Issues: Qualification – Separation from State (unable to meet work conditions), Discrimination (disability), and Benefits Leave (administrative leave); Ruling Date: August 30, 2017; Ruling No. 2018-4595; Agency: Department of State Police; Outcome: Qualified in Full.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of State Police
Ruling Number 2018-4595
August 30, 2017

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, 2017 grievance with the Department of State Police (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is qualified for a hearing.

FACTS

The grievant was employed by the agency as a Trooper II. After a work-related incident that occurred in 2012, the grievant was diagnosed with a medical condition. Since 2012, the grievant has received continuing treatment from a medical professional. On or about November 10, 2016, the grievant provided the agency with a note from his doctor, ordering him out of work due to worsening symptoms of his condition. The grievant applied for and received short-term disability benefits under the Virginia Sickness and Disability Program until May 8, 2017, the date on which he was cleared by his doctor to return to work. Before permitting the grievant to return, the agency ordered him to undergo a fitness for duty evaluation, which took place on May 15, 2017. The evaluating doctor determined that the grievant was not able to perform the duties of his job. The agency received the evaluating doctor's report on June 30, 2017, and subsequently notified the grievant on July 10, 2017 that he would be separated from employment with the agency at the close of business on July 14, 2017.

On July 25, 2017, the grievant initiated an expedited grievance challenging his separation from employment, and further alleging that the agency "removed [him] from administrative leave and required him to use personal leave" to cover his absence from work between July 1 and July 14, 2017. The parties mutually agreed to waive both the single management resolution step and the agency head's qualification decision, and the grievance advanced directly to EEDR for a qualification ruling.

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.[1] Additionally, the grievance statutes and procedure reserve to management the exclusive right to

[1] *See Grievance Procedure Manual* § 4.1.

manage the affairs and operations of state government.[2] 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.[3]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6] In this case, the grievant experienced an adverse employment action because he has been separated from employment with the agency.

Fitness for Duty Evaluation and Separation

In this case, the grievant appears to assert that the agency has violated the Americans with Disabilities Act ("ADA") by separating him from employment based on the outcome of the fitness for duty evaluation, "despite his years of service while suffering from [a medical condition] and lack of any incidents, write-ups, complaints or other indicators that the [medical condition] was effecting [sic] his employment." 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*. . ."[7] Under this policy, "'disability' is defined in accordance with the [ADA]", the relevant law governing disability accommodations.[8] 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.[9] A qualified individual is defined as a person with a disability, who, "with or without reasonable accommodation," can perform the essential functions of the job.[10] An individual is "disabled" if he/she "(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 . . . ."[11]

Under the ADA, an employer is prohibited from requiring a medical examination or making inquiries of an employee as to whether he is an "individual with a disability or as to the nature or severity of the disability unless such examination or inquiry is shown to be job-related

[2] Va. Code § 2.2-3004(B).
[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[4] *See Grievance Procedure Manual* § 4.1(b).
[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).
[8] *Id.*; *see* 42 U.S.C. §§ 12101 *et seq.*
[9] 42 U.S.C. § 12112(a).
[10] *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).
[11] 42 U.S.C. § 12102(1).

and consistent with business necessity."[12] Regulatory guidance clarifies that "[t]his provision permits employers to make inquiries or require medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job."[13] To demonstrate that a fitness for duty evaluation is consistent with business necessity, courts have stated an "employer must prove: (i) 'that the asserted "business necessity" is vital to the business,' (ii) 'that the examination . . . genuinely serves the asserted business necessity,' and (iii) 'that the request is no broader or more intrusive than necessary.'"[14]

Many courts have held that, because law-enforcement officers have unique public safety responsibilities, fitness for duty evaluations of such employees are generally consistent with business necessity, provided the employer has some legitimate reason to question the officer's ability to adequately and safely carry out his or her responsibilities.[15] Here, it appears reasonable that the agency's decision to order the fitness for duty evaluation was job-related and consistent with business necessity. The grievant was employed by the agency as a law-enforcement officer, suffers from a medical condition that was caused by a job-related incident, and had been taken out of work by his doctor for several months due to worsening symptoms of his condition. Under these circumstances, EEDR cannot conclude that the agency's questions about the grievant's ability to perform the essential functions of his position were unreasonable. Accordingly, it appears the agency's decision that the grievant should complete a fitness for duty evaluation before returning to work was consistent with business necessity in this case.[16]

With regard to the outcome of the fitness for duty evaluation, the parties disagree as to whether the grievant was, in fact, able to perform the essential functions of his position. The grievant's doctor released him to return to work without restrictions or accommodations on May 8, 2017. The doctor who conducted the fitness for duty evaluation on May 15, 2017, found that the grievant could not perform the essential functions of his position. Under DHRM Policy 1.60, *Standards of Conduct*, an agency may remove an employee who is "unable to meet the working conditions of his . . . employment" for certain specified reasons, including the employee's "inability to perform the essential functions of the job after reasonable accommodation (if required) has been considered . . . ."[17] The *Standards of Conduct* does not, however, address how an agency should resolve conflicting reports from medical professionals on the issue of whether an employee is actually able to perform the essential functions of his position. The relevant agency policy, General Order ADM 14.10, *Fitness for Duty*, describes the circumstances under which fitness for duty evaluations may be ordered and the manner in which they should be completed, but does not discuss the removal process or provide guidance for resolving conflicts between medical reports.

