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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2019-4846
April 19, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR")[1] at the Department of Human Resource Management ("DHRM") on whether his October 22, 2018 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance partially qualifies for hearing to the extent described below.

FACTS

The grievant initiated his grievance on October 22, 2018 to challenge the requirement that he must submit to a mandatory full body screening using an electronic body scanning machine before entering the agency's facility.[2] The grievant has multiple objections to being required to pass through the body scanner.[3] The grievant alleges that the body scanner is not safe and subjects employees to higher than approved levels of radiation. Along a similar line, the grievant does not want to be subjected to unnecessary doses of radiation and indicates he has experienced anxiety as a result of this issue. The grievant has also asserted a religious objection to going through the body scanner because of the image it produces, which reportedly exposes both internal aspects of the individual's body (similar to an x-ray image) and the outlines of external body parts. Lastly, the grievant expresses concerns about whether the use of the body scanner is appropriate legally and/or whether it violates an employee's privacy. After proceeding through the management resolution steps, the agency head denied the grievant's request for qualification of his grievance for hearing, and he now appeals that decision to EDR.

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.
[2] For ease of reference, EDR will refer to the machine as a "body scanner" for purposes of this ruling.
[3] Additional facts as to each claim will be discussed in the particular discussion section below.

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.[4] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[5] 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.[6] This grievance raises multiple potential issues that could potentially qualify for a hearing and are analyzed further below.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[7] 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."[8] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9] In this case, the grievant was effectively barred from the workplace, threatened with termination,[10] and has indeed ended up separated as a result of being placed on long-term disability. Accordingly, for purposes of this ruling only, we will assume that the grievance raises a sufficient question of an adverse employment action.

Safety – Radiation Exposure

The grievant has supplied an impressive amount of documents and information regarding the body scanner and the associated issues of radiation exposure. As a result of his assertions, either by a request from the agency or the grievant, the Virginia Department of Health ("VDH") sent staff to visit the facility and evaluate the radiation issues. The VDH unit determined that the body scanner was working within the limits of the applicable state regulation on radiation exposure.

The grievant raises reasonable questions in his grievance about the safety of the body scanner at issue given the daily use for an employee in light of a cited industry standard. Documentation from the manufacturer of the body scanner appears to presume exposure of 0.25 microsieverts of radiation per scan, at the low setting it is stated the agency uses for employee

[4] *See Grievance Procedure Manual* § 4.1.
[5] Va. Code § 2.2-3004(B).
[6] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b), (c).
[7] *See Grievance Procedure Manual* § 4.1(b).
[8] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[9] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[10] In point of fact, the grievant was actually terminated for a period of time. The agency terminated the grievant's employment as a result of his refusal to go through the body scanner. Having received additional notice that his disability claim was extended, the agency rescinded the termination and the grievant proceeded with his disability claim.

scans.[11] However, the results of the VDH inspection indicated a dose nearly four times that amount.[12] Additionally, documentation submitted as part of the grievance record would appear to indicate that some industry standards limit the maximum yearly dose of radiation to 250 microsieverts. Given that each scan apparently exposes an individual to nearly 1 microsievert of radiation, it would appear that an employee would receive a maximum annual dosage after roughly 250 scans. However, documentation in the grievance record also appears to indicate that similar industry standards apply a definition of a "negligible individual dose" as 1000 microsieverts in a year. That annual measure appears to be the same utilized in the VDH inspection and in the applicable Virginia regulation.[13] Under that maximum dosage, an employee would not approach maximum exposure until undergoing over 1000 scans, which was VDH's determination.

Even if the grievant is able to establish that the body scanner does not comply with an industry standard, EDR has not found any authority that indicates such a standard has been adopted for mandatory use in Virginia. While the grievant can reasonably assert claims that the agency, or the Commonwealth itself, should adopt radiation exposure standards that better protect the health and safety of employees and citizens, neither EDR nor a grievance hearing officer would have authority in this case to direct such an action. We must defer to the VDH evaluation conducted that determined the body scanner was operating within appropriate guidelines. The grievance does not demonstrate that the radiation exposure issues are noncompliant with an applicable law or regulation. Accordingly, EDR finds no basis to qualify this aspect of the grievance for a hearing.

