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QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2022-5309
November 17, 2021

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether her August 1, 2021 grievance with Virginia Department of Transportation (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

The grievant works as a fiscal technician at one of the agency's residency offices. Prior to July 1, 2021, the grievant was teleworking full-time during the ongoing COVID-19 pandemic.[1] The grievant's work schedule later appears to have been adjusted to include working from her office one to two days per week and teleworking for the remainder of the week; then, on July 1, she was instructed to begin working from her office four days per week and teleworking one day per week.

On or about August 1, 2021, the grievant initiated a grievance alleging that her office was "exceeding [the] Commissioner's Reopening Plan for physical in office" work and that employees at her office were "not following [COVID-19] cleaning protocols for shared work spaces." Regarding the agency's reopening plan, the grievant claimed that there was "no written communication" authorizing management to require her to work at her office four days per week and that she was able to meet her work responsibilities effectively while teleworking. The grievant further asserted that there was "[n]o consistency" in office schedules because employees at other offices were teleworking more frequently than one day per week, which demonstrated that management was showing "favoritism" toward certain employees. In addition, the grievant alleged that she was the only employee at her office consistently cleaning shared work areas each day. As relief, the grievant requested approval to telework more frequently, for "[m]ore consistency . . . in

[1] On March 12, 2020, the Governor of Virginia declared a state of emergency to respond "to the potential spread of COVID-19, a communicable disease of public health threat." Exec. Order No. 51 (2020), *Declaration of a State of Emergency Due to Novel Coronavirus (COVID-19)*. The Commissioner of the Virginia Department of Health had declared the COVID-19 virus a Communicable Disease of Public Health Threat on February 7, 2020. The World Health Organization confirmed that COVID-19 was a pandemic on March 11, 2020.

regards to all office staff coming in the same amount of days," and for increased "cleaning awareness from [other] staff members" at her office.[2]

In response, agency management explained to the grievant that her work schedule was consistent with its reopening plan because the grievant was the only fiscal technician in her office and that she was required to work at the office four days per week due to agency business needs. The agency further confirmed that other employees at the grievant's office had been reminded to follow cleaning and safety protocols to limit the spread of COVID-19. Following the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination 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.[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] The grievant has not alleged discrimination, retaliation, or discipline. Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action in its totality was so unfair as to amount to a disregard of the applicable policy's intent. Although EDR agrees that telework approval is broadly subject to a management's discretion under DHRM policy[6] and we recognize the agency's staffing imperatives during the present public health emergency, denial of telework approval for arbitrary reasons could rise to the level of a misapplication or unfair application of state or agency policy.

In this case, the grievant alleges that the agency has failed to comply with its reopening plan by directing her to work in-person at her office for four days per week. The grievant contends that, pursuant to Stage Three – Part 2 of the reopening plan, she should be working at her office no more than 40 percent of the time, or 2 days per week. The grievant further argues that fiscal technicians in other offices are working different in-office schedules than she is, with fewer days required at their office locations. Finally, the grievant claims that she is able to perform her job

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[2] The grievant has not identified a medical condition or disability for which she might be entitled to reasonable accommodation, nor is there any evidence that she requested an accommodation for such a medical condition or disability.

[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* DHRM Policy 1.61, *Teleworking*. While recognizing management's "sole discretion" to "[d]esignate and approve employees for telework," Policy 1.61 also provides that "[d]eterminations of telework eligibility should be focused on the work and the ability of the employee to effectively perform work duties at the alternate work location."

responsibilities in a satisfactory manner while teleworking, and thus her presence at the office for four days per week is unnecessary. In addition to her claims regarding the agency's reopening plan, the grievant asserts that other employees at her office are not complying with COVID-19 cleaning protocols, with the result that she is the only employee consistently cleaning in shared-use areas of the office.

Occupancy Limits Under the Agency's Reopening Plan

When the grievant began working in-person at her office four days per week on July 1, 2021, the agency had progressed to Stage Three – Part 2 of its reopening plan and appears to remain at that stage as of the date of this ruling. The agency's guidance for Stage Three – Part 2 of the reopening plan provides that "[o]ffice staff may continue to telework with the expectation employees work in the office a minimum of 20% of the time or at least one day a week." Nonetheless, management "will limit office occupancy to no more than 40% of office staff at a time." Significantly, the reopening plan also states that management may "approve exceptions" to the occupancy limit and other provisions of Stage Three – Part 2 of the plan.