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[12] 42 U.S.C. § 12112(d)(4).
[13] 29 C.F.R. Part 1630, App. § 1630.14(c).
[14] Blake v. Baltimore County, 662 F. Supp. 2d 417, 422 (D. Md. 2009) (quoting Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 97-98 (2d Cir. 2003)).
[15] *See, e.g.*, Kroll v. White Lake Ambulance Auth., 763 F.3d 619, 626 (6th Cir. 2014); Brownfield v. City of Yakima, 612 F.3d 1140, 1146-47 (9th Cir. 2010); Krocka v. City of Chicago, 203 F.3d 507, 515 (7th Cir. 2000); Watson v. City of Miami Beach, 177 F.3d 932, 935 (11th Cir. 1999).
[16] EEDR finds that the agency's reason for ordering the fitness for duty evaluation was consistent with business necessity for purposes of this ruling only. As the grievance is qualified for a hearing for the reasons further discussed below, nothing prevents the hearing officer from considering and addressing the agency's justification for the fitness for duty evaluation, if appropriate.
[17] DHRM Policy 1.60, *Standards of Conduct* § H(1).

In this situation, when faced with opposing conclusions from medical professionals who were both apparently qualified to evaluate the grievant's condition, EEDR cannot reconcile their conflicting determinations. In light of such evidence, EEDR finds that sufficient questions of fact exist with regard to whether the agency complied with applicable policy and/or law in removing the grievant from employment on the basis that he was unable to perform the essential functions of his job. Accordingly, the grievance is qualified for a hearing for further determination of this matter by a hearing officer.

Reasonable Accommodation

Where an employee is unable to perform the essential functions of his position, he may nevertheless be entitled to reasonable accommodation by the agency. Although some courts have held that an accommodation is unreasonable if it requires the elimination of an "essential function,"[18] "job restructuring, part-time or modified work schedules," reassignment, and "other similar accommodations for individuals with disabilities" are considered reasonable accommodations.[19] Potential accommodations could also include unpaid leave beyond the maximum amount available under any applicable policies, provided that such leave is not indefinite.[20]

In addition to his claims regarding the fitness for duty evaluation, the grievant further argues that he requested reasonable accommodations from the agency for his condition, and that these requests were improperly denied. In support of its actions, the agency asserts that no vacant positions were available for transfer or placement that would have satisfied the grievant's requested accommodations. Should the hearing officer determine that the grievant is unable to perform the essential functions of his position, he or she should also address any claims relating to reasonable accommodation(s) that may be available as an alternative to removal, including job restructuring, reassignment, unpaid leave, or other similar accommodations. Accommodations that could be reasonable and available to the grievant may differ depending on the hearing officer's assessment of the facts relating to the grievant's medical condition, his ability to perform the essential functions of his position, and other related issues.

Leave and Other Issues

Finally, the hearing officer should also consider the grievant's allegation that the agency improperly charged his absence from July 1 through July 14, 2017 to his personal leave balances, after it had received the results of the fitness for duty evaluation. Although the agency claims this action is consistent with its practice in such situations, EEDR is unaware of any policy to support such a practice when an employee has been medically cleared by his doctor to return to work, but is prevented from doing so because of an action taken by the agency (i.e., the fitness for duty evaluation). To the extent that the grievant has asserted any other additional claims and theories

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[18] *E.g.*, Hill v. Harper, 6 F. Supp. 2d 540, 544 (E.D. Va. 1998) (citing Hall v. U.S. Postal Service, 857 F.2d 1073, 1078 (6th Cir. 1988)).

[19] 42 U.S.C. § 12111(9)(B); EDR Ruling No. 2004-879; *see also* EEOC v. Stowe-Pharr Mills, Inc., 216 F.3d 373, 377 (4th Cir. 2000) (stating that "[t]he term reasonable accommodation may include . . . reassignment to a vacant position" (citation and internal quotation marks omitted)).

[20] Employer-Provided Leave and the American with Disabilities Act, https://www.eeoc.gov/eeoc/publications/ada-leave.cfms; *see* 29 CFR pt. 1630 app. § 1630.2(o) (stating that "accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment . . . .")

regarding his separation from employment, the denial of requested accommodations, or other related issues, EEDR deems it appropriate to send all alternative theories and claims raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

At the hearing, the grievant will have the burden of proof to show that his separation was not supported by the evidence, inconsistent with state or agency policy, violated applicable legal protections (such as under the ADA), or otherwise improper.[21] If the hearing officer finds that the grievant has met this burden on one or multiple theories, he or she may order corrective action as authorized by the grievance statutes and grievance procedure, including reinstatement of the grievant to his former position or an equivalent position, back pay, and restoration of benefits such as leave.[22]

CONCLUSION

The grievant's July 25, 2017 grievance is qualified for a hearing as described above. This qualification ruling in no way determines that any of the grievant's claims are supported by the evidence, but only that further exploration of the facts by a hearing officer is warranted. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for a hearing, using the Grievance Form B.

EEDR's qualification rulings are final and nonappealable.[23]

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Office of Equal Employment and Dispute Resolution

[21] *Rules for Conducting Grievance Hearings* § VI(C).
[22] Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* §§ VI(C), VI(D). The hearing officer will also have the authority to award attorneys' fees to the grievant if he substantially prevails on the merits of the grievance. *Rules for Conducting Grievance Hearings* § VI(E).
[23] *See* Va. Code § 2.2-1202.1(5).