Issues: Qualification – Management Actions (assignment of duties), Discrimination (disability), Retaliation (grievance activity and other protected right); Ruling Date: April 8, 2013; Ruling No. 2013-3546, 2013-3547; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Numbers 2013-3546, 2013-3547
April 8, 2013

The grievant has requested a ruling on whether her November 20, 2012 and December 5, 2012 grievances with the Department of Corrections (the agency) qualify for a hearing. For the reasons discussed below, these grievances do not qualify for a hearing.

FACTS

The grievant states that she was on short-term disability from June 22, 2012 until November 5, 2012. While she was out on leave, her personal items were removed from her work area and stored in a box. When she returned to work, she was informed that she was being reassigned to different job duties. She also learned that her personal items had been moved, and she asserts that some personal items from her work space were missing. On November 20, 2012, the grievant initiated a grievance challenging the duty reassignment, and on December 5, 2012, she initiated a grievance regarding her personal items being moved. After the parties failed to resolve the grievances during the management resolution steps, the grievant asked the agency head to qualify the grievances for hearing. The agency head denied the grievant's request, and the grievant sought a qualification ruling by 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.[1] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as to 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. In this case, the grievant has initiated grievances challenging two management actions: her reassignment and the handling of her personal items. Each of these issues will be addressed below.

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[1] *See Grievance Procedure Manual* § 4.1.
[2] *See* Va. Code § 2.2-3004(B).

Reassignment of Duties

The November 20, 2012 grievance challenges the grievant's reassignment from Buildings and Grounds to duties related to inmate grievances on her return to work from short-term disability. The grievant asserts that the reassignment was in retaliation for her previous grievance activity and her medical-related leave. She also alleges that the reassignment does not comply with her medical restrictions, which require her to be able to eat every two hours, and that the Buildings and Grounds assignment was in fact a previous accommodation by the agency for these restrictions.

i. Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[3] (2) the employee suffered an adverse employment action[4]; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.[5] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[6]

Assuming, for the purposes of this qualification ruling only, that the grievant is able to demonstrate that she engaged in a protected activity and that this activity was causally related to her reassignment, her retaliation claim nevertheless cannot qualify for hearing at this time as she has not demonstrated the existence of 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] A transfer or reassignment may constitute an adverse employment action if a grievant can show that the transfer/reassignment had some significant detrimental effect on the terms, conditions, or benefits of her employment.[9] A reassignment or transfer with significantly different responsibilities, or one providing reduced

[3] *See* Va. Code § 2.2-3004(A) and *Grievance Procedure Manual* § 4.1(b)(4).
[4] As noted in EDR Ruling Nos. 2013-3446, 2013-3447, although for the past six years EDR has used the "materially adverse action" standard for retaliation claims, we are returning to the "adverse employment action" standard for the assessment of all claims, including retaliation, as to whether they qualify for hearing. *See* Va. Code § 2.2-3004(A).
[5] *See*, *e.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).
[6] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 10, 101 S. Ct. 1089 (Title VII discrimination case).
[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).
[9] *See id.*

opportunities for promotion, may constitute an adverse employment action, depending on all the facts and circumstances.[10]

In this case, the grievant maintained the same job position and pay after her reassignment. She also apparently continues to perform clerical and administrative duties, although she now performs those duties for the office handling inmate grievances rather than Buildings and Grounds. The grievant asserts that in her new assignment, she will no longer regularly be able to eat every two hours, as the grievance files are located within the facility's perimeter. At the time EDR spoke with the grievant, however, she had not yet been required to work within the perimeter and had not therefore experienced this potential detriment. In the absence of evidence that the reassignment resulted in significantly different duties or a significant detrimental effect, the grievance does not raise a sufficient question that an adverse employment action has occurred to qualify for a hearing.[11]

ii. Failure to Accommodate

The grievant further asserts that her reassignment is, in effect, a denial of a reasonable accommodation for her medical condition. DHRM Policy 2.05 "[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, age, veteran status, political affiliation, genetics or *disability*."[12] Under DHRM Policy 2.05, "'disability' is defined in accordance with the 'Americans with Disabilities Act'," the relevant law governing disability accommodations.[13] Like DHRM Policy 2.05, the Americans with Disabilities Act (ADA) prohibits employers from discriminating on the basis of disability against an qualified individual.[14] A qualified individual with a disability is a person who, with or without "reasonable accommodation," can perform the essential functions of the job.[15] An individual is "disabled" if she "(A) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment."[16]

