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## QUALIFICATION RULING

In the matter of the Department of State Police
Ruling Number 2020-4969
October 31, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM")[1] on whether her July 2, 2019 grievance with the Department of State Police (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

## FACTS

The grievant was employed by the agency as a Senior Trooper.[2] In January 2019, the grievant asked to be removed from road duty and reassigned to a non-sworn position due to personal and work-related stress that she believed was affecting her ability to perform her job. The agency temporarily reassigned the grievant to an office position. The grievant requested to return to road duty in March 2019 and, before approving her request, the agency ordered her to undergo a fitness for duty ("FFD") evaluation. The FFD evaluation took place on or about April 22. The evaluating doctor determined that the grievant was not able to perform her job duties as a Senior Trooper at that time. The agency received the evaluating doctor's report on or about May 28 and, in consultation with him, decided to reassign the grievant to a Compliance Officer position rather than remove her from employment. Due to the nature of the agency's funding for Compliance Officer positions, all employees working in those jobs must start at the same salary. As a result, the reassignment resulted in an approximately 50 percent reduction in pay for the grievant.

On July 2, 2019, the grievant initiated a grievance challenging the outcome of the FFD evaluation and alleging that she had been "[t]erminated from [her] Trooper position without cause." As relief, the grievant requested "[t]o be reinstated as a Senior Trooper with back pay."

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[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

[2] While the grievance was pending, the grievant accepted a job with a different state agency. She resigned from her position with the agency effective August 10, 2019. This fact has no impact on EDR's evaluation of the issues in this case.

Following the management resolution steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

## DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] Thus, by statute and under the grievance procedure, complaints relating solely to issues such as the hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to a hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[4] The grievant has not alleged discrimination, retaliation, or discipline. Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] Thus, typically, the 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7] In this case, the grievant experienced an adverse employment action because she was reassigned to a position with significantly different responsibilities[8] and experienced a loss in pay.

*Fitness for Duty Evaluation*

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that 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 intent of the applicable policy. In this case, the grievant essentially argues that the agency violated the Americans with Disabilities Act ("ADA") by reassigning her to a Compliance Officer position based on the outcome of the FFD evaluation. 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*. . ."[9] Under this policy, "'disability' is defined in accordance with the [ADA]", the relevant law governing disability accommodations.[10] Like DHRM Policy 2.05, *Equal Employment Opportunity*, the ADA prohibits

[3] *See* Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(C); *See Grievance Procedure Manual* §§ 4.1(b), (c).
[5] *See Grievance Procedure Manual* § 4.1(b).
[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[8] A reassignment or transfer with significantly different responsibilities, or one providing reduced opportunities for promotion, can constitute an adverse employment action, depending on all the facts and circumstances. *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 375-77 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253, 255-256 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 Fed. Appx. 726, 729 (4th Cir. 2004).
[9] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).
[10] *Id.*; *see* 42 U.S.C. §§ 12101 through 12213.

employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.[11] A qualified individual is defined as a person who, "with or without reasonable accommodation," can perform the essential functions of the job.[12] A disability may refer to "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . ."[13]

Under the ADA, an employer is prohibited from requiring a medical examination or making inquiries of an employee as to whether she is an "individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity."[14] Regulatory guidance clarifies that "[t]his provision permits employers to make inquiries or require medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job."[15] To demonstrate that an FFD evaluation is consistent with business necessity, courts have stated an "employer must prove: (i) 'that the asserted "business necessity" is vital to the business,' (ii) 'that the examination . . . genuinely serves the asserted business necessity,' and (iii) 'that the request is no broader or more intrusive than necessary.'"[16]

