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QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2020-5026
January 3, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR")[1] at the Virginia Department of Human Resource Management ("DHRM") on whether his September 19, 2019 grievance with the Department of Behavioral Health and Developmental Services (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant was employed at one of the agency's facilities in a position that involved supervision of staff, training, and abuse and neglect investigations. The agency conducts monthly checks of a federal agency's exclusion list, which identifies individuals who have been convicted of certain crimes that prohibit them from participating in health care programs that receive federal funding. On or about August 21, 2019, the agency became aware that the grievant's name had appeared on the exclusion list because of a conviction for a program-related crime.[2] Due to his appearance on the exclusion list, the agency determined that the grievant was unable to meet the working conditions of his position and removed him from employment, effective August 21.

The grievant filed a dismissal grievance directly with EDR on September 19, 2019, alleging that he did "not have any criminal offenses that would prevent [him] from being employed at" the facility based on either the federal agency's exclusion list or state/agency policy. As relief, the grievant requested reinstatement to his former position, a salary increase, and restoration of his pay and benefits. Under the grievance procedure, only "terminations due to formal discipline or unsatisfactory job performance" may be challenged by filing a dismissal grievance directly with EDR and proceeding directly to a hearing.[3] Because the grievant was

[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] Upon being questioned by the agency, the grievant apparently acknowledged that he had received a letter from the federal agency about the exclusion list on or about August 5, 2019.
[3] *Grievance Procedure Manual* § 2.5.

disputing a management action that does not automatically qualify for a hearing,[4] EDR issued a compliance ruling returning the grievance to the agency to be addressed through the expedited grievance process.[5] Following the management resolution steps, the agency head determined that the grievance record did not contain evidence demonstrating that a misapplication or unfair application of agency policy had occurred or that the grievant's separation was discriminatory, retaliatory, or disciplinary in nature. As a result, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that 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.[6] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[7] Thus, claims relating to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as layoff, position classifications, 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.[8] 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."[9] 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."[10] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[11] In this case, the grievant has experienced an adverse employment action because he has been removed from his position with the agency.

Under Section H of DHRM Policy 1.60, *Standards of Conduct*, an employee who is "unable to meet the working conditions of his or her employment" under certain circumstances

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[4] *See id.* § 4.1.
[5] EDR Ruling No. 2020-4994.
[6] *See Grievance Procedure Manual* §§ 4.1(a), (b). Although the grievant's employment was terminated, the termination does not fall into one of those categories of grievances that automatically qualifies for hearing as it was not based on formal discipline or unsatisfactory job performance. *See id.*
[7] *See* Va. Code § 2.2-3004(B).
[8] *Id.* §§ 2.2-3004(A), 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[9] *See Grievance Procedure Manual* § 4.1(b).
[10] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[11] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

"may be removed" from employment.[12] Examples of events that would justify removal include, but are not limited to, the following:

- loss of driver's license that is required for performance of the job;
- incarceration for an extended period;
- failure to obtain license or certification required for the job;
- loss of license or certification required for the job;
- inability to perform the essential functions of the job after reasonable accommodation (if required) has been considered;
- failure to successfully pass an agency's background investigation;
- conviction of a misdemeanor crime of domestic violence for employees whose jobs require: (a) carrying a firearm; or (b) authorization to carry a firearm; or
- failure to timely present appropriate documentation of identity and eligibility to work in the U.S. as required by federal law.[13]

Before removing an employee pursuant to Section H, the agency "shall gather full documentation supporting such action and notify the employee, verbally or in writing, of the reasons for such a removal, giving the employee a reasonable opportunity to respond to the charges."[14] An employee removed under these circumstances should be notified of the agency's decision "via memorandum or letter, not by a Written Notice form."[15]

In his grievance, the grievant essentially contends that the agency misapplied and/or unfairly applied DHRM Policy 1.60 by removing him from employment. In support of his position, the grievant alleges that he was paid from state funds rather than federal funds, and that the agency is not prohibited from employing individuals who appear on the exclusion list. 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.

Under the Social Security Act, "[a]ny individual . . . that has been convicted of a criminal offense related to the delivery of an item or service under [the Act] or under any State health care program" is mandatorily excluded from "participation in any Federal health care program . . . ."[16] A "Federal health care program" is defined as "any plan or program that provides health benefits . . . which is funded directly . . . by the United States Government," as well as "any State health care program" as further defined therein.[17] An employer that "arranges or contracts (by employment or otherwise) with an individual or entity that the [employer] knows or should know is excluded from participation in a Federal health care program . . . for the provision of items or

[12] DHRM Policy 1.60, *Standards of Conduct*, at 18.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] 42 U.S.C. § 1320a-7(a).
[17] *Id.* § 1320a-7b(f).

services for which payment may be made under such a program" is subject to civil money penalties.[18]

In this case, there appears to be no dispute that the agency administers a Federal health care program and that the grievant was convicted of a program-related crime that triggered his appearance on the exclusion list. Significantly, the definition of "Federal health care program" under the Social Security Act also includes certain state health care programs, and thus a lack of federal funding for the grievant's salary would not necessarily insulate the agency and/or the grievant from violating the terms of the exclusion list if his employment with the agency were to continue. Indeed, the statutes make it clear that the "provision of items or services" that may be paid for under a Federal health care program is what matters for purposes of an individual's appearance on the exclusion list, and not the source of funding for their salary. In other words, both the agency and the grievant would have potentially violated the terms of the exclusion list if he provided items or services that were payable by a Federal health care program. Most importantly, the grievant's conviction for a program-related crime mandatorily barred him from participating in a Federal health care program, and therefore the agency did not have the discretion to determine whether he could remain employed without exposing itself to civil liability.

The grievance procedure accords much deference to management's exercise of judgment. Thus, a grievance that challenges an agency action like this one does not qualify for a hearing unless there is sufficient indication that the resulting determination was plainly inconsistent with other similar decisions by the agency, or that the decision was otherwise arbitrary or capricious.[19] Although appearance on the exclusion list is not specifically listed as a basis for removal under DHRM Policy 1.60, EDR finds that the agency's decision to remove the grievant from employment under these circumstances was consistent with the discretion granted under policy. While the grievant disagrees with the agency's decision, EDR has not reviewed evidence to demonstrate that the agency misapplied and/or unfairly applied any mandatory provision in Policy 1.60, that its decision remove the grievant was so unfair that it amounted to a disregard of the intent of Policy 1.60, or that the agency's actions were otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing.[20]

EDR's qualification rulings are final and nonappealable.[21]

[18] *Id.* § 1320a-7a(a).
[19] *See Grievance Procedure Manual* § 9 (defining an arbitrary or capricious decision as one made "[i]n disregard of the facts or without a reasoned basis").
[20] The agency's August 21, 2019 letter removing the grievant from employment notes that he planned to contact the federal agency that maintains the exclusion list and appeal its determination. To the extent the grievant has not already done so, an appeal to the appropriate federal agency that results in his removal from the exclusion list would make him eligible for rehire at the facility, as the agency explained in its letter of removal. Neither DHRM nor the state grievance procedure would appear to have authority to undo the federal agency's decision to place the grievant on the exclusion list.
[21] *See* Va. Code § 2.2-1202.1(5).

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