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QUALIFICATION RULING

In the matter of the Virginia Department of Motor Vehicles
Ruling Number 2024-5624
December 12, 2023

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether his August 21, 2023 grievance with the Virginia Department of Motor Vehicles (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant works at one of the agency's Motor Carrier Service Centers ("weigh stations"). On August 21, 2023, the grievant filed a grievance alleging safety and security concerns with his weigh station. In particular, he mentions that the Virginia State Police ("VSP") withdrew personnel support from his weigh station "over a year ago" and that there have been "a few disgruntle[d] drivers especially in the last few months." As an example, he mentions an incident occurring two weeks before the filing of his grievance, in which an agency employee at his weigh station inspected a passing truck and found drugs and a loaded gun inside. Finally, the grievant also includes as an attachment an incident reported by the local news on March 21, 2021, in which a deadly shooting occurred at one of the agency's other weigh stations.

As relief, the grievant has requested that his agency improve his weigh station's security measures and implement a plan to safeguard the employees at his weigh station and all other weigh stations. Throughout the management steps, the agency has made clear that it is the VSP's decision to withdraw themselves from the weigh stations, and that the agency has no authority over that decision. However, the agency has affirmed that they would continue to find and implement any additional security measures that they have the capacity to install. For example, in the agency head's qualification decision (which denied qualification), the Commissioner stated that management would "install security doors" "very soon," allowing agency staff to lock all doors if they feel it necessary. He also stated that the agency has already installed security cameras and bulletproof glass at all weigh stations, and that the agency will continue to review safety measures and maintain an open dialogue with the grievant and all other employees about the issue.

Despite this most recent agency response, the grievant states via communication with EDR that while security cameras have been installed, not much else has been done to solve the dilemma.

He adds that while the agency has yet to implement the security doors that the Commissioner mentioned at his weigh station, he nonetheless feels that security doors would not be an adequate solution. While the grievant cannot offer an all-encompassing solution himself, he does emphasize that something more needs to be done by the agency while he and other employees continue to "have to defend [them]sel[ves]." The grievant now appeals the qualification denial 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 methods, means 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 or agency 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]

Adverse Employment Action

It appears that the primary purpose of the grievance is to draw attention to what the grievant feels is an unsafe working environment. In particular, the grievant is alleging that the recent lack of personnel support by the VSP has caused the grievant and his fellow coworkers to feel unsafe in their working environment, as shown by examples such as inspecting a truck to find a loaded firearm. The grievant contends that the agency needs to act in some way to mitigate the growing safety concerns. Although the grievant's concerns regarding the lack of VSP involvement at weigh stations and lack of adequate security measures are understandable, EDR cannot conclude that any of these issues have an adverse impact on the terms, conditions, or benefits of the grievant's employment. State policy generally requires agencies to provide a safe working environment for their employees.[7] Federal and state laws also require employers to provide safe workplaces.[8] Thus,

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[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] *See* DHRM Policy No. 2.35, *Civility in the Workplace*.
[8] Under the Occupational Safety and Health Act of 1970, employers must establish "place[s] of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees.

an act or omission by an employer resulting in actual or threatened workplace violence against an employee, or an unreasonably unsafe work environment for that employee, can reasonably be viewed as having an adverse effect on the terms, conditions, or benefits of his employment.[9]

However, there has been no act or omission by the agency that has resulted in actual or threatened workplace violence against the employee. The primary "act or omission" at issue seems to be the VSP withdrawing their support from the weigh stations. But as the agency has noted in their grievance responses, VSP withdrawal was outside of the agency's authority and they could not do anything about that decision. Regardless, they have continued to attempt to implement various ways of improving weigh station security, such as installing cameras and having certain high-ranking agency personnel remain stationed at the grievant's weigh station for longer periods of time. The grievant also noted that the agency is now looking into implementing Commercial Vehicle Enforcement Officers at the weigh stations as an additional security check.

While the grievant nonetheless contends that the agency's efforts have been insufficient, the evidence EDR has reviewed does not suggest any certain acts or omissions by the agency that have caused or contributed to workplace violence. "Workplace violence" is defined as "[a]ny physical assault, threatening behavior, or verbal abuse occurring in the workplace by employees or third parties."[10] In this case, the grievant has not alleged that he was the victim of physical assault, threatening behavior, verbal abuse, or other similar conduct. While EDR is sympathetic to the grievant's argument of feeling unsafe and having the need to defend himself, a general concern of one's safety based on a lack of security personnel is not the type of action that could be considered workplace violence under the circumstances presented in this case. Accordingly, the grievance does not qualify for a hearing.

Misapplication/Unfair Application of Policy

For similar reasons, EDR does not find that the grievance raises a sufficient question that the agency misapplied or unfairly applied policy regarding weigh station safety measures. The grievant does not point to any particular policy that the agency is violating, nor can EDR find any relevant provision other than the workplace violence provisions of DHRM Policy 2.35 that has already been discussed. Nothing in the grievance or in its accompanying facts seem to suggest that the agency has misapplied DHRM Policy 2.35, evidenced by the fact that VSP involvement is outside of the agency's control and that they have continued to work with the grievant to resolve the issue as best as they are able. Therefore, the issues brought by the grievant are not matters that raise a sufficient question of a misapplication of policy that is required to qualify the grievance for a hearing.

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29 U.S.C. § 654(a)(1). Virginia state employees are covered by the Virginia Occupational Safety and Health Program, which also requires "every employer to furnish to each of his employees safe employment and a place of employment that is free from recognized hazards that are causing or are likely to cause death or serious harm to his employees . . . ." Va. Code § 40.1-51.1(A); *see* 16 Va. Admin. Code § 25-60-30.

[9] *See* Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742, 744 (7th Cir. 2002) (describing a "tangible employment action" as including circumstances where "the employee is not moved to a different job or the skill requirements of his present job altered, but the *conditions* in which he works are changed in a way that subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment . . . ." (emphasis in original)).

[10] DHRM Policy 2.35, *Civility in the Workplace*, at 8.

Recommendations

While EDR cannot find a sufficient question of a misapplication of policy or a valid adverse employment action presented by this grievance, it is nonetheless encouraged that the agency continue to work with the grievant and other relevant employees in a productive and engaging manner regarding the safety concerns outlined throughout the grievance process. The most recent correspondence with the grievant suggests that certain protections have been implemented since the agency head issued the qualification decision and that further security measures are being considered for future implementation.

CONCLUSION

For the reasons expressed in this ruling, the facts presented by the grievant in his August 21, 2023 grievance do not constitute a claim that qualifies for a hearing under the grievance procedure.[11]

EDR's qualification rulings are final and nonappealable.[12]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[11] *See Grievance Procedure Manual* § 4.1.
[12] Va. Code § 2.2-1202.1(5).