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 2022-5416
July 22, 2022

The grievant seeks a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") as to whether his March 30, 2022 grievance with the Virginia Department of Transportation (the "agency") qualifies for a hearing. For the reasons set forth below, the grievance is not qualified for a hearing.

FACTS

On or about March 30, 2022, the grievant filed a grievance to challenge his removal from employment with the agency for failing to maintain a state inspection license required for his job duties. The grievant's license appears to have expired at some point in November 2021. At that time, the grievant was on a period of disability leave related to mental health. The grievant states he was released to return to work on January 3, 2022, but was required to undergo a fitness for duty examination by the agency before returning. Once complete, the grievant's first day back at work was February 14, 2022. The grievant was asked about his license at that time by a supervisor. Because the grievant's license had been expired for more than a 30-day grace period, he was required to recertify with State Police as a new applicant. The grievant made an appointment for the appropriate testing, which was scheduled for March 9, 2022. In the meantime, agency management was purportedly informed by State Police that even if the grievant passed the testing on March 9, the paperwork approval would not be finalized for six to eight weeks. On March 3, 2022, the agency issued a due process notice indicating that the grievant's employment was to be ended due to his license expiration. The grievant apparently notified his supervisor that he would not be able to take the scheduled testing on March 9. Thus, the grievant was separated on March 9. After following the expedited grievance process, the agency head declined to qualify the grievance for a hearing. The grievant now appeals 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] Generally,

[1] *See Grievance Procedure Manual* § 4.1.

the grievance procedure limits grievances that qualify for a hearing to those that involve "adverse employment actions."[2] 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] Because the grievant in this case was separated from employment, EDR assumes for purposes of this ruling that he experienced an adverse employment action.

Actions that automatically qualify for a hearing include the issuance of formal discipline, such as a Written Notice, and dismissals for unsatisfactory performance.[5] Other claims, including those involving separation, do not qualify for a hearing unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, a misapplication or unfair application of policy, or a sufficient factual basis to question the underlying circumstances of the termination.[6] The grievant's challenges to his separation will be addressed below.

Required Certification

The grievant points out that the requirement for him to maintain a state inspection license is not listed in the required certifications section of his position description, but rather as a performance measure. The "Licensure" section requires a Commercial Driver's License and the "[a]bility to obtain State Inspection License … within 6 months of employment." A Core Responsibility of the position involves the performance of safety inspections on equipment and includes as a goal/measure/expectation that the grievant "[m]aintain Virginia Safety Inspector Licenses." While EDR understands the point the grievant has asserted, we do not agree that this has a material impact on the determinations in this case. Based on a review of the grievant's performance plan, it cannot reasonably be argued that the state inspection license was not required for his job, regardless of how it appeared in the document.[7] Thus, treating the loss of this license as a basis for removal for inability to meet working conditions[8] under the *Standards of Conduct* is consistent with state policy in this case.[9]

---

[2] *See id.* § 4.1(b).
[3] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[4] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[5] *Grievance Procedure Manual* § 4.1(a); *see* Va. Code § 2.2-3004(A).
[6] Va. Code §§ 2.2-3004(A), 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[7] The grievant sought and obtained records from the agency that reflected communications with management and human resources in this case about the grievant's job description. Human resources staff indicated that the job description should be "tightened up." While EDR would agree that the performance description could be reassessed, nothing in our review of the relevant documentation or the agency's internal discussions reasonably questions that the license was a requirement for the job.
[8] DHRM Policy 1.60, *Standards of Conduct*, at 16. Reasons for removal under the policy include "[f]ailure to obtain or retain license, certification, or other credentialing required for the job." *Id.*
[9] EDR consulted with DHRM's Policy Administration team to confirm that this is the appropriate application of policy in this case.

The grievance record reflects the difficult circumstances the grievant was navigating with his health during the time when his license expired in November 2021. However, the information available does not demonstrate that these circumstances rendered the agency's action here an unfair application of policy. Though EDR has been provided no medical opinions about the grievant's condition at the time of the license expiration, the grievance record reflects that the grievant was approved to return to work by his doctor on January 3, 2022. The grievant did not take steps to address the license until asked about it over a month later by his supervisor. While he subsequently scheduled a time to take a required test for recertification, EDR has not been presented with any information that would explain why no steps were taken before then, when the grievant's health was sufficiently stable that his doctor had cleared him for work. The grievant has acknowledged that the license is his personal license and he is responsible for maintaining it. Although we are sympathetic to the grievant's circumstances, we cannot find that the expiration of the grievant's license was the result of any action by the agency or that the grievant was unreasonably prevented from renewing his license such that the removal could be determined to be an unfair application of policy.

The grievance procedure accords much deference to management's exercise of judgment. Thus, a grievance that challenges an agency action like this one does not qualify for a hearing unless there is sufficient indication that the resulting determination was plainly inconsistent with other similar decisions by the agency, or that the decision was otherwise arbitrary or capricious.[10] EDR finds that the agency's decision to remove the grievant from employment under these circumstances was consistent with the discretion granted under policy. While the grievant disagrees with the agency's decision, EDR has not reviewed evidence to demonstrate that the agency misapplied and/or unfairly applied any mandatory provision in Policy 1.60, that its decision to remove the grievant was so unfair that it amounted to a disregard of the intent of Policy 1.60, or that the agency's actions were otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing.

