Issues: Qualification - Retaliation (denied reasonable accommodation), and Discrimination (disability); Ruling Date: December 7, 2018; Ruling No. 2019-4796; Agency: Virginia Department of Health; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of the Virginia Department of Health
Ruling Number 2019-4796
December 7, 2018

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") on whether his July 25, 2018 grievance with the Virginia Department of Health (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant initiated a grievance with the agency on July 25, 2018, alleging that management has "continued to retaliate against him" because he filed two complaints with the Equal Employment Opportunity Commission ("EEOC"), one of which resulted in a 2017 settlement agreement. More specifically, the grievant claims that he has a disability and has not received requested accommodations that will enable him perform his job; that he is micromanaged and has been given additional job responsibilities that are "disproportionate" and "more than any one employee is able to do effectively"; and that the agency denied his request for a salary increase in July 2018.[1] As relief, the grievant seeks a "[p]ay increase," "[a]ssistance with performing a co-worker's job duties," an updated job description, an "[e]nd to the micromanagement," and "[n]o further retaliation." After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EEDR.

DISCUSSION

Alleged Noncompliance by the Agency

As an initial matter, the grievant argues in his request for qualification that the agency did not comply with the grievance procedure during the management steps in several respects. In particular, the grievant claims that (1) the third step-respondent did not hold a face-to-face meeting with him; (2) the second step-respondent did not consider additional documentation the grievant provided at the second step meeting, or include that documentation in the grievance package through the remainder of the management steps; and (3) the third step-respondent and

[1] Although the Grievance Form A states that the request salary increase was denied in July 2017, the grievant and the agency have both clarified that this action occurred in July 2018.

agency head did not consider the grievant's additional information or provide adequate responses to the grievance.

The grievance procedure provides that, at the third step, "[a] meeting may be held to discuss the issues in dispute, but such a meeting is not required."[2] Accordingly, EEDR finds that the third step-respondent's decision not to hold a meeting was discretionary and did not constitute noncompliance the grievance procedure. In addition, while the grievant's concerns about the step-respondents' consideration of his additional documentation and the sufficiency of their responses is understandable, EEDR has reviewed the grievance package and concludes that the responses issued to the grievant were adequate.

Most importantly, and even assuming the grievant's assertions about these matters are true, he did not seek a ruling from EEDR that the agency was not in compliance with the grievance procedure as required in Section 6.3 of the *Grievance Procedure Manual* during the management steps. The *Grievance Procedure Manual* states that "[a]ll claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time."[3] Based on these facts, EEDR finds that the alleged noncompliance described in the grievant's request for qualification have been waived based on his continuation of the grievance beyond the agency head's qualification decision.[4]

Qualification

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[5] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[6] 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.[7]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[8] 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

[2] *See Grievance Procedure Manual* § 3.3.
[3] *Id.* § 6.3.; *see also, e.g.*, EDR Ruling No. 2004-752; EDR Ruling No. 2003-042; EDR Ruling No. 2002-036.
[4] To the extent the grievant contends the additional materials have not been made part of the grievance or considered properly, EEDR in its review at this stage has considered all materials submitted by the grievant.
[5] *See Grievance Procedure Manual* § 4.1.
[6] Va. Code § 2.2-3004(B).
[7] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[8] *See Grievance Procedure Manual* § 4.1(b).

responsibilities, or a decision causing a significant change in benefits."[9] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[10]

Retaliation

In the grievance, the grievant asserts that the agency has retaliated against him because he has filed two complaints with the EEOC alleging discrimination and/or retaliation, one of which resulted in a 2017 settlement agreement with the agency. 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;[11] (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 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.[12] 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.[13]

Here, the grievant engaged in protected activity by filing the two EEOC complaints. In support of his claim of retaliation, the grievant contends that agency management holds weekly meetings with him to micromanage his work performance, that he has been assigned additional duties beyond the responsibilities outlined in his Employee Work Profile ("EWP"), and that the agency denied his July 2018 request for a salary increase. Assuming without deciding that these management actions constitute adverse employment actions, EEDR has not reviewed evidence that raises a sufficient question as to whether the agency's actions were the result of a retaliatory motive, rather than legitimate work-related concerns. For example, the agency has indicated that duties were reassigned to the grievant and other employees due to a co-worker's absence on leave, that the grievant was not given the bulk of the responsibilities to be reassigned, and that the particular tasks the grievant is required to perform are contemplated within his EWP. The agency further states that weekly meetings with employees are routine across the grievant's work unit, and that the grievant's compensation is consistent with those of other employee who work in the employee's role and perform similar job duties.

