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QUALIFICATION RULING

In the matter of the Virginia Department of Health
Ruling Number 2021-5165
November 23, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") on whether her August 6, 2020 grievance with the Virginia Department of Health (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is qualified for a hearing.

FACTS

The grievant currently works as an executive secretary for the director of one of the agency's local departments. On or about August 6, 2020, she initiated a grievance alleging that the director had been exhibiting "unprofessional, uncivil and retaliatory behavior" toward her for "well more than a year." This conduct, the grievant claims, has included withdrawing "meaningful work," no longer speaking to the grievant unless "absolutely necessary," and altering her regular duties to such an extent that her job as an executive secretary has fundamentally changed. Most recently, the grievant alleges, the director withdrew approval for limited telework for the grievant during the ongoing COVID-19 pandemic while permitting other employees, who would not normally be telework-eligible, to use this option.[1] According to the grievant, because the pandemic has caused schools and childcare providers to close and/or present health risks for those who attend, she has limited but essential child-supervision responsibilities during work hours. She claims she met her work and caregiving responsibilities in the early months of the pandemic by teleworking effectively, but her director's withdrawal of telework approval has forced her to deplete various paid-leave benefits to manage pandemic-related caregiving.[2] The grievant asserts

[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. DHRM Policy 4.52, *Public Health Emergency Leave*, provides that during such circumstances, agencies should arrange telework for employees who can work at alternate locations "to further promote social distancing." Although the parties dispute whether the grievant's position is considered telework-eligible, there is no dispute that the grievant did telework regularly from March to July 2020 because of the pandemic conditions.

[2] The grievant has sought approval to telework in the afternoons during most weekdays and represents that she is fully able to complete her afternoon work duties remotely while monitoring her children's remote school attendance, as she

that the director's actions, including denial of telework, are an effort to "phase her out" due to improper and/or retaliatory motives. As relief, the grievant requested reassignment to a different supervisor within the executive office.

In response, agency management concluded that the grievant and the director had a "personality conflict that prevents [them] from maintaining a cohesive and productive working relationship," but that the director had not engaged in retaliation or other prohibited conduct. The agency proposed reassigning the grievant to "provide administrative support and coordinate clinical activities . . . for all the clinical teams" under a different supervisor, while also "continu[ing] to perform the . . . duties you are currently performing." The grievant rejected the reassignment on grounds that it constituted a substantial increase in responsibilities without additional pay and did not align with her current responsibilities.[3] The agency declined to grant further relief or qualify the grievance for a hearing, and the grievant now appeals the latter 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.[4] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[5] Thus, claims relating to issues such as the means, methods, 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.[6] 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.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[7] Typically, then, a 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."[8] Adverse employment actions include any

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did in the spring and into the summer months. The agency has not suggested that the grievant's telework during this time gave rise to any performance concerns. Nevertheless, the director informed the grievant on October 1, 2020 that the duties specified on her Employee Work Profile are not compatible with any telework. The grievant alleges that the director has not been willing to engage in a meaningful discussion of options.

[3] While this ruling was pending, the agency represented to EDR that the reassignment offered in fact would not increase the grievant's job duties; she would have a new role and would no longer perform her existing duties. EDR is unaware whether the agency has clarified the apparent discrepancy in communications with the grievant.

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

[5] Va. Code § 2.2-3004(B).

[6] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

[7] *See id.* § 4.1(b)

[8] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9]

In this case, the grievant alleges that the director's improper denial of telework approval has caused the grievant to deplete her various paid leave balances prematurely with respect to the expected duration of the public health emergency, when she would have rather worked full days, such that she will soon exhaust her available benefits in continuing to meet her pandemic-induced caregiving responsibilities.[10] The grievant claims that she would have performed her work responsibilities remotely had she been permitted to do so; instead, she did not work and applied paid leave benefits to those absences. Because there appears to be no dispute that the challenged management actions have resulted in a depletion of tangible employment benefits, the grievant has sufficiently alleged an adverse employment action for purposes of qualification for hearing.[11]