Disability Discrimination

The grievant contends that either due to the circumstances of his health and/or his prior approval by the agency for a reasonable accommodation that the agency's decision to remove him from employment was the result of discrimination. DHRM Policy 2.05, *Equal Employment Opportunity*, "[p]rovides 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*. . ."[11] Under this policy, "disability" is defined in accordance with the Americans with Disabilities Act (ADA), the relevant federal law governing disability discrimination and accommodations.[12] Like Policy 2.05, the ADA

[10] *See Grievance Procedure Manual* § 9 (defining an arbitrary or capricious decision as one made "[i]n disregard of the facts or without a reasoned basis").
[11] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).
[12] *Id.*; *see* 42 U.S.C. §§ 12101 through 12213. 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 . . . ." 42 U.S.C. § 12102(1). Because the record presents no dispute on

prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.[13] A qualified individual is defined as a person who, "with or without reasonable accommodation," can perform the essential functions of the job.[14]

For a claim of discrimination to qualify for a grievance 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. 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.[15] Similarly, a claim of retaliation may qualify for a hearing only if the grievant presents evidence raising a sufficient question whether the grievant's protected activity[16] is causally connected to a subsequent adverse employment action against him.[17] 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.[18]

The grievant has described past harassment by a former manager and fellow employees that he alleges either led to or exacerbated his health problems. However, in reviewing the grievance record, EDR is unable to identify information that raises a sufficient question that current management's decision was influenced by an improper motive or that the stated basis for the grievant's removal (expired license) was a pretext for discrimination or retaliation.[19] For example, the District Engineer indicated in his response to the grievance that the grievant's district had never had a situation when an employee had obtained an inspection certification, had it expire, and continued to be employed. Agency management also maintains that it was supportive of the grievant's circumstances previously and granted a reasonable accommodation in 2021 above what the agency's Civil Rights division had approved. Based on the information available in the

---

this issue, EDR presumes for purposes of this ruling that the grievant satisfies the definition of an individual with a disability.

[13] 42 U.S.C. § 12112(a).

[14] *Id.* § 12111(8); 29 C.F.R. § 1630.2(m). Given this circumstances of this case (the loss of the grievant's license), it is a reasonable question as to whether the grievant would have met this definition. As a determination of this issue is not necessary to resolve these claims, EDR will assume, for purposes of this ruling only, that the grievant was a qualified individual with a disability.

[15] *See* Strothers v. City of Laurel, Md., 895 F.3d 317, 327-28 (4th Cir. 2018); *see*, *e.g.*, EDR Ruling No. 2017-4549.

[16] Only the following activities are protected activities under the agency's grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." Va. Code § 2.2-3004(A); *see also Grievance Procedure Manual* § 4.1(b)(4). While the grievant has not specifically cited retaliation, his prior request for reasonable accommodation may be considered a protected activity as to such a claim.

[17] *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).

[18] *Id.*

[19] Upon the grievant's return to work in February, he states that he found a note in his work boot that stated "Nobody wants you here loser. Go back home dumb ass." The grievant reported this incident and the agency took steps to investigate. There is no evidence available that indicates this note was attributable to management activity or that management failed to take appropriate action to address the incident.

grievance record, EDR cannot find that the grievance raises a sufficient question of either discrimination or retaliation to qualify for a hearing.

As a general rule, an employer must 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]."[20] "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."[21] In order to determine the appropriate reasonable accommodation, it may be necessary for [the employer] "to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[22] Under the ADA, an employer is not required to approve the exact accommodation requested by an employee if some other accommodation is available that will allow her to perform the essential functions of her position.[23]

Although it does not appear that any interactive process occurred at the time of the grievant's separation even though it can be fairly stated that agency management knew about the grievant's health challenges, the only accommodation that EDR can identify that may have been potentially reasonable to address the situation would have been additional time, perhaps in the form of leave, for the grievant to obtain the lost inspection license. Whether the grievant would have been eligible for such an accommodation is unclear. However, a period of indefinite leave is generally not a reasonable accommodation under the ADA.[24]

In hindsight, it could have been reasonable for the agency to wait to see if the grievant would pass the certification test he scheduled for March 9, 2022, even if the paperwork would not have been officially approved for many weeks later. However, the grievant canceled that test, and so the potential period of leave that would have been needed for an accommodation to obtain the license seems more likely to be indefinite. The grievant has also indicated that he scheduled and took the certification test in June 2022, but did not pass. Thus, at the time of this ruling, EDR is presented with no evidence that indicates there would have been a sufficiently definite period of

---

[20] 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.").

[21] 29 C.F.R. § 1630.2(o)(1)(iii); *see* 42 U.S.C. § 12111(9)(B). A reasonable accommodation encompasses "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. pt. 1630 app. § 1630.2(o).

[22] 29 C.F.R. § 1630.2(o)(3).

[23] *See id.* pt. 1630 app. § 1630.9 (stating that an employer should conduct an individualized assessment of the employee's limitations and the job, then "select and implement the accommodation that is most appropriate for both the employee and the employer").

[24] Employer-Provided Leave and the American with Disabilities Act, https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act; *see* 29 CFR pt. 1630 app. § 1630.2(o) (stating that "accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment.").

time that the agency could have granted as an accommodation for the grievant to be recertified. In light of these factors, EDR has no basis to determine that the agency failed to provide an accommodation required under the ADA for purposes of this grievance.[25]

CONCLUSION

Based on the foregoing analysis, the grievance does not qualify for a hearing. EDR's qualification rulings are final and nonappealable.[26]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[25] EDR's determinations in this regard only address whether the claims presented qualify for hearing under the grievance procedure. To the extent the grievant may have other legal or equitable remedies available, they could be sought in another forum. For example, nothing in this ruling precludes the grievant from pursuing a timely complaint with the federal Equal Employment Opportunity Commission.
[26] *See* Va. Code § 2.2-1202.1(5).