Many courts have held that, because law-enforcement officers have unique public safety responsibilities, FFD evaluations of such employees are generally consistent with business necessity, provided the employer has some legitimate reason to question the officer's ability to adequately and safely carry out his or her responsibilities.[17] Here, the agency's decision to order the FFD evaluation appears to have been job-related and consistent with business necessity. In 2016, the grievant was involved in a work-related incident when a suspect fired a gun at her vehicle, which led her to seek treatment that she has continued to receive since the incident. In her January 2019 request to be reassigned to a non-sworn position, the grievant identified personal and work-related stress as factors that were making it difficult for her to carry out her job duties as a Senior Trooper. According to accounts from agency managers about the grievant's behavior during this time, the grievant explained that she felt overwhelmed by her job, expressed dissatisfaction with working in a sworn position, and was receiving medical treatment for physical symptoms that were negatively impacting her ability to work. The agency temporarily reassigned the grievant to an office position until March 2019 and, before authorizing her to return to road duty, determined that an FFD evaluation was warranted to ensure her own safety and the safety of others. Under these circumstances, EDR cannot conclude that the agency's questions about the grievant's ability to perform the essential functions of her position were unreasonable. Accordingly, it appears the agency's decision that the grievant should complete an FFD evaluation was consistent with business necessity in this case.

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[11] 42 U.S.C. § 12112(a).
[12] *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).
[13] 42 U.S.C. § 12102(1).
[14] *Id.* § 12112(d)(4).
[15] 29 C.F.R. Part 1630, App. § 1630.14(c).
[16] Blake v. Baltimore County, 662 F. Supp. 2d 417, 422 (D. Md. 2009) (quoting Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 97-98 (2d Cir. 2003)).
[17] *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).

With regard to the outcome of the FFD evaluation, the parties disagree as to whether the grievant was, in fact, able to perform the essential functions of her position. The grievant argues that the evaluating doctor's report was inaccurate and generally disputes his conclusion that she was not fit for duty. More specifically, she claims that the doctor's report incorrectly states she worked at several agency functions when she did not actually do so, and that, as part of the FFD evaluation, the doctor mistakenly contacted a manager who did not have knowledge of her current ability to perform her job for additional information. EDR has thoroughly reviewed the information provided by the parties and cannot conclude that the agency erred by relying on the evaluating doctor's conclusion that the grievant was not fit for duty. Indeed, it is not clear that an agency could or should disregard an evaluating doctor's opinion that an employee is not fit for duty in the absence of evidence to show that the doctor's conclusion was flawed or based on inaccurate information. This is especially true in the law-enforcement context, where, as discussed above, an agency must consider specialized public safety considerations.

While the grievant may be raising legitimate concerns about some aspects of the evaluating doctor's report, the specific errors alleged by the grievant, if true, do not appear to have had a material impact on the doctor's opinion such that EDR can determine his conclusion about her fitness for duty was invalid. The doctor determined that the grievant was experiencing symptoms that rendered her unable to perform the essential functions of her position as a Senior Trooper. Much of the doctor's report consists of transcriptions of the grievant's answers to his questions. It appears that the grievant's description of her condition was broadly similar to agency managers' summary of their concerns when initially referring her for the FFD evaluation: she was experiencing symptoms that had impacted her ability to perform her job, she was dissatisfied with working in a sworn position, and she wished to work for the agency in a non-sworn capacity. Under DHRM Policy 1.60, *Standards of Conduct*, an agency may remove an employee who is "unable to meet the working conditions of his or her employment" for certain specified reasons, including the employee's "inability to perform the essential functions of the job after reasonable accommodation (if required) has been considered . . . ."[18] In this case, the agency decided to reassign the grievant to a Compliance Officer position in lieu of removal, with approval from the evaluating doctor that such action would be appropriate.

The grievant understandably disagrees with the agency's decision in this case, and EDR is sympathetic to her concerns. Having conducted a review of the information in the grievance record, however, EDR finds that the grievant has not raised a sufficient question as to whether the agency misapplied and/or unfairly applied policy, acted in a manner that was inconsistent with other decisions regarding FFD evaluations, or was otherwise arbitrary or capricious. Under the circumstances presented in this case, it appears that the agency's decision to refer the grievant for an FFD evaluation, and subsequently reassign her based on the evaluating doctor's opinion that she was not able to perform the essential functions of her position, was within with the scope of its discretion under policy. Accordingly, the grievance does not qualify for a hearing.

