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QUALIFICATION RULING

In the matter of the Department of State Police
Ruling Number 2020-5117
July 31, 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 his May 27, 2020 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 at the agency as a Senior Trooper. In late 2019, he underwent surgery for a work-related injury and, during his recovery, received weekly workers' compensation benefits for temporary total disability. On February 4, 2020, the grievant sought and received medical approval to return to work, resuming his duties the following day. However, during an equipment training in mid-March, the grievant allegedly experienced limitations related to the injury. As a result, the agency removed him from work assignments pending a fitness-for-duty evaluation. The grievant claims that an agency-selected physician evaluated him on March 31 and again on April 28, 2020, concluding that the grievant was not sufficiently recovered from the surgery to be fit for duty. Following the second evaluation, the physician recommended that the grievant be "offered medical disability." On May 13, 2020, the agency notified the grievant that his employment would end effective immediately, based on the finding that he was not fit for duty.

The grievant initiated a grievance on May 27, 2020, seeking a change to his separation status. He claims that, during the approximately two months between the equipment training and his separation, he was in contact with management multiple times weekly asking how to return to disability-leave status, but received no assistance.[1] He alleges that, due to the public health emergency in effect during this period, the authorized physician for his workers' compensation case was unable to evaluate him until May 13, 2020, at which time he recommended the grievant

[1] It appears that, during this period, the grievant's absences were charged against his annual leave balance, which the grievant believed was incorrect. The grievant asserts that, in response to his inquiries about going back on disability leave based on his work-related injury, his supervisor advised him to "not worry about it" because his annual leave would be credited back to him. The grievant further alleges that human resources staff repeatedly responded "I don't have anything for you" in response to his inquiries about how to resume disability leave. The record suggests that the agency later re-classified most of the grievant's absences as administrative leave.

be excused from work until July based on his continuing disability.[2] The grievant alleges that, approximately two hours after advising his supervisor of this medical excuse, the agency notified him of his separation from employment. Following an expedited grievance process, the agency declined to alter the grievant's separation status or to qualify the grievance for a hearing. The grievant has appealed 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.[3] Generally, the grievance procedure limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] 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] Because the grievant in this case was separated from his employment, EDR assumes for purposes of this ruling that he experienced an adverse employment action.

In addition, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[7] Thus, claims relating solely to the "[h]iring, promotion, transfer, assignment, and retention of employees" 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 or agency policy may have been misapplied or unfairly applied.[8] Here, the grievant appears to allege that the agency misapplied and/or unfairly applied state policies by effectively ignoring his requests for assistance in claiming disability benefits and, instead, separating him from employment based on lack of fitness. 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.

The agency's separation notice to the grievant explained that the decision was based on a physician finding that the grievant was not fit for duty. The agency's General Order ADM 14.10, *Fitness for Duty*, allows it to require a "mental or physical examination of an employee by a designated psychiatrist, psychologist, or physician when . . . it is in the best interest of the employee or the [agency]." More generally, DHRM Policy 1.60, *Standards of Conduct*, permits an employee to be removed from employment for his "[i]nability to meet working conditions."[9] However, federal and state laws and policies also establish various protections for employees who may be

[2] It appears that the grievant has received a new workers' compensation award based on these circumstances; however, he seeks to claim long-term disability benefits for which he believes he should have been eligible.
[3] *See Grievance Procedure Manual* § 4.1.
[4] *See id.* § 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] *See* Va. Code § 2.2-3004(B).
[8] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[9] DHRM Policy 1.60, *Standards of Conduct*, at 18.

unable to fully perform their job duties for medical or health reasons. These protections – such as the Americans with Disabilities Act, the Family and Medical Leave Act, Virginia's Workers' Compensation Act, and DHRM Policy 4.57, *Virginia Sickness and Disability Program* ("VSDP") – may limit how fitness-for-duty examinations are appropriately used. For example, state policy permits an agency to remove an employee due to his "inability to perform the essential functions of the job *after reasonable accommodation (if required) has been considered*."[10] In addition, DHRM Policy 4.57 provides for short-term disability benefits during employment and long-term disability benefits for eligible employees who are unable to return to work on a full-duty basis.[11]

In this case, the grievant alleges that he informed his supervisor and human resources department in mid-March that his disability, for which he had recently been receiving workers' compensation and short-term disability benefits, presented new restrictions. He asserts he made regular requests to resume disability benefits and asked what he needed to do to go back on disability leave. In the meantime, although he was unable to be evaluated by the authorized physician for his workers' compensation case, he claims he was referred to the agency's physician, who found him not fit for duty as of March 31, 2020, based on limitations that arose from the earlier work injury and surgery.