Medical Exception – ADA Claim

The grievant asserts in his grievance that he should not be required to go through the body scanner and expose himself to the radiation. He understandably does not want to exacerbate his risk of developing harmful effects or illnesses and, as a result, states he has anxiety and stress because of this issue. The agency's policy provides that employees with "medical conditions that preclude use of the [body scanner] must provide documentation from a physician." While the policy does not explicitly describe questions arising under this provision as accommodations under the Americans with Disabilities Act ("ADA"), that appears to be how the agency evaluated the grievant's situation.

The grievant appears to have submitted two statements from his physician at different times. The first, dated October 3, 2018, identifies the anxiety and stress the grievant is experiencing over the use of the body scanners in light of his family history of multiple types of cancer. The physician also states in the letter that "the amount of radiation he would be exposed to by acquiescing to these screening procedures would in fact result in exposure to excessive amounts of radiation and theoretically increase his risk for cancer." The agency requested

[11] It appears that scans of visitors are at a higher level of radiation. While not a subject of this ruling, the agency may wish to revisit the matter of radiation exposure to visiting minors, which the grievant addressed in his grievance. This question is not one that is properly the subject of this grievance, but it is a concern that the agency should review.

[12] The VDH report states that the low setting produced 95 microrems of radiation, which is equal to 0.95 microsieverts.

[13] 12 VAC § 5-481-720 (providing a maximum dose for members of the public of 1 millisievert per year, which is equal to 1000 microsieverts).

additional information from the grievant and his physician to identify an "existing impairment" qualifying for accommodation under the ADA. The second document from the grievant's physician, dated January 3, 2019, stated that the grievant "should be allowed to go through alternative security entrance/exit measures" due to the medical issues he was experiencing. The agency again, it states, requested additional clarification from the grievant about his disability and an authorization to permit the agency to contact the grievant's physician directly, both of which the grievant declined to provide. As such, the agency denied the grievant's accommodation request for not identifying a disability it believed fell under the ADA and for failing to continue with the interactive process.

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*. . ."[14] Under this policy, "'disability' is defined in accordance with the 'Americans with Disabilities Amendments Act,'" the relevant law governing disability accommodations.[15] 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.[16]

The ADA defines a qualified individual as a person with a disability who, "with or without reasonable accommodation," can perform the essential functions of her job.[17] 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 . . . ."[18] 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]."[19] Accordingly, in assessing such claims at the qualification stage, EDR must consider whether the grievance raises a sufficient question that the grievant met the definition of disabled, that a reasonable accommodation was available to the grievant, and whether such accommodation would have imposed an undue hardship.

The Equal Employment Opportunity Commission ("EEOC"), the federal agency responsible for enforcement of the employment-related provisions of the ADA, has provided guidance that indicates an employer may require an employee to submit reasonable documentation about a claimed disability.[20] "Reasonable documentation means that the

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[14] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).
[15] *Id.*; *see* 42 U.S.C. §§ 12101 *et seq.*
[16] 42 U.S.C. § 12112(a).
[17] *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).
[18] 42 U.S.C. § 12102(1).
[19] *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 disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.").
[20] EEOC Enforcement Guidance, Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, No. 915.002, at Question 6 (Oct. 17, 2002), *available at* https://www.eeoc.gov/policy/docs/accommodation.html.

employer may require only the documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation."[21] In this case, the agency sought such reasonable documentation. Although the grievant provided some information from his physician, the information conveyed was minimal. The agency understandably had reasonable questions to address, which were refused by the grievant. The EEOC guidance states further that "[i]f an individual's disability or need for reasonable accommodation is not obvious, and s/he refuses to provide the reasonable documentation requested by the employer, then s/he is not entitled to reasonable accommodation."[22] Because the grievant effectively cut off the interactive process in this case, EDR cannot find that the grievance raises a sufficient question as to a claim of disability discrimination under the ADA.[23]

