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QUALIFICATION RULING

In the matter of the Department of Motor Vehicles
Ruling Number 2022-5362
March 2, 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 his December 19, 2021 grievance with the Department of Motor Vehicles (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant carpooled to his work location with a colleague on December 2, 2021. Earlier that day, the colleague reported to the agency that they did not feel well but believed their illness was related to a recurring medical condition. The colleague decided to report to work with management approval. The colleague later left work to seek treatment and subsequently reported to the agency that they had tested positive for the COVID-19 virus. After the colleague reported their COVID-19 test results to the agency, the agency directed the grievant to isolate for 14 days before returning to work. The agency's initial communication to the grievant indicated that he would be eligible to use Public Health Emergency Leave ("PHEL"), though the grievant was later informed that he was ineligible for PHEL because he did not test positive for COVID-19 during the 14-day isolation period. The grievant used his personal leave balances to cover his absence.[1]

On December 19, 2021, the grievant initiated a grievance alleging that he was "forced to quarantine and use [his] personal leave after intentionally being exposed to COVID-19." The grievant essentially argues that management should have directed his colleague to stay home when they reported their illness on December 2, which would have prevented the grievant from being exposed to COVID-19. As relief, the grievant requests restoration of the leave balances he used during the 14-day isolation period and for the agency to stop discriminating against him "due to [his] health choices and [his] religious beliefs." Following the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

[1] According to the grievant, he used approximately 11 days of leave.

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.[2] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] 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.[4]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7] For purposes of this ruling, we will assume that the grievant has alleged an adverse employment action because he has raised issues with his use and retention of leave.

In this case, the grievant essentially contends that the agency misapplied or unfairly applied policy by requiring him to isolate for 14 days after a COVID-19 exposure and use his personal leave balances to cover the absence. As support for this position, the grievant alleges that management at his work location knew his colleague was sick on the morning of December 2, 2021, and directed the colleague to "come in to work and not say anything." The grievant asserts that he was not responsible for his exposure to COVID-19 and therefore should not have been required to use his personal leave balances for the 14-day isolation period. 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.[8]

According to the evidence provided to EDR, the agency circulated a COVID-19 health screening questionnaire to employees in March 2021, listing symptoms and other circumstances that should lead employees to stay home and notify management. In April 2021, the agency sent an additional communication encouraging employees to "stay home and see a doctor" if they had "symptoms of allergies, cold, [or] flu" which could also be symptoms of COVID-19 infection. The grievant describes the colleague's appearance as "noticeably ill" on December 2 and claims that other employees at their work location offered to cover the colleague's shift. The colleague's condition apparently worsened to the point that they decided to leave work and seek treatment, at

[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).
[4] *Id*. at § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).
[5] *See Grievance Procedure Manual* § 4.1(b).
[6] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[8] *See, e.g.*, EDR Ruling No. 2022-5309.

which point another employee reported to cover the colleague's shift. The colleague reported their positive COVID-19 test results to the agency later in the day. Because the grievant carpooled to work with the colleague, the agency determined that he had been exposed to COVID-19 and must isolate for 14 days before returning to work.[9]

During the management steps, the agency conducted an investigation of the incident, interviewing the employees involved. According to the investigation notes, the grievant's colleague stated that they reported their symptoms to management as a low-grade fever and headache, but did not feel like they should stay home and did not feel "forced" to come to work. The manager involved described the conversation with the colleague in similar terms. The manager reported asking the colleague to not "mention [their medical condition] to anybody" because their symptoms did not meet the criteria on the agency's COVID-19 health questionnaire.

We do not disagree with the grievant that management's apparent direction to the colleague to withhold information about their symptoms from other employees is concerning. In hindsight, it is also clear that the grievant's colleague should have stayed home on December 2. Nonetheless, the record is clear that the grievant received an appropriate instruction to isolate due to his commute with the colleague by carpool.