As stated above, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government, including the methods, means and personnel by which work activities are to be carried out, as well as the establishment

[9] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[10] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[11] *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).
[12] *See, e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 139-40 (4th Cir. 2014).
[13] *See id.* (citing Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013)).

and revision of salaries, wages, and general benefits.[14] Here, EEDR has reviewed nothing to indicate that the agency's actions with regard to the grievant were based on anything other than legitimate, non-retaliatory business reasons. Furthermore, 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 actions complained of by the grievant. Accordingly, the grievance does not qualify for a hearing on this basis.

Failure to Accommodate

In addition, the grievant contends that the agency has discriminated against him based on his disability because it has not reduced his workload as a reasonable accommodation pursuant to the Americans with Disabilities Act ("ADA"). 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*. . ."[15] Under this policy, "'disability' is defined in accordance with the 'Americans with Disabilities Amendments Act,'" the relevant law governing disability accommodations.[16] 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.[17]

The ADA defines a qualified individual as a person with a disability who, "with or without reasonable accommodation," can perform the essential functions of his job.[18] An individual is "disabled" if he "(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 . . . ."[19] 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] In this case, there appears to be no dispute between the parties that the grievant has a disability.

From EEDR's review of the grievance record and the information provided by the parties, it is unclear what, if any, precise reasonable accommodation(s) the grievant has requested of the agency that have not been approved. The agency states that it implemented a reasonable accommodation for the grievant in conjunction with the 2017 settlement agreement,

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[14] Va. Code §§ 2.2-3004(B), (C).
[15] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).
[16] *Id.*; *see* 42 U.S.C. §§ 12101 *et seq.*
[17] 42 U.S.C. § 12112(a).
[18] *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).
[19] 42 U.S.C. § 12102(1).
[20] *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.").

that the grievant has not requested further accommodation(s), and that the agency has not denied any additional request(s) for accommodation. In support of his position, the grievant has indicated to EEDR that he is unable to complete the volume of work tasks assigned to him because of his disability, that he has reported this issue to agency management, and that the agency has not provided him with a reduced workload to accommodate his limitations.

"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 this case, the grievant asserts that he requires a reduced workload in order to perform the essential functions of his position, and specifically requests that his tasks be reduced to what they were at the time of the 2017 settlement agreement. Regulatory guidance, however, provides that an employer "is not required to reallocate essential functions" of an employee's job as a reasonable accommodation.[22] Moreover, courts have held that an employee's request for a reduced workload is inherently unreasonable because such a request would require the removal of essential functions of the employee's position.[23] As such, EEDR finds that the grievant's request that the agency reduce his workload by reassigning tasks to other employees would not be considered reasonable under the ADA in this case.[24]

The grievant appears to further contend that the additional job duties assigned to him fall outside of the scope of his job description and, thus, are not essential functions of his position. If the job duties in question are not essential functions of the grievant's position, then an accommodation to reduce or remove those duties could be reasonable, depending on the facts and circumstances. Essential functions are the "fundamental job duties" of the employee's position, and may be essential, for example, because "the reason the position exists is to perform that function," because a limited number of employees can perform that function, or because it is "highly specialized."[25] In determining what functions are essential, factors such as the employer's judgment as to what functions are essential, written job descriptions, the amount of time spent performing particular functions, and past or present work experience of others in the same or similar jobs are relevant.[26] Here, the grievant's EWP states that the purpose of his position is to "serve[] as a front line resource of verbal and written communication for internal

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[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. pt. 1630 app. § 1630.2(o).

[23] *E.g.*, Searls v. Johns Hopkins Hosp., 158 F. Supp. 3d 427, 436 (D. Md. 2016); Lewis v. Gibson, 2014 U.S. Dist. LEXIS 172853, at *34-40 (M.D.N.C. Dec. 15, 2014) (collecting cases holding that an employee's request for changes in performance standards and/or workload is not a reasonable accommodation).