Discrimination - Religion

Grievances that may qualify for hearing include those with claims of discrimination on the basis of religion. Federal law provides that employers are required to make reasonable accommodations for the religious beliefs of employees, except where such accommodations would cause undue hardship to the employer.[24] For such a claim to qualify for a hearing, the grievance must raise a sufficient question as to the following elements: 1) the grievant has a bona fide religious belief that conflicts with an employment requirement; 2) the grievant informed the employer of the belief; 3) the grievant was disciplined (or experienced some other adverse employment action) for failure to comply with the conflicting employment requirement.[25] If the agency is able to demonstrate either that it has already provided a reasonable accommodation for the grievant's religious belief or that the accommodation was not provided because it would have caused an undue hardship,[26] the grievance will, nevertheless, not qualify for a hearing.

The Fourth Circuit Court of Appeals has noted that it is neither the employer's nor a court's place "to question the correctness or even plausibility of [an employee's] religious understandings."[27] With this in mind, EDR presumes the grievant has at least raised a sufficient question as to a bona fide religious belief in conflict with the requirement to proceed through the body scanner and he minimally raised that concern to the agency's attention.[28] The grievant has additionally raised a sufficient question as to whether he experienced an adverse action as a result of the agency's refusal to allow him to enter the facility without going through the body

[21] *Id.*
[22] *Id.*
[23] This ruling is not meant to indicate that such a situation could never qualify under the ADA, or that the grievant himself may not be able to demonstrate an ADA-qualified disability that required accommodation if additional information was discovered and/or shared, but rather that on the grievance record available to EDR, there are not sufficient facts to make such a finding.
[24] EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 312 (4th Cir. 2007) (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 75 (1977)).
[25] *See id.* (quoting Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1019 (4th Cir. 1996)).
[26] *See id.* (quoting Philbrook v. Ansonia Bd. of Educ., 479 U.S. 60, 67 (1986)).
[27] EEOC v. Consol Energy, Inc., 860 F.3d 131, 142 (4th Cir. 2017).
[28] The grievant asserted his religious discrimination claim with little specificity in his grievance. The agency reportedly inquired as to this claim, but there was little additional information provided by the grievant at the time. EDR gathered additional information from the grievant for purposes of this ruling. Without relaying the details, the grievant has raised at least a sufficient question as to a bona fide religious belief regarding keeping his body covered such that this claim qualifies for a hearing. Nevertheless, the determination as to whether the grievant informed the agency of his beliefs to satisfy the requirements of this claim is a factual matter that will need to be determined by a hearing officer. The agency will have the opportunity to properly contest this point at hearing.

scanner. The grievant has perceived going through the body scanner as untenable. This claim bears a close resemblance to a claim of constructive discharge, where an employee quits rather than enduring an intolerable work environment.[29] Although the grievant did not quit in this instance, he was approved for disability leave as a result of the anxiety he has experienced because of the body scanner issue. That disability claim has resulted in his separation from employment with the agency. While this difference may have a bearing on this claim at hearing, the grievance at this stage has raised a sufficient question as to an adverse employment action to qualify for a hearing.

In considering whether the agency could establish a defense to this claim, there is insufficient evidence that would prevent the case from proceeding to a hearing at this time. First, the agency has provided no accommodation to the grievant's religious beliefs. This is largely due to the fact that the grievant did not appear to assert this claim with much detail or clarity when the agency inquired.[30] Nevertheless, because there has been no accommodation provided, it cannot be used as a defense. Similarly, and while the agency is not prevented from asserting a claim of undue burden at hearing, EDR's review of the case finds insufficient evidence of undue burden at this stage to prevent the grievance from proceeding to hearing. The alternative the grievant appears to have presented was to undergo a "pat down" search upon entry to the facility. Given that the agency is already providing accommodations to pregnant employees and other employees with established medical justifications, it would appear difficult for the agency to argue that allowing the grievant to proceed through similar accommodations that are available to others was an undue burden.[31] Accordingly, EDR finds that the grievance raises a sufficient question of religious discrimination to qualify for a hearing.

