



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 2023-5498
January 20, 2023

The grievant seeks a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management as to whether his October 20, 2022 grievance with the Virginia Department of Transportation (the “agency”) qualifies for a hearing. For the reasons set forth below, EDR finds that the grievance is not qualified for a hearing.

FACTS

Pursuant to the reissued statewide telework policy and guidance on returning to the workplace in 2022, the agency’s District Administrator Council (DAC) was delegated by the agency to “determin[e] which positions would be eligible for telework under the new telework policy.” The DAC was to consider the type of work that agency employees complete, the requirements of various positions, and the ability of employees to perform the assigned work duties. Supervisors of individual employees had no say in these determinations; rather, the policy provides that one-day telework eligibility can be approved by the Agency Head, two-day telework eligibility by the Secretary of Transportation, and telework greater than two days per week by the Governor’s Chief of Staff.

On or about July 1, 2022, the grievant submitted a request to telework from July 5 – September 5, 2022, with the reason being to find childcare for his school-age child. The DAC determined that the grievant’s position was ineligible for telework. At the time of this telework request, the grievant’s official role title was Architect/Engineer I, with his official position title being Engineer Operations ITS. Coinciding with the new telework policy, on June 10, 2022, the grievant was moved from the Operations Division into Traffic Engineering and Operations after the two divisions merged. As a result of this merger, the team the grievant formerly worked with all moved to the Bristol District, while the grievant remained in the Salem District. The grievant’s position title never changed; his official title when he originally transferred into the agency in 2020 was “Engineer Operations ITS,” which is still his official position title now. This position centers around construction contract management. Importantly, the Engineer Operations ITS position is unique to the state. The DAC made the determination that positions that primarily involve management and oversight of construction maintenance contracts are considered “field-facing” positions and are ineligible for any amount of telework, with the exception of situational telework.

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The grievant filed a grievance against the telework determination on or about October 20, 2022. The grievant reports that the same Engineer Operations ITS position he had prior to the June 10 merger, a position still falling within the “Engineer I” role, was eligible for telework, and he had teleworked all throughout the COVID-19 pandemic. The grievant further states that the other two Engineer I employees in his section that primarily work in the field had been deemed eligible for telework. In addition, the grievant asserts that a Staunton employee who is ineligible for telework that the agency discussed as a comparator to the grievant as one with similar field-facing work is not comparable because the employee does not manage contracts like the grievant does. Nevertheless, following revisions to the Commonwealth’s telework policy, the grievant has been denied telework completely (outside of situational telework). The grievance has proceeded through the management resolution steps without any relief being granted. The agency head declined to qualify the grievance for a hearing, and the grievant appealed 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.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 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 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 We do not reach the question of whether the denial of telework is an adverse employment action as the matter can be resolved on other grounds.⁷

It appears that the grievant principally argues that state policy has been misapplied or unfairly applied. Specifically, he argues that the job duties of his current position of Engineer Operations ITS have barely changed since he joined the agency in 2020, when at that point he was eligible for telework. He claims that those in the DAC who decided his ineligibility for telework

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 The agency has also presented a noncompliance issue, arguing that the grievance was not timely initiated. However, EDR need not reach this issue because regardless of the determination of that question, the grievance does not qualify for a hearing, as discussed further below.

did not know his job responsibilities, unlike his supervisors who deemed him eligible. The grievant's position has some merit in that he had reportedly been permitted to telework throughout the COVID-19 pandemic despite his position title not changing. However, with the issuance of the Commonwealth's updated telework policy, a new telework framework was created and all existing telework agreements were to be reviewed and replaced.⁸ In that effort, the agency determined, through its delegation to the District Administrator Council, that employees in positions like the grievant's with an emphasis in construction contract management were determined to no longer be eligible for telework. Employees with this type of work are deemed "field-facing," meaning "work [that] is best completed in the office and in the field, even if some tasks can be accomplished remotely."

The state telework policy provides:

*Eligible positions are determined by the type of work and job requirements of the position, as defined by heads of agencies. Determinations for telework eligibility will be focused on the job requirements and the ability of the individual employee to perform work duties assigned to the individual and the team.*⁹

While the grievant's position is unique to the state, the DAC determined that positions of this type – those that heavily involve contract management – are ineligible for telework due to their field-facing nature. The grievant argues that the DAC should not have made these determinations without consulting the grievant's supervisors, who both believed that he was eligible to telework. He claims that not consulting these supervisors allowed them to make these determinations without accurately knowing and understanding the grievant's job duties. Regardless of his supervisors' views, the determination of eligibility was left solely to the DAC, who would then relate any determinations of eligibility to the appropriate supervisor. Although the grievant is apparently in a unique position, it appears that the agency has sought to be consistent and determined that all employees in positions performing the type of work the grievant performs are ineligible for telework.

The agency has referred to an employee within the Staunton District who, like the grievant, manages and oversees construction maintenance contracts, and is similarly ineligible for telework. The grievant asserts that this comparison is unfounded because the Staunton employee does not manage a signal contract like he does. However, the DAC has found that since the Staunton employee manages other maintenance contracts, that is enough to meet the definition of "field-facing," similar to how that has been applied to the grievant. The grievant has also asserted that two of his counterparts in other districts with the same role and allegedly similar duties are eligible for telework. EDR asked the agency about these comparators, but the information shared did not support the grievant's position. One of the comparators could not be located as a current employee and the other is not eligible for telework, like the grievant. Therefore, EDR cannot find a mandatory policy provision violated by the agency in this instance for attempting to make a blanket application to all positions based on certain duties.

⁸ DHRM Policy 1.61, *Teleworking*, at 1-2.

⁹ *Id.* at 1.

As stated above, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.¹⁰ Although the grievant disagrees with the agency's assessment of how to determine telework eligibility for his position, EDR finds that his grievance does not raise a sufficient question as to whether the agency misapplied and/or unfairly applied policy, or was otherwise arbitrary or capricious. It appears instead that the agency's determination of telework eligibility for the grievant's position is consistent with the discretion granted by policy. Accordingly, the grievance does not qualify for hearing on this basis.

EDR's qualification rulings are final and nonappealable.¹¹

Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁰ Va. Code § 2.2-3004(B).

¹¹ Va. Code § 2.2-1202.1(5).