The grievant's frustration regarding his use of personal leave for the two-week isolation period is also understandable. Nevertheless, he has not identified, and EDR has not found, a mandatory policy provision that the agency has misapplied or unfairly applied. For example, EDR is not aware of any law or policy that would have required the agency to place the grievant on paid leave status in this situation without the application of personal leave. One possible exception might have been DHRM Policy 4.52, *Public Health Emergency Leave*, which is intended to "protect the health of state employees and the public and to provide continuity of services to the citizens of the Commonwealth during times of pandemic illness."[10] When implemented, employees are eligible for paid leave "to attend to their own medical condition and/or to care for immediate family members . . . ."[11]

On September 1, 2021, DHRM issued a Policy Guide addressing the application of Policy 4.52 to COVID-19.[12] The Policy Guide provides that employees may use PHEL "to attend to [their] own illness due to a confirmed positive test for COVID-19" or "to attend to an immediate family member who has contracted COVID-19 through a confirmed positive test."[13] The guidance goes on to clarify that, once an employee has exhausted their PHEL allotment, "employees may

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[9] Other employees at the grievant's work location took safety measures to prevent the spread of the virus but were not required to isolate. The agency asserts that other employees at the work location were not in close contact with the colleague in the same way as the grievant because the agency had implemented mitigation measures in the workplace, including physical distancing and masking.

[10] DHRM Policy 4.52, *Public Health Emergency Leave*, at 1.

[11] *Id.* at 3.

[12] DHRM Policy Guide – Policy 4.52, *Public Health Emergency Leave (COVID-19 ONLY)*, Sept. 1, 2021, at 1 (amended Oct. 26, 2021). DHRM has issued multiple documents providing policy guidance about COVID-19, PHEL, and related matters since March 2020. A complete list of these resources is available at https://www.dhrm.virginia.gov/covid-19.

[13] DHRM Policy Guide – Policy 4.52, *Public Health Emergency Leave (COVID-19 ONLY)*, Sept. 1, 2021, at 1 (amended Oct. 26, 2021). The guidance also permits use of "[u]p to 8 hours of PHEL . . . to obtain a COVID-19 vaccine and/or booster and/or recover from side-effects resulting from obtaining the vaccine effective September 1, 2021 forward." *Id.*

use appropriate and available leave balances" including Sick Leave, Family-Personal Leave, Annual Leave, Compensatory Leave, Overtime Leave, Recognition Leave, or Leave without Pay.[14] In addition, DHRM has provided guidance about returning to work for employees who contract or are exposed to COVID-19.[15] At the time of the events at issue in this case, DHRM's guidance stated that public health authorities recommended that isolation "continue for 14 days after the last exposure as the safest option."[16] Although "shorter quarantine periods" were authorized for employees who did not develop symptoms or presented negative results, DHRM's guidance indicates that these shorter isolation options were discretionary.

In this case, the grievant did not meet the criteria for PHEL eligibility because he never received a confirmed positive test for COVID-19. Moreover, the agency's decision that the grievant must isolate for 14 days appears to be consistent with DHRM's guidance and public health recommendations at the time. The grievant's options were therefore to use his personal leave balances or go unpaid during the isolation period. EDR has no basis to conclude that this result is inconsistent with policy under these circumstances.

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." Although the grievant seems to have identified his "health choices" and "religious beliefs" as bases for discrimination, he has not identified any connection between his health choices or religious beliefs and the agency's decision to direct him to isolate after a COVID-19 exposure, nor has he alleged how the agency's decision was motivated by either of those factors. As discussed above, the agency's decision here appears consistent with its practice in cases where employees were exposed to COVID-19 in accordance with applicable policy and public health standards.

In sum, EDR cannot second-guess the agency's decisions regarding the management of its operations and affairs, absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[17] Here, the grievant has presented no evidence that other similarly situated agency employees were treated differently – *i.e.* were exposed to COVID-19 and not required to isolate or were given additional paid leave to offset an isolate period that was not eligible for PHEL – nor has EDR reviewed any such evidence. For these reasons, EDR finds that the grievance does not raise a sufficient question as to whether the agency misapplied or unfairly applied policy, acted in a manner that was inconsistent with other decisions regarding the approval of leave for employees, or was otherwise arbitrary or capricious. Under the circumstances presented in this case, it appears that the agency's decision regarding the grievant's leave was consistent with the discretion granted by policy. Accordingly, the grievance does not qualify for a hearing on these grounds.

EDR's qualification rulings are final and nonappealable.[18]

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[14] *Id.*
[15] DHRM Guidance – Returning to the Work Place Following COVID-19 Exposures, Suspected Infections, and Positive Cases, Sept. 16, 2020 (amended Dec. 7 and Dec. 8, 2020).
[16] *Id.* at 1.
[17] *See, e.g.,* EDR Ruling No. 2009-2090.
[18] *See* Va. Code § 2.2-1202.1(5).

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