[24] In addition, an employer is not required to approve the exact accommodation requested by an employee if some other accommodation is available that will allow him to perform the essential functions of his position. *See* 29 C.F.R. 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").

[25] 29 C.F.R. §§ 1630.2(n)(1), (2); *see* 42 U.S.C. § 12111(8). "The inquiry into whether a particular function is essential . . . focuses on whether the employer actually requires employees in the position to perform the functions" that are considered essential. 29 C.F.R. app. § 1630.2(n).

[26] 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n)(3).

and external customers," perform "secretarial support tasks," and carry out other "administrative duties . . . ." The grievant's job description lists activities such as "typing, filing, scanning, data entry, faxing, [and] sorting and distribution of mail & other correspondence" as examples of typical work tasks.

The agency asserts that the additional duties assigned to the grievant fall within the terms of his EWP, and that they were reassigned to him while a co-worker was out of work on extended leave. The grievant disputes the agency's characterization of the duties assigned to him and argues that the co-worker in question has returned, yet he continues to perform additional tasks. Although the grievant argues that his job responsibilities are "disproportionate," his EWP specifically provides that he may be asked to carry out "other duties as assigned" by management. Furthermore, the grievant does not dispute that he is actually able to perform the work tasks assigned to him.[27] Most importantly, the grievant does not appear to have identified with specificity any of the additional tasks he has been assigned, either during or after the co-worker's absence. EEDR has thoroughly reviewed the information presented by the parties and finds the grievant has not raised a sufficient question as to whether the agency's reassignment of tasks to the grievant was unreasonable, or whether the duties assigned to the grievant were outside the scope of his EWP. For these reasons, EEDR cannot conclude that the additional job duties assigned to the grievant should not be considered essential functions of his position such that an accommodation with regard to those duties would be reasonable under the circumstances.

In conclusion, EEDR is not persuaded by the grievant's assertion that the agency should have reduced his workload as a reasonable accommodation that would allow him to perform the essential functions of his position. As a result, EEDR finds that the grievant has not raised a sufficient question as to whether the agency failed to provide a reasonable accommodation under the ADA or otherwise comply with policy and/or law. Accordingly, the grievance does not qualify for a hearing on this basis.

Hostile Work Environment

Finally, and taken as a whole, the arguments presented by the grievant also amount to a claim that the agency has engaged in discrimination, retaliation, and/or harassment that has created an alleged hostile work environment. For a claim of hostile work environment or workplace harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or prior protected activity; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[28] In the analysis of such a claim, the "adverse employment action" requirement is satisfied if the facts raise a sufficient question as to whether the conduct at issue was sufficiently severe or pervasive so as to alter the conditions of employment and to create and abusive or hostile work environment.[29] "[W]hether an

[27] Indeed, information in the grievance record suggests that the agency has found the grievant's job performance to be satisfactory.
[28] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[29] *See generally id.* at 142-43.

environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[30]

In support of his position, the grievant contends that agency management has engaged in harassing conduct based on his disability status and/or his previous EEOC complaints. **[id]** As discussed more fully above, the grievant specifically asserts that he is micromanaged, has been assigned additional job duties that are "disproportionate" to his ability, and was denied a salary increase. The grievant further contends that he was "written up" in 2018 for an absence from work that occurred in 2017. While the grievant's concerns about, and general disagreement with, the agency's actions are understandable, EEDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment. Prohibitions against harassment do not provide a "general civility code"[31] or remedy all offensive or insensitive conduct in the workplace.[32] For workplace conduct to constitute an actionable hostile environment, the conduct must rise to a "sufficiently severe or pervasive" level such that an unlawfully abusive or hostile work environment was created.[33] In this case, the challenged conduct cannot be found to rise to this level.[34] In the absence of such evidence, the grievance does not qualify for a hearing on this basis.

EEDR's qualification rulings are final and nonappealable.[35]

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[30] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[31] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (citation omitted).
[32] *See, e.g.*, Beall v. Abbott Labs, 130 F.3d 614, 620-21 (4th Cir. 1997); Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).
[33] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[34] *See generally* Gunten v. Maryland, 243 F.3d 858, 869 (4th Cir. 2001).
[35] *See* Va. Code §§ 2.2-1202.1(5).