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 Medical Assistance Services
Ruling Number 2023-5483
February 7, 2023

The grievant seeks a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management as to whether her October 7, 2022 grievance with the Virginia Department of Medical Assistance Services (the "agency") qualifies for a hearing. For the reasons set forth below, EDR finds that the grievance is not qualified for a hearing.

FACTS

On or about October 7, 2022, the grievant submitted a grievance challenging the agency's decision to deny her two-day telework request. The grievant first submitted a two-day telework request on or about May 17, 2022, which was ultimately declined due to there not being a compelling reason. EDR and the agency's human resources department have confirmed that nobody else in the grievant's division was approved for two days or more of telework during this request period in May unless the agreement was under Americans with Disabilities Act (ADA), Family and Medical Leave Act (FMLA), or temporary childcare deferral. However, the grievant was approved to telework one day per week, which remains in effect.

On August 3, 2022, the grievant submitted another telework request but then voided it, informing "the Manager about changed circumstances." At the time, the grievant was requesting approval for FMLA accommodations. On September 9, the grievant's request for such accommodations was denied. It appears that the grievant was attempting to receive accommodations through FMLA, but the agency clarified that the FMLA provides leave entitlement rather than accommodations. Importantly, the agency stated that being eligible for FMLA does not automatically allow for telework, whereas ADA accommodations could allow for telework. The grievant was approved for FMLA (the ability to take medical leave), but not ADA accommodations, and for that reason, the agency denied the grievant's request.[1]

Finally, on September 15, the grievant submitted another new two-day telework request. However, because the agency had decided to halt new telework requests for current employees,

[1] EDR does not interpret the grievance at issue in this ruling to be requesting telework as an ADA accommodation. Therefore, EDR has not evaluated whether there would be evidence raising a sufficient question as to whether such an accommodation would be due in the grievant's situation.

her request was denied.[2] The grievant claims that she never received a notice regarding the deadline for current employees to submit new telework agreements. At this point, there were two other employees in the grievant's division who were approved for two-day telework for non-ADA, FMLA, or childcare-related reasons, but unlike the grievant's request, EDR and the agency have confirmed that these requests were submitted before the agency decided to no longer accept new requests for telework.

The grievance has proceeded through the management resolution steps without any relief being granted, though the agency director confirmed in their qualification decision that the grievant's one-day telework agreement remains in effect. 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.[3] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[4] 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.[5]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8]

The grievant principally argues that she was not treated consistently with other agency employees because there were two other employees in her same division that were approved for two days of telework despite using the same justifications as her own, and that she received no notice of the apparent deadline to halt new telework agreements from current employees. The agency's decision to halt all new telework agreements after August 2022 is thus the basis for this grievance. Little explanation as to this new policy is given by the agency. EDR is also unable to

---

[2] The agency states the decision to not accept new telework requests from current employees was made in September 2022.
[3] *See Grievance Procedure Manual* § 4.1.
[4] Va. Code § 2.2-3004(B).
[5] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[6] *See Grievance Procedure Manual* § 4.1(b).
[7] 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)).
[8] 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").

discern that agency employees were provided a clear notice of a deadline. A date of August 18 was apparently given for employees with temporary agreements due to lack of childcare, not for all agency employees. The only clear indication of this policy's existence is within the agency's qualification decision sent to the grievant, stating that in September 2022, the agency made the decision to halt submissions unless the employee's circumstances changed.

The grievant's argument has merit. The two other employees in the grievant's division that submitted new telework requests in July were in the same situation as the grievant, in that their job positions were the same and they had no ADA or childcare-related accommodations to take into account. The fact that an employee cannot receive two days of telework that similarly situated employees in her same division received, simply due to the fact that she missed a deadline she was not informed of, could be seen as arbitrary. The agency director also told the grievant in the qualification decision that her position was not "hard to fill," a requirement for being eligible for two days of telework; yet those coworkers with the same position were approved in August because their position was classified as "hard to fill."

This situation arises in the context of the updated telework policy of the Commonwealth, in which a new telework framework was created and all existing telework agreements were to be reviewed and replaced.[9] The policy provides that "[d]eterminations 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."[10] As for the grievant, EDR has not been made aware of a basis in the grievant's job duties or requirements that led to her telework request being denied – rather it was because she missed a deadline that does not appear to have been communicated to employees. EDR does not interpret the telework policy itself as providing a deadline or preventing employees from submitting telework requests at a later time, especially if their needs and circumstances have changed. Therefore, EDR finds that the grievance raises a sufficient question as to whether the agency misapplied and/or unfairly applied policy, or was otherwise arbitrary or capricious.

Despite this finding, however, EDR is unable to find that there was an adverse employment action resulting from this application of policy. An adverse employment action requires some form of adverse effect on the terms, conditions, or benefits of employment. DHRM Policy 1.61 describes telework as a benefit of employment.[11] However, under the particular facts of this case, we are unable to find that there has been a *significant* change to the grievant's benefits of employment.[12] The grievant currently has a one-day telework agreement in effect and is attempting to be considered for a revised two-day agreement. DHRM Policy 1.61 mentions no minimum amount of days for telework when it describes it as a benefit of employment. Further, EDR has not discovered relevant and applicable case law to support an argument that the refusal to let an employee telework for one additional day is an adverse employment action. Some courts have found that even refusing telework altogether is not considered an adverse employment action,

[9] DHRM Policy 1.61, *Teleworking*, at 1-2.
[10] *Id*. at 1.
[11] *Id.* (requiring agency heads to inform employees that "teleworking is a benefit offered to employees, rather than an obligation of the Commonwealth").
[12] *See Ray*, 909 F.3d at 667.

unless it has some tangible effect on the terms or conditions of employment.[13] EDR cannot find any facts that show that the agency's denial of the additional telework day desired by the grievant has such an effect. Nothing in the grievance record, including her updated request in September, mentions any accommodation requests or similar changes in circumstances. Therefore, because there is not an adverse employment action at issue, the grievance does not qualify for a hearing. EDR's qualification rulings are final and nonappealable.[14]

To the extent the agency chooses to continue not to accept new telework requests from its current employees, EDR would recommend that the agency review with DHRM's Policy Administration team as to whether such an application is consistent with DHRM Policy 1.61.

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[13] *See, e.g., Walker v. Md. Dep't of Info. & Tech.,* No. CCB-20-219, 2020 U.S. Dist. LEXIS 204142, at *8 (D. Md. Nov. 2, 2020) ("Still, as courts in this circuit have frequently held, an employer's refusal to allow a flex schedule or telework arrangement, without more, does not rise to the level of an adverse employment action.").
[14] Va. Code § 2.2-1202.1(5).