In addition, the grievance record raises a sufficient question whether this depletion of benefits resulted from the director's prohibited conduct and/or misapplication or unfair application of policy, effectively ratified by the agency. The grievant has provided written statements from other employees confirming that the director went long periods without speaking to and actively avoiding the grievant – her own executive secretary and direct report. EDR has previously recognized that such behavior from a supervisor could constitute unprofessional conduct that is prohibited by DHRM Policy 2.35, *Civility in the Workplace*, and, as such, must not be tolerated by agencies.[12] Indeed, the agency acknowledged in its step responses that a "personality conflict" between the grievant and the director prevents them from having a "productive working relationship."[13]

While EDR agrees that telework approval is broadly subject to a supervisor's discretion,[14] and we recognize the agency's staffing imperatives during the present public health emergency, denial of telework approval for arbitrary reasons such as personal dislike could rise to the level of a misapplication or unfair application of the telework policy. Here, the agency has maintained that the director "determined that the office was best served with the grievant returning to work as she is the primary administrative support." Yet it appears that this determination has in fact caused the grievant to work less, drawing down her paid-leave balances every week rather than working full

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[9] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

[10] The grievant alleges that her childcare responsibilities have caused her to exhaust all applicable paid leave under DHRM Policy 4.57, *Virginia Sickness and Disability Program*; DHRM Policy 4.40, *School Assistance and Volunteer Service*; and the federal Families First Coronavirus Relief Act. She contends that she would have retained these benefits for continuing use as needed during the pandemic had she received approval for limited teleworking for which her position is eligible. She further alleges that, although she has over 70 hours of paid leave benefits remaining under DHRM Policy 4.52, *Public Health Emergency Leave*, the agency has not approved the use of this leave for regular child care, even if pandemic-related.

[11] *See, e.g.*, EDR Ruling No. 2021-5138; EDR Ruling No. 2020-4983.

[12] *See* EDR Ruling No. 2020-4950; EDR Ruling No. 2019-4948.

[13] The agency's effort to reassign the grievant could potentially be an appropriate response to this situation and its implications under Policy 2.35, but the record at this stage presents at least some ambiguity about the nature of the grievant's proposed new role and the extent to which it would have the practical effect of increasing her responsibilities. Because the qualification analysis turns primarily on the allegedly improper denial of telework permission for the grievant and the resulting depletion of her paid leave benefits, this ruling need not further address potential issues related to the agency's proposed reassignment.

[14] *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."

days that include some remote hours. According to the grievant, the director has been unwilling to consider a nuanced approach to telework, categorically denying it on the sole basis of the grievant's EWP, despite a sustained period of effective telework in the recent past. The grievant also alleges that the director has granted telework approval more freely to other employees.

The totality of these alleged circumstances, and their direct effect on tangible benefits of the grievant's employment, presents a sufficient question whether the agency has misapplied and/or unfairly applied the telework policy and the benefits for which it provides. EDR further notes that DHRM Policy 4.52, *Public Health Emergency Leave*, provides that employees "with approved telework agreements should be encouraged to work off site to reduce the risk of exposure" during circumstances such as the current pandemic. While applicable policies confirm management's discretion in this regard, a hearing officer is best suited to determine the reasons for denying approval for the grievant to telework in this case, and specifically whether those reasons were so arbitrary and/or unfair as to exceed the scope of management's authority to grant or deny telework benefits under state policy. To ensure a full exploration of these issues, the hearing officer may consider the grievant's claims as to any potentially improper motive for denying telework benefits, including retaliation for an activity protected by law.[15]

At the hearing, the grievant will have the burden of proof as to her claims of improper denial of telework approval, and as to the causal link between such improper denial and the depletion of specific paid-leave benefits.[16] If the hearing officer finds that the grievant has met this burden, they may order corrective action as authorized by the grievance statutes and grievance procedure, including restoration of benefits such as leave.[17] Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B. This ruling does not prevent the parties from independently pursuing settlement of the issues grieved prior to a hearing.

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

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[15] Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." *See also Grievance Procedure Manual* § 4.1(b)(4). State law mandates that employees of the Commonwealth "shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Va. Code § 2.2-3000.
[16] *Rules for Conducting Grievance Hearings* § VI(C).
[17] Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* § VI(C).
[18] *See* Va. Code § 2.2-1202.1(5).