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## QUALIFICATION RULING

In the matter of the Department of State Police  
Ruling Number 2022-5407  
July 18, 2022

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (DHRM) on whether his March 3, 2022 grievance with the Department of State Police (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is qualified for a hearing.

### FACTS

On or about March 3, 2022, the grievant initiated a grievance challenging the agency’s determination that he was ineligible for career progression. The grievant, employed as a Trooper, had sought promotion to the rank of Senior Trooper in accordance with the agency’s Career Progression Program. According to the agency, employees such as the grievant “must be in compliance with the [agency]’s Weight Control Policy to be eligible for career progression.” On or about December 8, 2021, the agency’s physician examined the grievant and determined that he was medically exempt from the agency’s weight control requirements because his “excess weight is due to medical reasons.” However, after subsequent discussion with agency staff, the physician apparently revised his determination on February 3, 2022, finding that the grievant was not exempt “due to lack of direct medical cause noted (based on [agency] policy).” Accordingly, the agency maintained that the grievant did not meet the weight requirement to progress to Senior Trooper. During the management resolution steps, the agency further declined to grant the grievant’s requested relief of promotion or to qualify the grievance for a hearing. The grievant has appealed the latter 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.<sup>1</sup> Generally, the grievance procedure limits grievances that qualify for a hearing to those that involve “adverse employment actions.”<sup>2</sup> 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,

<sup>1</sup> See *Grievance Procedure Manual* § 4.1.

<sup>2</sup> See *id.* § 4.1(b).

reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”<sup>3</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>4</sup>

In addition, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>5</sup> Thus, claims relating solely to the “[h]iring, promotion, transfer, assignment, and retention of employees” 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.<sup>6</sup> 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.

Because the record presents no dispute that the agency declined to promote the grievant, EDR finds that the grievance sufficiently alleges an adverse employment action. Accordingly, the grievance may qualify for a hearing if it also raises a sufficient question whether the agency’s decision constituted a misapplication or unfair application of policy.

Here, the agency’s Career Progression Program stipulates requirements to be eligible for promotion to Senior Trooper, including that an employee must “be in compliance with the maximum allowable weight standards . . . OR be in compliance with the Weight Control Program, unless there is an underlying medical problem as certified by the [agency’s] physician.”<sup>7</sup> The agency’s Weight Control Policy provides that “employees who feel their inability to comply with . . . weight requirements is due to a medical condition” must submit documentation of the condition and request referral for evaluation by the agency physician.<sup>8</sup>

In this case, it appears that the agency referred the grievant to its physician, who saw him on December 8, 2021 to assess weight compliance. According to the grievant, he provided the agency physician with a letter from the grievant’s own doctor confirming treatment for a specific medical condition and noting that the grievant was currently “in a weight control program.” The agency’s physician then completed the agency’s Weight Compliance Examination form, noting “discussion of weight issues” and ultimately indicating that the grievant was “EXEMPT” from the agency’s weight control requirements for promotion. Nevertheless, on January 25, 2022, the agency advised the grievant that he would need to demonstrate compliance with the weight control requirements as part of his anticipated promotion. On February 3, 2022, the agency physician revised the Weight Compliance Examination form from December 2021 to conclude that the grievant “does NOT qualify for weight exemption due to lack of direct medical cause noted (based on [agency] policy).”

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<sup>3</sup> Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

<sup>4</sup> Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>5</sup> See Va. Code § 2.2-3004(B).

<sup>6</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>7</sup> Department of State Police Gen. Order ADM 7.01, *Career Progression Program: Senior Trooper*.

<sup>8</sup> Department of State Police Gen. Order ADM 14.12, *Weight Control Policy*.

The grievant maintains that he has a medical diagnosis that “impact[s] his ability to lose weight,” which he discussed with the agency physician and then with management during the grievance resolution steps. In addressing the grievant’s claims, the agency’s third-step respondent elaborated that, in the agency’s view, the grievant’s “excessive weight is not a symptom of an underlying medical condition,” but instead was “the proximate cause” of his medical condition. The third-step respondent explained: “the documentation you provided indicated your excess weight was the underlying medical condition . . . . This is the very condition why there is a weight control program in the agency. To be granted an exemption under current policy, your weight must be excessive due to another underlying medical condition.”