Privacy/Search Issues

Searches conducted of employees in the public employment context present legal and, indeed, constitutional, questions as to employees' rights. The Fourth Amendment to the U.S. Constitution protects the right to not be subject to unreasonable searches or seizures. Agency employees do not waive all such rights by becoming employed by the agency.[32] However, the privacy interests agency employees have and, consequently, what searches are deemed reasonable, are considered within the context of their particular employment circumstances.[33] Given the agency's important role in preventing the flow of contraband into its facilities and the nature of the environment, there is necessarily a strong interest in conducting searches of both employees and visitors entering its facilities.[34] Nevertheless, the question is not whether the employer can conduct the search in question at all, but whether it is conducted in the appropriate circumstances. In short, the question raised in this grievance is whether the agency's requirement of the grievant to go through the body scanner without suspicion of any possession of or involvement with contraband is permissible.

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[29] *See Consol Energy, 860 F.3d at* at 144-45 (addressing a similar claim in which an employee refused to go through a scan required of the employer upon entry to the its facility, which was in apparent conflict with the employee's religious beliefs).

[30] Evidence of the agency's inquiry and the grievant's response may be relevant to the hearing officer's determination as to whether the grievant adequately raised his religious objection to the agency.

[31] *Cf. id.* at 143.

[32] *E.g.*, Leverette v. Bell, 247 F.3d 160, 167 (4th Cir. 2001).

[33] *Id.* at 168; *see also* Braun v. Maynard, 652 F.3d 557, 561 (4th Cir. 2011).

[34] *See Leverette*, 247 F.3d at 168.

The reasonableness of a search in this context involves a balancing of the agency's need for a particular search against the invasion of personal rights entailed in that search.[35] While there are few bright line rules in this regard, the more personal and invasive that a search is, the more particularized and individualized the information available to the employer must be to justify the intrusion.[36] Indeed, if the search is not invasive, in the prison context at least, there is no requirement of individualized suspicion. For example, while EDR can find no Fourth Circuit or Virginia precedent on point, it is reasonable to surmise that "pat down" searches upon entry to an agency facility are reasonable.[37] On the other hand, courts have recognized that an employer must have individualized suspicion to conduct a far more intrusive visual body cavity search[38] or a strip search.[39] So the question presented by this case is: how intrusive is a search using the agency's body scanner?

As a relatively newer technology, few courts have had occasion to address the use of body scanners in the prison employment context.[40] As going through the body scanner does not involve the employee being physically touched by another person, the search could be viewed as relatively noninvasive. However, the results of that search also produce images that potentially expose the private areas of the employee's body that would be displayed during a strip search or visual body cavity search.[41] Exposure of the private areas of one's body is one of the factors courts have considered in determining how invasive or demeaning a search process is.[42]

The body scanner also operates as an x-ray of the employee's entire body, producing an image of an individual's internal body makeup, including, for example, bone structures, some organs, and, potentially, medical devices. The potential for harm to an individual as a result of exposure to radiation is an additional factor considered on this issue. An additional consideration is the potential for repetitive exposure in this instance, which is not something EDR has found addressed in court precedent. It is a potentially different question to consider whether a single search using a body scanner is deemed reasonable, as opposed to subjecting an

