Issue: Qualification – Discrimination (disability); Ruling Date: January 19, 2016; Ruling No. 2016-4238; 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 Number 2016-4238
January 19, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether her June 30, 2015 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant was employed by the agency as a Corrections Officer. On or about December 4, 2014, the grievant went on short-term disability leave. Subsequently, on April 13, 2015, the grievant submitted a request for reasonable accommodation from the agency. On or about April 20, 2015, the grievant's health care provider advised the agency that the grievant should "not be working directly with offenders or around weapons or firearms." In May 2015, the grievant's health care provider clarified to the agency that the grievant would be able to work in an office environment "where she would not feel threatened, without firearms and limited amount of inmate exposure." By letter dated June 18, 2015, the agency advised the grievant that she could not be accommodated in her current position as a Corrections Officer and that it was unable to find a vacant position for which she was minimally qualified and that would accommodate her restrictions. The grievant had previously been advised, by letter dated June 10, 2015, that her active employment had ended on June 4, 2015, the date her long-term disability benefits had begun.

On June 30, 2015, the grievant initiated a grievance challenging the agency's actions. After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and she has appealed to EDR.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[1] Thus, claims relating to issues such

[1] Va. Code § 2.2-3004(B).

as the method, 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 influenced management's decision, or whether state policy may have been misapplied or unfairly applied. In this case challenging her separation from employment, the grievant has asserted claims that the agency failed to accommodate her disability.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[2] Thus, typically, 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."[3] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[4] In this case, the grievant lost employment in her former position, which is clearly an adverse employment action.

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*."[5] Under this policy, "'disability' is defined in accordance with the 'Americans with Disabilities Amendments Act'" ("ADA"), the relevant law governing disability accommodations.[6] 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.[7] 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.[8] An individual is "disabled" if 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 . . . ."[9]

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 business [or government]."[10] "Undue hardship" is defined as a "significant difficulty or expense

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[2] *See Grievance Procedure Manual* § 4.1(b).
[3] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[4] *See, e.g.,* Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[5] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added); *see also* Department of Corrections Operating Procedure 101.5, *Reasonable Accommodations*.
[6] DHRM Policy 2.05, *Equal Employment Opportunity*; *see* 42 U.S.C. §§ 12101 *et seq.*
[7] 42 U.S.C. § 12112(a).
[8] *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).
[9] 42 U.S.C. § 12102(1).
[10] 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

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."[11] 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."[12] For purposes of this ruling, it is presumed that the grievant's condition meets the definition of "disability." The focus of this ruling, therefore, is whether the agency acted in accordance with law and policy in determining whether a reasonable accommodation was available.

The agency asserts that the grievant's requests for accommodations indicate that she cannot perform the essential functions of her position. It also asserts that reassignment to a vacant position was not possible, as there were no vacant positions for which the grievant was minimally qualified and that satisfied her restrictions. Whether a function is essential is evaluated on a case-by-case basis by examining a number of factors. The ADA provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential" and the employer's written description for that job.[13] Other factors to consider include: (1) "[t]he amount of time spent on the job performing the function," (2) "[t]he consequences of not requiring the incumbent to perform the function," (3) the terms of any collective bargaining agreement, (4) "[t]he work experience of past incumbents in the job," and (5) "[t]he current work experience of incumbents in similar jobs."[14] Where an employee is unable to perform the essential functions of her position, she 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,"[15] "job restructuring, part-time or modified work schedules," reassignment, and "other similar accommodations for individuals with disabilities" are considered reasonable accommodations.[16]

In this case, it is clear that the grievant could not have performed the essential functions of her position as a Corrections Officer, as she could neither have direct contact with offenders

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disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.").

[11] 29 C.F.R. §§ 1630.2(p)(1), (p)(2)(v).

[12] *Id.* § 1630.2(o)(3).

[13] 42 U.S.C. § 12111(8).

[14] 29 C.F.R. § 1630.2(n)(3).

[15] *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)).

[16] 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)); Cravens v. Blue Cross & Blue Shield, 214 F.3d 1011, 1017-19 (8th Cir. 2000) (holding that reassignment could be a reasonable accommodation where the employee could not perform the essential functions of his current job);; Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 677 (7th Cir. 1998) ("The option of reassignment is particularly important when the employee is unable to perform the essential functions of his or her current job, either with or without accommodation or when accommodation would pose an undue hardship for the employer.").

(limited or otherwise) nor be in the presence of firearms. The question then becomes whether the agency satisfied its duty of considering reassignment options for the grievant. This is a much more difficult assessment to make.

EDR's investigation in this case has been complicated by having received somewhat conflicting and/or incomplete information from the agency regarding its efforts to place the grievant, and it remains somewhat unclear to what extent the agency attempted to place the grievant after her health care provider clarified her restrictions.[17] In addition, we share the grievant's concern that she was apparently separated from employment with the agency prior to the agency's having notified her that no reasonable accommodation was possible. However, notwithstanding these problems, EDR has not found evidence that there was, at the time of the grieved conduct, a vacant position to which the grievant could have been reassigned.

The agency has represented to EDR that it considered the possibility of placing the grievant in a number of positions, including positions in probation and parole, program support, and the mailroom. However, the agency determined that there were no probation and parole or mailroom positions available, and that, based on an application the grievant completed for the purpose of reassignment, she lacked the minimum qualifications—in particular, computer and administrative skills—for the available program support opportunity. The agency further determined that there were no other vacant positions which would satisfy both the grievant's qualifications and the specific accommodations she needed, and EDR is unaware of any information would call the agency's determination into question. In the absence of any available reasonable accommodation, any failures by the agency in its application of law and/or policy cannot be found to have caused any material harm to the grievant. For this reason, this grievance is not qualified for hearing.

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

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[17] As a result of the complicated nature of EDR's investigation, the issuance of this ruling has been delayed.
[18] Va. Code § 2.2-1202.1(5).