Upon a thorough review of the record, the evidence presented by the parties is inconclusive as to whether the grievant’s medical condition prevents him from complying with the agency’s weight requirements. Although both parties provided medical documentation at EDR’s request, none of the evidence presents a medical opinion as to the causal relationship between the grievant’s medical condition and his weight. The letter from the grievant’s doctor, dated September 29, 2021, identifies his underlying medical condition and generally references a “weight control program.” The agency’s physician determined that the grievant’s excess weight had no “direct medical cause,” but this determination was stated in a conclusory manner and reversed the physician’s prior determination for unknown reasons, apparently with no further evaluation of the grievant.

Moreover, we acknowledge the grievant’s objection to the agency’s exemption process as well as to its outcome. The record presents no dispute that, consistent with the agency’s Weight Control Policy, the grievant obtained documentation of an underlying medical disorder and submitted it to the agency’s physician for the evaluation on December 8, 2021. It appears that the physician granted the exemption as of that date; yet the agency did not recognize the exemption when advising the grievant that he was otherwise eligible for career progression. Agency staff then apparently had a discussion with the physician, which prompted the physician to revisit and reverse his determination. The record is silent as to what prompted this discussion, what medical conclusions resulted from it, and who ultimately determined that the grievant does not have an underlying medical condition that prevents him from complying with the agency’s weight requirements. Thus, while agency management has asserted that the grievant’s weight is a cause of his medical disorder rather than a symptom, EDR is unable to identify a documented basis for that conclusion. Because the grievant has documented an underlying medical condition, and because the record is unclear as to whether or how the agency’s physician evaluated it as a basis to exempt the grievant from weight requirements, we conclude that the grievance presents a sufficient question whether the agency misapplied or unfairly applied its Career Progression policy by deeming the grievant ineligible.

For similar reasons, we note that exemption from the agency’s weight requirement could potentially be required by the Americans with Disabilities Act (ADA) and related state policy.<sup>9</sup> Under the ADA, a disability may refer to “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . .”<sup>10</sup> The grievant has presented documentation of an impairment that could potentially rise to the level of a disability under this

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<sup>9</sup> See 42 U.S.C. § 12112(a); see 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m); DHRM Policy 2.05, *Equal Employment Opportunity*.

<sup>10</sup> 42 U.S.C. § 12102(1).

standard. As a general rule, the ADA requires an employer to make reasonable accommodations to the known physical or mental limitations of a qualified employee with a disability, unless the employer “can demonstrate that the accommodation would impose an undue hardship on the operation of the business [or government].”<sup>11</sup> Consistent with these requirements, the agency’s Career Progression and Weight Control policies specifically provide for medical exemptions that could be granted as a reasonable accommodation when required to allow a qualified employee to perform the essential functions of their job.

Here, the grievant alleges that his weight does not prevent him from performing the essential functions of a Trooper or Senior Trooper, but that he is nevertheless unable to comply with the agency’s Weight Control policy due to his underlying medical condition. The current record offers scant indication whether exemption from the weight requirements would be a reasonable accommodation to allow the grievant to follow the standard career progression for his position or, alternatively, whether it would unduly burden agency operations. Accordingly, to the extent that the grievant argues that the agency has misapplied or unfairly applied state disability policy, this issue would be best resolved by a hearing officer following a full exploration of all the relevant evidence.

In sum, the record presents a qualifiable issue as to whether the agency misapplied or unfairly applied policy to effectively deprive the grievant of a standard promotion and/or reasonable accommodations to which he was entitled. The grievance qualifies in full, including any alternative related theories raised by the grievant to challenge his ineligibility for career progression. At the hearing, the grievant will have the burden to prove that the agency’s determinations in this regard were improper.<sup>12</sup>

Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear the claims qualified for hearing, using the Grievance Form B. However, this ruling is not intended to prevent or discourage the parties from resolving the underlying issues outside the context of a hearing. Should the parties wish to pursue resolution of the issues herein prior to a hearing date, EDR is available to assist in such any efforts as desired and appropriate.

EDR’s qualification rulings are final and nonappealable.<sup>13</sup>

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<sup>11</sup> 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) (“It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.”). “Reasonable accommodations” include “[m]odifications or adjustments that enable [an employee] with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.” 29 C.F.R. § 1630.2(o)(1)(iii); *see* 42 U.S.C. § 12111(9)(B).

<sup>12</sup> *Rules for Conducting Grievance Hearings* § VI(C).

<sup>13</sup> *See* Va. Code § 2.2-1202.1(5).