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QUALIFICATION RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2022-5330
January 20, 2022

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether his July 15, 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 or about July 15, 2021, the grievant initiated a grievance claiming discrimination due to his choice not to receive a vaccine against the COVID-19 virus for religious reasons. He alleges that, upon arrival to his work facility on July 15, he and other employees were stopped at the entry and publicly informed that they must be tested for COVID-19 prior to entry because they were not vaccinated. While the grievant does not have a religious objection to testing, he claims that his facility’s staff have not been discreet in identifying who is required to take tests,¹ which exposes differences among employees regarding vaccination. The grievant expressed that he has felt “singled out” due to his vaccination status and addressed his perception of the agency’s efforts to encourage employees to become vaccinated, which he feels do not respect his religious position. In addition, he has expressed concern that others’ knowledge of his vaccination status may affect his opportunities for advancement in the agency. As relief, the grievant desired not to experience discrimination or restricted job opportunities due to the grievance or issues raised therein.²

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 third-step respondent noted that, upon investigation, he determined that facility staff had complied with policies to facilitate testing with as much privacy for employees as possible; however, management would not tolerate retaliation against the grievant. The director declined to qualify the grievance for a hearing, and the grievant now appeals that determination to EDR.

¹ According to the grievant, unvaccinated employees at his facility have had to administer a self-test for COVID-19 twice a week.

² The grievant also indicated that he wanted “to negotiate a salary increase to remain within the pay band of my current position and/or a guarantee of promotion within a specified time-frame.” The agency denied this relief.

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 whether discrimination, retaliation, or discipline may have improperly influenced management's 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 Workplace harassment rises to this level if it includes conduct that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."⁹

In this case, the grievance is reasonably read to assert that the agency has violated laws and/or policies that protect the grievant's sincerely-held religious beliefs. In general, the First Amendment to the United States Constitution "forbids the adoption of laws designed to suppress religious beliefs or practices unless justified by a compelling governmental interest and narrowly tailored to meet that interest."¹⁰ 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." Similarly, 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.¹¹

However, the grievant does not appear to dispute the agency's claim that its COVID-19 policies are designed to mitigate viral outbreaks in its facilities during the ongoing pandemic, not to suppress or burden any religious beliefs or practices. In addition, the grievant has not indicated

³ See *Grievance Procedure Manual* § 4.1.

⁴ Va. Code § 2.2-3004(B).

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

⁶ See *Grievance Procedure Manual* § 4.1(b).

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

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

⁹ *Strothers v. City of Laurel*, 895 F.3d 317, 331 (4th Cir. 2018) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

¹⁰ *Booth v. Maryland*, 327 F.3d 377, 380 (4th Cir. 2003). However, the First Amendment "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* (citation omitted).

¹¹ See *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)).

that he seeks a religious accommodation as to the testing requirement as applied to him. Instead, the grievant primarily takes issue with what he views as agency management's disregard for employees who choose not to be vaccinated against COVID-19. The grievant suggests it is disrespectful for agency management to attempt to persuade unvaccinated employees to change their minds about vaccination when the employees' choice is grounded in personal religious considerations.¹²

Upon a thorough review of the record, the grievance does not raise a sufficient question whether the grievant has experienced an adverse employment action. Although the grievant's allegations regarding testing and lack of discretion are concerning, we cannot conclude that such allegations might be sufficiently severe or pervasive to alter the conditions of the grievant's employment and create a hostile and/or abusive work environment that could qualify for a grievance hearing.¹³ The record does not suggest that the grievant has otherwise experienced a tangible adverse effect on any other term, condition, or benefit of his employment. Accordingly, this grievance does not satisfy the threshold requirement for a hearing under the grievance statutes.

That said, it is undisputed that the agency's substantial efforts to mitigate the spread of COVID-19 within its facilities have included broadly encouraging employees to consider getting all COVID-19 vaccines approved and recommended by public health authorities. To the extent that the grievant's religious convictions conflict with the agency's broader approach to workplace health, he may reasonably be concerned that members of management who are aware of his position will have a more negative opinion of him going forward. Should the grievant experience future adverse consequences that relate to his religious convictions or practices, nothing in this ruling prevents the grievant from challenging such events in a future grievance. If any such consequences (should they occur) rise to the level of an adverse employment action, a future grievance challenging such an adverse employment action could qualify for a hearing.

EDR's qualification rulings are final and nonappealable.¹⁴

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¹² The grievant has not indicated that he has been subjected to direct encouragement by agency staff to be vaccinated beyond the communications all agency employees receive.

¹³ "[W]hether an 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." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993); *see, e.g., Parker v. Reema Consulting Servs.*, 915 F.3d 297, 304-05 (4th Cir. 2019) (finding that a false rumor that an employee was promoted for sleeping with a manager altered the conditions of her employment because the employee was blamed for the rumor and told she could not advance in the company because of it); *Strothers*, 895 F.3d at 331-32 (holding that a hostile work environment could exist where a supervisor overruled the employee's bargained-for work hours, humiliated the employee for purportedly violating the dress code, required her to report every use of the restroom, and negatively evaluated her based on perceived slights).

¹⁴ *See* Va. Code § 2.2-1202.1(5).