The grievant's concern about management's expectation that she must work at her office four days per week is understandable, but the language in the reopening plan does not limit individual employees to working 40 percent of their schedule at the office. The plan instead describes an office occupancy limit of 40 percent; *i.e.*, no more than 40 percent of all administrative/office employees at a particular location may be at the office at the same time. According to the agency, the grievant, a fiscal technician, is the only administrative/office employee at her work location. Three maintenance supervisors and approximately 20 maintenance staff are also assigned to the grievant's office location. The agency has indicated that neither the supervisors nor the maintenance staff are considered administrative/office employees. The maintenance staff do not perform their job duties from the office; they are responsible for performing work in the field. Although the supervisors work in the office on an intermittent basis, they frequently work in the field with the maintenance staff. The agency has indicated that larger offices in the grievant's residency with multiple administrative/office employees comply with the 40 percent occupancy limit by rotating the employees' schedules. Because the grievant is the only administrative/office employee at her work location, the 40 percent occupancy limit cannot be applied at her office location in the same manner as it is with larger offices.

Business Justification for In-Office Work Schedules

During the management steps, the agency explained to the grievant that her residency has determined that fiscal technicians must provide office coverage four days per week "to support the [offices] being open and meet internal and external customer needs." The agency specifically cited one such need as: "[a]n employee must always be available to receive visitors." The agency further stated that fiscal technicians "provide direct support to [] maintenance staff at each [office]," and thus the grievant's presence at her office "is pertinent to support our crews as well as other internal and external customers." The agency also noted that fiscal technicians working from the office are able to address "phone calls and customer questions . . . without our Maintenance leadership being tied to the office." The agency clarified that having the maintenance staff or supervisors adjust their schedules to ensure presence at the grievant's office on a regular basis would decrease productivity and customer service, while having fiscal technicians provide office coverage four

days per week supports the agency's goal of meeting "the needs of the traveling public more efficiently and effectively."

The grievant appears to disagree with the agency's explanation of its business justification for her work schedule, arguing that she is not needed in-person at her office for four days per week and that the other employees at her work location (both supervisors and maintenance staff) are not complying with the reopening plan. For example, the grievant states that at least one of the three supervisors at her office routinely works from the office, while the other two supervisors work in the field. The grievant claims that, at times, all three supervisors work from the office at the same time. The grievant also alleges that she was able to complete her job duties satisfactorily when she was teleworking full-time, before returning to work at her office location, and we have reviewed nothing that would suggest otherwise. Moreover, the grievant claims that members of the public require assistance at the office only four to six times per year, and that other in-office needs can be addressed by the supervisors or maintenance staff. The agency's responses do not contradict these assertions, but instead merely note that "[a]n employee must always be available to receive visitors."

Having carefully considered the parties' arguments about these issues, EDR finds that the grievant has not presented sufficient evidence to show that the agency has misapplied or unfairly applied policy and/or the requirements of Stage Three – Part 2 of the agency's reopening plan. The grievance procedure accords much deference to management's exercise of judgment, including matters such as the work schedules of employees. Thus, a grievance that challenges actions such as those at issue in this case does not qualify for a hearing unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.[7] Agencies have significant discretion to direct the methods, means and personnel by which work activities are to be carried out.[8] Depending on the circumstances, directives that express a preference for employees to work in-person from their office locations, even if telework is an equally viable option that some employees would prefer, could be an appropriate exercise of management's discretion. Although the grievant disagrees with the agency's decision to require her to work an in-office schedule of four days per week under its reopening plan and expresses some legitimate questions as to the agency's business need, she has not offered evidence that raises a sufficient question whether the agency misapplied or unfairly applied policy or acted in a manner that was inconsistent with other decisions regarding employees' in-office work schedules. It therefore appears that the agency has exercised its discretion in this matter consistent with policy. Accordingly, the grievance does not qualify for a hearing on these grounds.

Compliance with Cleaning Protocols

The grievant also asserts that the maintenance staff at her location have not been complying with COVID-19 cleaning rules in shared-use areas since she returned to the office, leaving her to wipe down surfaces in shared-use areas each day. EDR has likewise not reviewed evidence to demonstrate that agency management has failed to address the grievant's concerns consistent with policy. During the management steps, the step respondents confirmed that maintenance staff had

[7] *See Grievance Procedure Manual* § 9 (arbitrary or capricious is defined as a decision made "[i]n disregard of the facts or without a reasoned basis").
[8] Va. Code § 2.2-3004(A).

been reminded of cleaning practices at the grievant's office. In addition, it appears that the agency has taken measures to address at least some of the grievant's safety concerns by reducing the maintenance staff's need to enter the shared-use areas of the grievant's work location. In addition, we also note that the grievant works in an office with a door that can be closed to limit her exposure to others in shared-use areas. Though the grievant may be articulating some legitimate concerns about these issues at her work location, she has not provided specific examples of conduct that violated safety or cleaning practices and went unaddressed, nor has she shown that agency management failed to respond to these issues when she has raised them. As a result, we cannot find that she has raised a sufficient question whether the agency misapplied or unfairly applied policy with regard to safety or cleaning rules such that qualification is warranted to address this matter further.

CONCLUSION

For the reasons expressed above, the facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure at this time.[9] EDR's qualification rulings are final and nonappealable.[10]

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