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[35] *Leverette*, 247 F.3d at 166-67.
[36] *Id.* at 168.
[37] *Cf.* Spear v. Sowders, 71 F.3d 626, 630 (6th Cir. 1995) (stating that pat-down searches of prison visitors do not require individualized suspicion).
[38] *Leverette*, 247 F.3d at 168.
[39] *See* Braun v. Maynard, 652 F.3d 557, 564 (4th Cir. 2011).
[40] The case of *Electronic Privacy Information Center v. U.S. Department of Homeland Security*, 653 F.3d 1 (D.C. Cir. 2011), addressed the use of body scanners in the context of airport screenings. The court found no issue with the use of the body scanners in that case, largely due to past determinations that airport screenings are administrative searches and, thus, do not require individualized suspicion. *Id*. at 10. While some searches of prison employees do not require individualized suspicion, some do, as discussed above. Further, the context of airport searches can be considered different in some respects from the facts of this case, as well as the particular factors weighed in the D.C. Circuit case. *Id.* For example, a key difference is that airport passengers had the ability to opt out of using the body scanner and be screened by pat down. *Id.* Accordingly, while this case is not irrelevant, we do not find that it directly answers the questions raised in this case.
[41] The detail of the images and what is shown of an employee's private areas is a question that will require further factual review by a fact finder. The body scanner has the capability to produce images with high quality on different settings. It is not clear how invasive the particular images presented in the grievance record would be. These are the types of factual determinations more suited to an independent fact finder after thorough review of the testimony and evidence both parties wish to submit.
[42] *See, e.g.*, *Braun*, 652 F.3d at 564.

employee to the x-ray radiation every work day. Thus, relevant scientific evidence as to this matter would be one likely relevant consideration for a fact finder.

The method of the search process is also a relevant consideration. For example, the officials conducting a search involving the exposure of an individual's private areas should be of the same sex as the individual.[43] The agency has indicated that while it is the preference that employees' body scans be viewed by a same-sex operator, it may not always occur if the facility is short-staffed.

In light of the foregoing discussion, EDR finds that the grievance raises a novel question that warrants consideration at a hearing. The discussion above indicates that there is at least a sufficient question as to the invasiveness of the requirement to proceed through the body scanner in light of relevant legal precedents. The search parameters must necessarily be balanced against the needs demonstrated by the agency for the particular search. The agency's justifications are certainly not without merit here. Indeed, if the question was whether there was a likelihood of success on the merits, the record reviewed at this stage may not be enough for EDR to make such a determination. Nevertheless, the grievant has raised sufficient questions on qualifiable matters that warrant further review. A hearing officer will be in a better position to assess the disputed facts and weigh the evidence to determine this balance.

Grievances that qualify for hearing include those that raise a sufficient question as to misapplication and/or unfair application of policy.[44] An application of state or agency policy that results in a violation of an employee's privacy and/or constitutional rights (if proven in this case) would be considered "unfair." Accordingly, the grievance qualifies for a hearing on this basis. This determination in no way finds that the agency has violated any law or other applicable requirement.

CONCLUSION

For the foregoing reasons, the grievance is partially qualified for a hearing, only as to the matters and claims described above. As this is a non-disciplinary matter, the grievant will bear the burden of proof as to the claims in this case. The agency is directed to submit a completed Grievance Form B within 10 workdays of this ruling.

Given the posture of this matter, EDR will provide additional guidance as to potential relief available at hearing. This grievance has been pending for many months, initially with the agency and later under review by EDR. During that time, as a result of his anxiety reportedly resulting from the body scanner issue, the grievant was on approved disability leave. The disability claim has run its course and the grievant was separated from employment with the agency. If the hearing officer determines that the requirement of the grievant to go through the body scanner was improper or that the grievant should have been offered an alternative, and that his absence on disability was the result of this body scanner issue, the hearing officer will have authority to put the grievant back in the position he should have been in prior to the improper

[43] *Cf.* Lee v. Downs, 641 F.2d 1117, 1120 (4th Cir. 1981) (addressing the removal of a female prisoner's underclothing in the presence of male guards as an invasion of privacy).
[44] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

application of the body scanner matter.[45] Such an order could include reinstatement and/or back pay, if warranted and appropriate under the circumstances.[46]

EDR's qualification rulings are final and nonappealable.[47]

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[45] *See* Va. Code § 2.2-3005.1; *Rules for Conducting Grievance Hearings* § VI(C).
[46] *See id.*
[47] Va. Code § 2.2-1202.1(5).