

Issues: Qualification – Discrimination (disability), and Separation from State (unable to meet work conditions); Ruling Date: November 18, 2016; Ruling No. 2017-4424; Agency: Department of State Police; Outcome: Qualified in Full.



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

QUALIFICATION RULING

In the matter of the Department of State Police
Ruling Number 2017-4424
November 18, 2016

The grievant has requested a ruling on whether his August 22, 2016 grievance with the Department of State Police (“agency”) qualifies for a hearing. For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

On or about February 19, 2016, the grievant was notified by the agency that he was being suspended and placed on pre-disciplinary leave pending the completion of a fitness for duty evaluation. As the result of an evaluation by a health care professional to whom the grievant was sent by the agency and the grievant’s failure to complete a psychological test in a timely basis, the agency separated the grievant from employment effective October 1, 2016. On or about August 22, 2016, the grievant initiated a grievance challenging the agency’s actions. After the parties failed to resolve the grievance during the resolution steps, the grievant requested qualification for hearing. The agency head denied the grievant’s request, and the grievant has appealed.

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 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 his separation, the grievant asserts that the agency’s actions are without basis in policy, disciplinary in nature, and based on false and inaccurate reasons.

The agency asserts that the grievant’s separation from employment was not disciplinary in nature, but instead was the result of the grievant’s inability to perform his job. A grievance

¹ Va. Code § 2.2-3004(B).

challenging separation for an inability to perform a job, though an adverse employment action,² can qualify for a hearing but does not automatically qualify.³ In many situations when separation occurs for such reasons, there are no factual or policy questions to be resolved by a hearing officer, and, thus, a hearing is unnecessary. This, however, is not such a case. To the contrary, this grievance raises a number of sufficient questions appropriate for a hearing officer to resolve.

The agency has characterized the grievant's separation as being a "direct result of a Fitness for Duty Review." However, a comparison of the agency's General Order 14.10, *Fitness for Duty*, with the facts presented by this case raises a question as to whether the actions taken by the agency were in accordance with policy. For example, Paragraphs 1 and 5 of General Order 14.10 indicate that the fitness for duty examination must be conducted by a "psychiatrist, psychologist, or physician."⁴ In this case, however, the examination was conducted by a nurse practitioner, arguably not a "psychiatrist, psychologist, or physician."⁵ The question of whether the professional selected by the agency was appropriate under General Order 14.10 is best resolved by a hearing officer, after both parties have had an opportunity to present relevant information.

It is also unclear whether, under General Order 14.10, the agency acted appropriately when it required the grievant to pay the cost of the Minnesota Multiphasic Personality Inventory ("MMPI"), a psychological test ordered by the agency. Arguably, this cost should have been considered part of the cost for the fitness for duty examination, which is chargeable to the agency under Paragraph 7 of General Order 14.10, rather than as part of the grievant's treatment. The grievance also raises a sufficient question as to whether assessing the cost of the MMPI to the grievant violated the protections of the Americans with Disabilities Act and related state policy.⁶ Lastly, there are also unresolved questions about the appropriateness of the manner in which the agency passed the responsibility to the grievant to find a professional capable of administering the MMPI and to arrange the test of the grievant. These questions are also best addressed through the hearings process.

Therefore, in light of these, as well as other, unresolved questions, the grievant's August 22, 2016 grievance is qualified for hearing on all matters related to the agency's actions regarding the grievant's fitness for duty evaluation through to his termination in full. As there is

² See Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

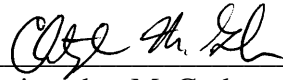
³ See *Grievance Procedure Manual* § 4.1(b).

⁴ General Order 14.10 appears to distinguish between a nurse practitioner and a "psychiatrist, psychologist, or physician," in that the Order provides that the determination that a fitness for duty examination is needed may be based on an examination by "the Nurse Practitioner," but contemplates that the fitness for duty examination itself be conducted by a "psychiatrist, psychologist, or physician." See General Order 14.10 ¶¶ 1, 2(c), 5.

⁵ According to information publicly available through the Department of Health Professions, the health care professional who conducted the fitness for duty examination is a nurse practitioner, registered nurse, and certified nurse specialist. Based on the same publicly available information, she does not appear to hold M.D. or D.O. degrees, nor does she appear to be licensed as a clinical psychologist, applied psychologist, school psychologist, licensed clinical social worker or licensed social worker. The health care professional's own signature indicates that she holds a Ph.D. and is a board certified psychiatric and mental health nurse practitioner. The grievant states that the health care professional conducting the fitness for duty examination holds a Ph.D. in Nursing.

⁶ See Enforcement Guidance: Disability Related Inquiries and Medical Examinations under the Americans with Disabilities Act, available at <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

insufficient evidence to show that this was a disciplinary action, the burden of proof at hearing will be on the grievant.⁷ Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.



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⁷ See *Grievance Procedure Manual* §5.8(3).