*Compensation*

In addition, the grievant arguably challenges the agency's decision to reduce her compensation in connection with her reassignment to the Compliance Officer position. In lieu of removing the grievant from employment based on the outcome of the FFD evaluation, the agency

[18] DHRM Policy 1.60, *Standards of Conduct* § H(1).

elected to reassign her to a different Role in a lower Pay Band. The evaluating doctor agreed that the grievant would potentially be able to perform the essential functions of a non-sworn position. Under these circumstances, the grievant's reassignment is best categorized as a non-competitive Voluntary Demotion.[19]

Under DHRM Policy 3.05, *Compensation*, a Voluntary Demotion is a competitive or non-competitive "movement to a different position in a lower Pay Band."[20] Policy 3.05 further provides that a demoted employee's salary is "negotiable from the minimum of the lower pay band up to the employee's current salary, not to exceed the maximum of the assigned Salary Range."[21] If, however, "the employee's current salary exceeds the maximum of the lower assigned Salary Range, the agency has the option of freezing the salary for up to six months," and "[a]fter six months the salary must be reduced to the maximum of the assigned Salary Range."[22] In addition, Policy 3.05 reflects the intent to invest agency management with broad discretion for making individual pay decisions and corresponding accountability in light of each of 13 enumerated pay factors.[23] Because agencies are afforded great flexibility in making pay decisions, EDR has repeatedly held that qualification is warranted only where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[24]

Having reviewed the information provided by the parties, EDR finds that there is insufficient evidence to demonstrate that the agency's action violated a specific mandatory policy provision or was outside the scope of the discretion granted by the applicable compensation policies. The grievant moved from a Senior Trooper position in Pay Band 5 to a Compliance Officer position in Pay Band 3. Her salary prior to the demotion was within the ranges of both Pay Bands, and thus it appears the agency could have maintained her salary pursuant to Policy 3.05. However, the agency has further explained to EDR that its funding for Compliance Officer positions requires that all employees begin at the same pay.[25] The agency therefore reduced the grievant's salary to the amount offered to all employees who begin working in Compliance Officer positions. While the grievant may be raising legitimate concerns about her compensation, the agency has presented evidence to show that it did not have the discretion to maintain her former salary based on the nature of its funding for the Compliance Officer position to which she was reassigned. Based on the totality of the circumstances, EDR cannot find that the agency's decision

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[19] While the grievant may not have perceived the reassignment as a voluntary choice because she did not request it, the outcome of the FFD evaluation justified her removal, as discussed above. EDR has reviewed nothing to suggest that she was unable to refuse the reassignment, in which case she presumably would have been removed from employment pursuant to Policy 1.60.

[20] DHRM Policy 3.05, *Compensation*, at 2 (rev. Jan 1., 2019). Policy 3.05 has been amended since the events at issue in this case. This ruling will refer to the version of Policy 3.05 that was in effect at the time of the grievant's reassignment.

[21] DHRM Policy 3.05, *Compensation*, at 9.

[22] *Id.*

[23] *Id.* at 4, 9. The 13 pay factors include agency business need; duties and responsibilities; performance; work experience and education; KSAs and competencies; training, certification, and licensure; internal salary alignment; market availability, salary reference data; total compensation, budget implications; long-term impact; and current salary. *Id.* at 4.

[24] *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); *see also, e.g.*, EDR Ruling No. 2008-1879.

[25] Indeed, the agency's Salary Administration Plan states that employees in Compliance Officer positions "will not be eligible to negotiate starting pay."

to reduce the grievant's salary was improper or otherwise arbitrary or capricious in this case. Accordingly, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.[26]

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[26] *See* Va. Code § 2.2-1202.1(5).