Issues: Qualification – Benefits/Leave (FMLA), and Discrimination (Disability and Race); Ruling Date: February 14, 2017; Ruling No. 2017-4477; Agency: Virginia Museum of Fine Arts; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution[1]

QUALIFICATION RULING

In the matter of the Virginia Museum of Fine Arts
Ruling Number 2017-4477
February 14, 2017

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether his October 19, 2016 grievance with the Virginia Museum of Fine Arts (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant was employed by the agency as a Training and Compliance Coordinator. In that role, the grievant acted as a Special Conservator of the Peace and carried a weapon. On or about May 19, 2016, the grievant asked to take some sick leave because of his "state of mind" and feeling unwell. Because of concerns about the grievant's behavior, the agency asked the grievant to take a fitness for duty exam. This examination, which was conducted by an outside consultant/evaluator on June 21, 2016, concluded that the grievant was "unable to carry out [his] duties and responsibilities." The grievant's own mental health care provider cleared the grievant to return to work in a public safety role effective the first week of August 2016, although both he and the outside consultant recommended that the grievant not report to his "prior chain of command." As the agency was unable to provide a law enforcement position that was not under the same supervision and the grievant wanted to remain in law enforcement, the agency concluded the grievant was unable to return to the agency.[2] The grievant was separated from employment with the agency effective October 9, 2016.

On October 19, 2016, the grievant initiated a grievance alleging the agency's actions violated his rights under the Americans with Disabilities Act and the Family and Medical Leave Act. The grievant also alleges that the agency has discriminated against him on the basis of race because it required him to take a fitness for duty examination while not requiring examinations of similarly situated employees of another race.

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[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as "EDR" in this ruling to alleviate any confusion. EDR's role with regard to the grievance procedure remains the same post-merger.

[2] According to the agency, the grievant sought to bypass the administrators of the agency law enforcement department and report directly to the CFO/Deputy Director of Administration. The only vacant full time positions were "highly specialized towards museum subject matter expertise."

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 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 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]

Disability Discrimination

In this case, the grievant asserts that the agency has violated the Americans with Disabilities Act, as amended, by terminating his employment based on his disabilities "in complete disregard of [his] medical documentation supporting [his] ability to perform the essential functions of [his] job."

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, age, veteran status, political affiliation, genetics, or *disability*. . ."[9] Under this policy, "'disability' is defined in accordance with the 'Americans with Disabilities Amendments Act'" ("ADA"), the relevant law governing disability accommodations.[10] Like DHRM Policy 2.05, *Equal Employment Opportunity*, the ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.[11] A qualified individual is defined as a person with a disability, who, "with or without reasonable accommodation," can perform the essential

[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] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[9] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).
[10] DHRM Policy 2.05, *Equal Employment Opportunity*; *see* 42 U.S.C. §§ 12101 *et seq.*
[11] 42 U.S.C. § 12112(a).

functions of the job.[12] An individual is "disabled" if he/she "(A) [has] a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment . . . ."[13]

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]."[14] "Undue hardship" is defined as a "significant difficulty or expense incurred by [an agency]" upon consideration of certain established factors, including the "impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business."[15] 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."[16] For purposes of this ruling, it is presumed that the grievant's condition meets the definition of "disability." The focus of this ruling, therefore, is whether the agency acted in accordance with law and policy in determining whether a reasonable accommodation was available.

The agency asserts, in effect, that the grievant cannot perform the essential functions of his position. It also asserts that reassignment to a vacant position was not possible, as there were no vacant positions for which the grievant was minimally qualified and that satisfied his restrictions and preferences. Whether a function is essential is evaluated on a case-by-case basis by examining a number of factors. The ADA provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential" and the employer's written description for that job.[17] Other factors to consider include: (1) "[t]he amount of time spent on the job performing the function," (2) "[t]he consequences of not requiring the incumbent to perform the function," (3) the terms of any collective bargaining agreement, (4) "[t]he work experience of past incumbents in the job," and (5) "[t]he current work experience of incumbents in similar jobs."[18] Where an employee is unable to perform the essential functions of her position, he/she may nevertheless be entitled to reasonable accommodation by the agency. Although some courts have held that an accommodation is unreasonable if it requires the

[12] *Id.* § 12111(8); 29 C.F.R. § 1630.2(m). The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. § 1630.2(n).
[13] 42 U.S.C. § 12102(1).
[14] 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.").
[15] 29 C.F.R. §§ 1630.2(p)(1), (p)(2)(v).
[16] *Id.* § 1630.2(o)(3).
[17] 42 U.S.C. § 12111(8).
[18] 29 C.F.R. § 1630.2(n)(3).

elimination of an "essential function,"[19] "job restructuring, part-time or modified work schedules," reassignment, and "other similar accommodations for individuals with disabilities" are considered reasonable accommodations.[20]

