Issue: Qualification – Separation from State (unable to meet work conditions); Ruling Date: March 1, 2017; Ruling No. 2017-4487; Agency: Department of State Police; 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 State Police
Ruling Number 2017-4487
March 1, 2017

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether his January 13, 2017 grievance with the Virginia State Police (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 Senior Trooper. In July 2016, the grievant suffered a heart attack. On October 26, 2016, the agency notified the grievant that he had been deemed unfit to return to duty and advised him to submit an application for disability retirement. In addition, the agency advised the grievant that the effective date of his retirement would be January 1, 2017. The grievant applied for disability retirement but was denied on December 22, 2016. The grievant is currently appealing the denial of disability retirement. At the close of business on December 31, 2016, the grievant was involuntarily separated from the agency.[2] He subsequently initiated a grievance challenging his separation.

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

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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] At the time of the grievant's separation on December 31, he had been out of work (with the exception of a two-day period) since June 27, 2016 and had exhausted his family and medical leave on August 11, 2016.

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

[4] Va. Code § 2.2-3004(B).

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]

In this case, the grievant asserts, in effect, that the agency has violated the Americans with Disabilities Act ("ADA"), as amended, by separating him from employment after he became medically unable to perform his job. More specifically, the grievant argues that the agency should have allowed him to use sick leave or perform light duty work until his disability retirement appeal was completed.

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 [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 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

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[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] *Id.*; *see* 42 U.S.C. §§ 12101 *et seq.*
[11] 42 U.S.C. § 12112(a).
[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] *Id.* § 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

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.

In this case, the parties seem to agree that the grievant is no longer capable of performing the essential functions of the Senior Trooper position. 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 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]

Because the parties agree that the grievant is unable to perform the duties of the senior trooper position, the question then becomes whether the agency satisfied its duty of considering reassignment options for the grievant. Here, too, there is little dispute: the grievant

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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).

[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.").

acknowledges that there are no vacant positions that he could perform or that he desires.[21] The only question at issue is whether the agency had a duty to allow the grievant to use his available sick leave or allow him to perform light duty on a temporary basis while he appealed the denial of his disability retirement. As both parties agree that the grievant is not capable of performing the essential functions of his current job and that no satisfactory vacant positions exist, the purpose of these actions would not be to accommodate the grievant in his continued employment with the agency: rather, the purpose would be simply to allow the grievant to be paid until his disability retirement benefits began. While EDR can certainly appreciate the grievant's concerns regarding his current lack of employment, the grievant has not presented evidence that would suggest that the agency was required to do either of these things, nor is EDR aware of any legal or policy requirement that would require such action. 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.

EDR's qualification rulings are final and nonappealable.[22]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[21] The grievant in this case does not apparently seek reassignment to another location or to a position other than Senior Trooper.
[22] *See* Va. Code § 2.2-1202.1(5).