminatory business reason for the acts or omissions grieved, the grievance will not be qualified for hearing absent sufficient evidence that the agency's proffered justification was a pretext for discrimination.[6] Similarly, a claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether the grievant's protected activity is causally connected to a subsequent adverse employment action against her.[7] Ultimately, a successful retaliation claim must raise a sufficient question as to whether, but for the grievant's protected activity, the adverse action would not have occurred.[8]

Here, the grievant engaged in protected activity by requesting ADA accommodations for her previous position as a Hotline Specialist. The grievant claims that these accommodations, and consequently her disability, caused the agency to reassign her to the ICPC Consultant position. She also alleges in her grievance that her previous involvement as a witness for a coworker's

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[1] Va. Code § 2.2-3004(C); *see Grievance Procedure Manual* §§ 4.1(b), (c).
[2] *Grievance Procedure Manual* § 4.1(b).
[3] 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)).
[4] 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").
[5] *See* Strothers v. City of Laurel, 895 F.3d 317, 327-28 (4th Cir. 2018).
[6] *See id.*; *see*, *e.g.*, EDR Ruling No. 2017-4549.
[7] *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).
[8] *Id.*

grievance against the agency created cause for retaliation by the agency.[9] EDR has not identified evidence that raises a sufficient question that the grievant's limited involvement in the coworker's grievance is causally connected to her reassignment. By contrast, the grievant's reassignment is clearly related to her needed accommodations. Therefore, we assess whether the agency has engaged in prohibited discrimination and/or retaliation by considering whether the agency has acted consistent with the Americans with Disabilities Act (ADA).[10]

The agency has asserted that the reassignment is for a legitimate business reason in that the grievant's accommodations no longer allowed her to perform the essential functions of the Hotline Specialist position. The agency explains that in the Spring of 2022, management made the business decision that availability to work evenings, weekends, and alternate shifts was an essential function for Hotline staff. This was applied to all Hotline Specialist employees – not just the grievant. The grievant's accommodations, as requested in 2020, included being unable to work varying shifts, weekends, or holidays. Based on the grievant's existing accommodations, the agency determined that the grievant was not qualified to perform the essential functions of the Hotline Specialist position, even with an accommodation.[11]

The grievant argues that availability to work all shifts is not actually essential for the Hotline Specialist position, as she claims no full-time Hotline Specialists are ever asked to work weekends or holidays. Under the ADA, a job function may be "essential" when:

> the reason the position exists is to perform that function, when there aren't enough employees available to perform the function, or when the function is so specialized that someone is hired specifically because of his or her expertise in performing that function. If an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. Other relevant evidence can include the employer's judgment as to which functions are essential, the amount of time spent on the job performing the function, the consequences of not requiring the incumbent to perform the function, and the work experience of people who hold the same or similar job.[12]

The EWP for the Hotline Specialist position states that "[t]his position is required to be available to work varying shifts depending on call volume and the needs of the State Hotline. This includes holidays, days, nights, overnights and weekend coverage." Further, the agency has stated

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[9] The grievant was listed as a witness for the grievance hearing involving a co-worker. However, the grievant did not testify at the hearing.

[10] *See generally* 42 U.S.C. §§ 12101 through 12213.

[11] In the employment context, the ADA provides protections to a "qualified individual" with a disability, defined as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

[12] Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 579-80 (4th Cir. 2015) (citing 42 U.S.C. § 12111(8); 29 C.F.R. §§ 1630.2(n)(2), 1630.2(n)(3)) (internal quotation marks omitted) (finding that "providing customer service" was not necessarily one of a court clerk's essential job duties, even though it was listed in her job description); *see* 29 C.F.R. app. § 1630.2(n) ("The inquiry into whether a particular function is essential . . . focuses on whether the employer actually requires employees in the position to perform the functions" that are considered essential); *see also* Stephenson v. Pfizer, Inc., 641 F. App'x 214, 220 (4th Cir. 2016); EEOC v. Womble Carlyle Sandridge & Rice, 616 F. App'x 588, 594 (4th Cir. 2015) (employee's personal experience of the job is not a dispositive factor in determining whether a function of the job is essential).

that the requirement is now applied consistently. Although the grievant questions whether some employees would be required to work alternative shifts, the agency maintains that all Hotline employees are available to work all shifts. Additionally, the agency decided to implement the requirement at this time due to difficulties maintaining staffing levels on various shifts for the Hotline. To the extent the availability of Hotline staff to work all shifts may not have been as important in the past, the agency has presented a reasoned basis for its judgment that staffing will be impacted if there are Hotline staff with limited availability. Thus, the agency has presented sufficient evidence to support its contention that availability to work all shifts is an essential function of the job.

