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## QUALIFICATION RULING

In the matter of the Virginia Department of Corrections  
Ruling Number 2022-5329  
January 14, 2022

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 30, 2021 grievance with the Virginia Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

### FACTS

On August 5, 2021, the Governor of Virginia signed Executive Directive 18, to be effective September 1, 2021. The directive requires most executive branch employees who do not confirm full vaccination against the COVID-19 virus<sup>1</sup> to “undergo weekly COVID-19 testing and disclose weekly the results of those tests to the designated agency personnel.”<sup>2</sup> Consistent with Executive Directive 18, the agency currently requires routine testing for unvaccinated employees (*i.e.* regardless of symptoms or known exposure).

On August 30, 2021, the grievant initiated a grievance challenging the agency’s policy in that it does not also require routine testing of vaccinated employees. The grievant presented evidence that individuals may still become infected with the COVID-19 virus and spread it to others, even if they are up to date on recommended COVID-19 vaccinations. The grievant alleges that numerous employees at her facility, including some who were fully vaccinated, have recently tested positive for the virus. She argued that the agency’s failure to conduct surveillance testing of all employees discriminates against unvaccinated employees and creates unjustified health and safety risks for in-person staff. As the grievance proceeded through the management steps, the agency maintained that it would continue to apply its existing policies as an appropriate mitigation for potential viral outbreaks. The agency director declined to qualify the grievance for a hearing, and the grievant now appeals that determination to EDR.

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<sup>1</sup> The World Health Organization recognized the COVID-19 virus as a pandemic on March 11, 2020. As of the date of this ruling, the U.S. Centers for Disease Control and Prevention indicates that COVID-19 transmission rates in every Virginia county are at the highest classification level. See CDC COVID Data Tracker, available at [covid.cdc.gov/covid-data-tracker/#county-view](https://www.covid.cdc.gov/covid-data-tracker/#county-view).

<sup>2</sup> Exec. Dir. 18 (2021), *Ensuring a Safe Workplace*, at 1.

## 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.<sup>3</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>4</sup> 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 whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.<sup>5</sup>

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."<sup>6</sup> 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."<sup>7</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>8</sup>

Based on the facts presented, it does not appear that the grievance challenges a management action that constitutes an adverse employment action. The grievant essentially argues that the agency should take more proactive measures to keep the COVID-19 virus out of its facilities, and that its current approach is unfairly concentrating the surveillance burden on unvaccinated employees. Although the grievant herself is required to undergo routine testing, she has indicated she does not seek to be free from this requirement; instead, she seeks a change in policy to extend the requirement to others as greater protection against viral exposure. While the grievant's concern about effective mitigation may be reasonable, the grievance record contains no information that the agency's chosen approach to mitigation, in its discretion to manage the totality of its operational imperatives, conflicts with any applicable public health and safety requirements or guidelines. Accordingly, the record does not raise a sufficient question whether the agency's mitigation practices have had a tangible adverse effect on the grievant's work circumstances or another term, condition, or benefit of her employment.

Similarly, even if an adverse employment action were alleged, the record does not raise a sufficient question whether management has misapplied or unfairly applied a state policy, including prohibitions on employment discrimination. The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>9</sup> Accordingly, 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

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<sup>3</sup> See *Grievance Procedure Manual* § 4.1.

<sup>4</sup> Va. Code § 2.2-3004(B).

<sup>5</sup> *Id.* at § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

<sup>6</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>7</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>8</sup> *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>9</sup> Va. Code § 2.2-3004(B).

was so unfair as to amount to a disregard of the applicable policy's intent.<sup>10</sup> As stated above, although the grievant may reasonably disagree with the agency's decision to devote its testing resources to its unvaccinated employees, the record presents no allegation that this approach deviates from any public health standards to which the agency is bound. As to discrimination, DHRM Policy 2.05, *Equal Employment Opportunity*, requires that "all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity or expression, age, veteran status, political affiliation, genetics, or disability." Here, it is not apparent that the grievance alleges discrimination on any of the bases identified in DHRM Policy 2.05. Accordingly, the grievance suggests no state policy, and we identify none, that might require the agency to change its testing approach under the circumstances presented.

In sum, because the grievance does not present an adverse employment action or a misapplication or unfair application of policy for purposes of hearing qualification, this grievance is not qualified. However, nothing in this ruling prevents the grievant from challenging the agency's COVID-19 mitigation policies and practices in a future grievance, should she believe that the agency has failed to respond appropriately to new conditions and/or applicable public health requirements that may arise.

EDR's qualification rulings are final and nonappealable.<sup>11</sup>

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<sup>10</sup> See, e.g., EDR Ruling No. 2022-5309.

<sup>11</sup> See Va. Code § 2.2-1202.1(5).