In this case, it is clear that the grievant could not have returned to his previous position as both his own physician and the outside consultant determined that he should not work under the supervision of law enforcement department managers. The question then becomes whether the agency satisfied its duty of considering reassignment options for the grievant. The agency asserts that there was no position available that satisfied the grievant's desire to work in law enforcement or that did not call for specialized training and expertise that the grievant did not possess. The grievant has not presented evidence that would challenge the agency's assertions, nor is EDR aware of any such evidence. In the absence of any available reasonable accommodation, even if there were any failures by the agency in its application of law and/or policy, these errors cannot be found to have caused any material harm to the grievant. For these reasons, the grievant's claim of disability discrimination is not qualified for hearing.[21]

FMLA Retaliation

The grievant also asserts that he was retaliated against for his use of the Family and Medical Leave Act. In support of this claim, the grievant states that the agency "issued the fitness for duty exam on a date when [he] was effectively on job protected leave," "denied [his] return from leave" and terminated his employment in retaliation for his use of the FMLA.

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[22] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does

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[19] *E.g.*, Hill v. Harper, 6 F. Supp. 2d 540, 544 (E.D. Va. 1998) (citing Hall v. U.S. Postal Service, 857 F.2d 1073, 1078 (6th Cir. 1988)).

[20] 42 U.S.C. § 12111(9)(B); EDR Ruling No. 2004-879; *see also* EEOC v. Stowe-Pharr Mills, Inc., 216 F.3d 373, 377 (4th Cir. 2000) (stating that "[t]he term reasonable accommodation may include . . . reassignment to a vacant position" (citation and internal quotation marks omitted)); Cravens v. Blue Cross & Blue Shield, 214 F.3d 1011, 1017-19 (8th Cir. 2000) (holding that reassignment could be a reasonable accommodation where the employee could not perform the essential functions of his current job);; Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 677 (7th Cir. 1998) ("The option of reassignment is particularly important when the employee is unable to perform the essential functions of his or her current job, either with or without accommodation or when accommodation would pose an undue hardship for the employer.").

[21] To the extent the grievant argues that the agency took action against him because of his record of mental illness, it appears, based on EDR's review, that the agency considered the grievant's past mental illness only in reference to its impact on the grievant's current condition, rather than as an independent basis for its actions.

[22] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the 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." *Grievance Procedure Manual* § 4.1(b)(4).

not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[23] Ultimately, to support a finding of retaliation, EDR must find that the protected activity was a but-for cause of the alleged adverse action by the employer.[24]

In this case, the grievant has not presented evidence that raises a sufficient question that the agency's actions were the result of a retaliatory motive, rather than a legitimate concern over the grievant's ability to perform his job duties. In addition, there does not appear to be evidence raising a sufficient question that, to the extent there was any retaliatory motive, such a motive was the but-for cause of the grievant's loss of employment. Accordingly, the grievant's claim of FMLA retaliation is not qualified for hearing.

Race Discrimination

The grievant also asserts that the agency has discriminated against the grievant because of his race. Specifically, the grievant asserts that he was required to take a fitness-for-duty examination in order to continue his employment, while employees of another race were not required to take such examinations despite alleged conduct calling their mental health into question**.**

For a claim of discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[25]

In this case, the grievant has presented evidence that four employees of a different race engaged in conduct evidencing mental health and/or substance abuse issues but were not required to complete a fitness for duty examination prior to returning to work. The grievant's allegations of disparate treatment, if true, are worthy of concern. However, in this case, regardless of the motivations behind the fitness-for-duty-examination required of grievant, the results of that examination and the recommendations of the grievant's own doctor indicate that the grievant is not able to return to work to his current position. Further, for the reasons previously discussed, there is no basis on which EDR can conclude that the agency is obligated to restructure the grievant's current position to eliminate the existing reporting relationships or otherwise to create a new position.

EDR has recognized that there are some cases when qualification is inappropriate, even if a grievance challenges a management action that might qualify for a hearing. For example, during the resolution steps, an issue may have become moot, either because the agency granted

[23] *See*, *e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[24] *See id.* (citing Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013)).
[25] *See*, *e.g.*, Holland v. Wash. Homes, Inc., 487 F.3d 208, 214 (4th Cir. 2007) (citations omitted).

the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

This is such a case. Irrespective of the reasons for the fitness for duty examination, there is an insufficient basis on which a hearing officer could determine that the grievant's leave and ultimate separation from work were, in themselves, violations of law and/or policy. Thus, it would be inappropriate for a hearing officer to grant relief regarding these actions. As there is no effectual relief for the allegations of discrimination that could be provided by a hearing, this issue is not qualified and will not proceed further.[26]

EDR's qualification rulings are final and nonappealable.[27]

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Office of Employment Dispute Resolution

[26] This ruling merely determines that no remedy would be available through the grievance process. It is possible that the grievant's claims could be pursued through other administrative or legal means, such as through the Equal Employment Opportunity Commission.
[27] *See* Va. Code § 2.2-1202.1(5).