Under DHRM Policy 4.57, agency responsibilities with respect to the benefits therein include the following:

- Coordinate disability claim and benefits with the [third-party administrator], employee, and employee's supervisor.
- Coordinate VSDP Work-related disability claims with Workers' Compensation benefit coordinator and VSDP coordinator.
- Ensure employee receives appropriate communication regarding VSDP and FMLA.
- Communicate with employee during absence if employee is physically able.[12]

The policy further provides certain responsibilities for employees who wish to claim disability benefits, including:

- Understand the program features of VSDP and his or her role and responsibilities of participating in the program. . . .

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[10] *Id.* (Emphasis added.) In addition, state policy requires 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*. . ." DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added). Like DHRM Policy 2.05, the federal Americans with Disabilities Act prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability. 42 U.S.C. § 12112(a); *see* 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m). 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 for purposes of the Americans with Disabilities Act, provided the employer has some legitimate reason to question the officer's ability to adequately and safely carry out his responsibilities. *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).

[11] *See generally* DHRM Policy 4.57, *Virginia Sickness and Disability Program*.

[12] *Id.* at 31.

- Complete leave slips using leave until time off is authorized by VSDP. If work-related disability, monitor leave balances to assure credits are made for approved periods of disability under Workers' Compensation and/or VSDP….
- Understand the requirement for notifying your supervisor and the [third-party administrator] of absence and ensuring that medical information is provided to the [third-party administrator] in a timely manner.
- Understand the requirement for notifying your supervisor of any workers' compensation injury/illness.
- Contact the [third-party administrator] regarding illness/disability as soon as possible or within 14 days of disability in order to receive full retro payment if approved. . . .
- Ensure that supervisor is kept informed regarding disability claim and any changes that occur to return to work date; and restrictions. . . .
- Report any change in disability to the [third-party administrator].[13]

The grievant alleges that although he regularly requested assistance from both his supervisor and from human resources staff in coordinating his workers' compensation and short-term disability claims, he did not receive help or substantive communications regarding his requests.[14] He maintains that he contacted his supervisor approximately three times per week between March and May seeking to stop using his annual leave for his time out of work and instead claim disability leave. For its part, the agency maintains that the grievant failed to properly initiate disability claims with supporting medical documentation and also failed to communicate with the third-party administrator. In light of the grievant's allegation that the agency's own physician evaluated him on March 31, 2020 as unable to fulfill his job duties due to a disability, and that he continuously sought to claim disability benefits following this evaluation, a hearing officer would be best positioned to resolve the apparent factual dispute as to whether the agency was on adequate notice of a need to take additional action under Policy 4.57. Further, the record is silent as to whether the agency otherwise considered whether additional leave time to which the grievant was entitled would have been a reasonable accommodation to allow him to become fit for duty.[15] Ultimately, the available facts raise a sufficient question whether the agency failed to carry out mandatory responsibilities under Policy 4.57 and/or responded to the grievant's continuing work-related disability in a manner so unfair as to amount to a disregard of the intent of Policy 4.57.[16]

In sum, although EDR perceives nothing to indicate that the agency could not properly order a fitness-for-duty exam following the grievant's report of new limitations, the record presents a qualifiable issue as to whether the agency misapplied or unfairly applied policy to effectively deprive the grievant of disability benefits to which he was entitled. The grievance qualifies in full,

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[13] *Id.* at 32-33.

[14] The grievant also alleges that he discussed other possible accommodations with his supervisor, such as modified or light-duty assignments, but was told no such accommodations were available.

[15] *See, e.g.*, EEOC, "Employer-Provided Leave and the Americans with Disabilities Act," May 9, 2016, available at https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act.

[16] One of the express purposes of Policy 4.57 is to "[p]rovide[] eligible employees supplemental replacement income during periods of partial or total disability for both non-occupational and occupational disabilities." DHRM Policy 4.57, at 1. EDR notes additional allegations by the grievant that his separation followed a workers' compensation evaluation by a matter of hours and that, when he cited his many requests to claim disability, agency staff responded with ridicule. These concerning allegations are neither resolved nor determinative in this ruling; however, EDR encourages the agency to investigate as it deems appropriate, if it has not already done so.

including any alternative related theories raised by the grievant to challenge his removal. At the hearing, the grievant will have the burden to prove that his removal was improper.[17]

Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear the claims qualified for hearing, using the Grievance Form B. However, this ruling is not intended to prevent or discourage the parties from resolving the underlying issues outside the context of a hearing. Should the parties wish to pursue resolution of the issues herein prior to a hearing date, EDR is available to assist in such any efforts as desired and appropriate.

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

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[17] *Rules for Conducting Grievance Hearings* § VI(C).
[18] *See* Va. Code § 2.2-1202.1(5).