Finally, "the ADA does not require an employer to reassign any of the essential functions of a disabled employee, nor does it require an employer to hire additional employees to perform an essential function."[13] The ADA only requires that the agency attempt to provide sufficient accommodations for the employee to perform the function.[14] If the agency cannot adequately accommodate the employee to carry out the essential functions, they must then reassign the employee if no undue hardship would result. Indeed, a reassignment for such a purpose is defined by the Equal Employment Opportunity Commission ("EEOC").[15] Because the agency allowed for all requested accommodations by the employee, and with such accommodations the grievant is unable to carry out the essential function of being available to work flexible days and hours, the grievant's reassignment does not raise a sufficient question of discrimination imputable to the agency or failure to adhere to the ADA. Further, EDR has been unable to identify any evidence that raises a sufficient question as to whether the agency's justification for its decisions was mere pretext for a discriminatory or retaliatory motive for the reassignment. Consequently, EDR cannot qualify the grievance for a hearing on either of these grounds.[16]

Misapplication/Unfair Application of Policy

The grievant also alleges that the agency was wrong to reassign her to the ICPC Consultant position because the position requirements are beyond what she is qualified for; EDR is interpreting this claim as an allegation of misapplied and/or unfairly applied policy. The grievant also alleges that the agency reassigned her without an approved EWP and "without a medical determination to assess if the individual can do the new job requirements." Finally, the grievant alleges that the proper Pay Band for the ICPC Consultant position is Pay Band 6, based on an EWP that she received from the agency, which is not a reassignment within the Pay Band under policy as her former Hotline Specialist position was in Pay Band 5.

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a

[13] *Stephenson*, 641 F. App'x at 219.
[14] *Id*.
[15] EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, *Reassignment*, www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada ("[Reassignment] must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship.").
[16] EDR's ruling on these issues only determines whether there is evidence raising a sufficient question to qualify the grievance for a hearing. To the extent the grievant pursues or is pursuing other complaint processes regarding the issues of discrimination and retaliation, EDR's ruling has no bearing on those matters.

mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. A grievance that challenges an agency's action such as a reassignment does not qualify for a hearing unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.[17]

DHRM Policy 3.05, *Compensation*, provides that:

> From time-to-time agency business (staffing or operational) needs may require the movement of staff. Reassignment Within the Pay Band is the management-initiated action that is used for this purpose. Under Reassignment Within the Pay Band:
> 1. Employees may be moved (reassigned) to different positions within the same assigned Salary Range.
> 2. The position to which an employee is reassigned may be in the same or a different Role within the same Salary Range.
> 3. The employee's base salary is not changed as a result of the reassignment.[18]

The grievant appears to be arguing that the reassignment was improper in part because, according to an EWP she received, the agency reassigned her to a position in a higher pay band. However, the agency has confirmed that the ICPC Consultant position is indeed a Pay Band 5 position, the same as the Hotline Specialist position. Both the third-step respondent and the agency head stated that the correct role title for the position is "Program Administrative Specialist II." The correct EWP that was sent to the grievant on March 31, one that indicates Pay Band 5, has this role title, while the incorrect EWP that the grievant mentioned, under Pay Band 6, has the role title of "Program Administrative Specialist III." The record does not provide much insight on why this incorrect EWP was provided to the grievant, but regardless, the agency has since made clear what the correct EWP and role title are for the grievant. Since the new position falls under the same pay band as the grievant's previous position, the transfer appears to be a reassignment within the Pay Band pursuant to Policy 3.05.

The grievant also contends that the agency, in performing the reassignment, did not adequately consider the grievant's ADA accommodations. However, the agency made clear in its responses that the new position does not interfere with the grievant's current accommodations. According to the agency, the new position allows for her ADA accommodations to be met, and the agency has made clear that such accommodations will not be rescinded in any part. For these reasons, EDR does not find that the agency misapplied or unfairly applied policy in regards to the grievant's existing accommodations.[19]

Finally, the grievant asserts that the agency should not have reassigned her to the ICPC Consultant position because she alleges the qualifications for that position exceed her knowledge,

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[17] *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as "[i]n disregard of the facts or without a reasoned basis.").
[18] DHRM Policy 3.05, *Compensation*, at 14 ("Reassignment Within The Pay Band").
[19] EDR has not been presented with evidence that the grievant has sought or requires accommodation concerning any new duties of her new position. To the extent such issues arise, the grievant should seek those accommodations from the agency. If she disagrees with the agency's response thereto, she could choose to file a new grievance or pursue another complaint process.

skills, and abilities. However, the agency has noted that due to the unique nature of the ICPC Consultant position, new employees in that position learn as they work through the position; there are no prior qualifications that are appropriate for a job of this nature. The agency also states that the entry requirements for this position are lower than those set for the Hotline Specialist position, which required working knowledge and experience in the field of Child Welfare. All other employees who have been reassigned to the ICPC Consultant position are no more qualified than the grievant due to the unique nature of the role. In summary, the agency is not rescinding any of the grievant's current ADA accommodations in lieu of this reassignment, and the ICPC Consultant position does not require any qualifications that the grievant does not already have. Accordingly, the grievance does not raise a sufficient question as to whether the agency misapplied and/or unfairly applied policy, and it does not qualify for a hearing on this basis.

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

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[20] Va. Code § 2.2-1202.1(5).