As a general rule, an employer must make reasonable accommodations to the known physical or mental limitations of a qualified employee with a disability, unless the employer can demonstrate that the accommodation "would impose an undue hardship on the operation of the

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[10] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 F. App'x 726 (4th Cir. 2004) (unpublished opinion).
[11] We note that if, after this ruling, the grievant experiences a significant detriment from her reassignment, she is not prevented from challenging the agency conduct resulting in the detriment (for example, requiring her to work in the perimeter without allowing access to food in accordance with her medical restrictions) through a subsequent grievance.
[12] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).
[13] 42 U.S.C. §§ 12101 *et seq.*
[14] 42 U.S.C. § 12112(a).
[15] 42 U.S.C. § 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).
[16] 42 U.S.C. § 12102(1).

business [or government]."[17] "Undue hardship" is defined as a "significant difficulty or expense incurred by [an agency]" upon consideration of certain established factors, including the "impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business."[18] In order to determine the appropriate reasonable accommodation, it may be necessary for the employer "to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[19]

In this case, the grievant has not shown that the agency has failed to accommodate her medical restrictions. While she asserts that her reassignment will result in her not being able to comply with her medical restrictions, she agrees that this has not yet occurred. Further, the agency states that she will continue to be allowed to eat in accordance with those restrictions. As a result, even assuming for purposes of this ruling that the grievant has satisfied the requirement of a disability, she has failed to present evidence raising a sufficient question for her accommodation claim to qualify for hearing. We note, however, that in the event that the grievant's medical restrictions are not accommodated in the future, the grievant may, at that time, initiate a new grievance challenging the failure to accommodate.[20]

Moving of Personal Items

In addition to her claims regarding her reassignment, the grievant also alleges that the agency acted improperly when it moved and boxed her personal items during her leave. As previously noted, with limited exceptions (such as a failure to accommodate), only those actions involving an adverse employment action may qualify for hearing. As explained above, to be an adverse employment action, the challenged management conduct must have an adverse effect *on the terms, conditions, or benefits* of one's employment.[21] In this case, the removal and boxing of the grievant's personal items was a reasonable management response to her prolonged leave, during which time another employee performed her job duties, and did not have an adverse effect on her terms, conditions or benefits of employment. To the extent the grievant asserts that items were missing or taken from the box of items moved from her workspace, her remedy for such a

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[17] 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.").
[18] 29 C.F.R. § 1630.2(p).
[19] 29 C.F.R. § 1630.2(o)(3).
[20] In considering whether any such grievance would qualify for hearing, EDR would assess, among other factors, whether the grievant had an actual disability or a record of such a disability, whether an accommodation could be made that would not result in an undue hardship, and the extent to which the parties engaged in the interactive process. *See, e.g.*, EDR Ruling Nos. 2006-1220, 2006-1239 (qualifying for hearing claims regarding an alleged failure to accommodate, related in part to DOC's reliance on the grievant's failure to apply to the ADA Review Committee).
[21] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

claim is the operating procedure covering tort claims regarding which the agency advised her, not the grievance process. Accordingly, this claim does not qualify for hearing.

CONCLUSION

For all the foregoing reasons, the grievant's November 20, 2012 and December 5, 2012 grievances do not qualify for hearing. However, the parties are advised that in the event the grievant is in fact not allowed to eat in accordance with her medical restrictions, she may grieve that denial as a new agency action.

EDR's qualification rulings are final and nonappealable.[22]

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[22] Va. Code § 2.2-1202.1(5).