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QUALIFICATION RULING

In the matter of the Department of State Police
Ruling Number 2020-5095
June 8, 2020

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 his March 24, 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

On or about March 24, 2020, the grievant filed an expedited grievance challenging his separation from employment. During 2019, the grievant's supervisor expressed increasing concerns about his performance and whether substance abuse was a potential cause. On January 1, 2020, the grievant reported to work for a discussion with his supervisor. After he arrived, the agency determined that he had alcohol in his system and put him on leave, during which he completed an alcohol rehabilitation program. On February 6, 2020, the agency arranged for a fitness-for-duty examination prior to the grievant returning to work.[2] The examiner issued a report on February 24, 2020, expressing an opinion that the grievant was not fit to return to his duties. The reasoning focused on the grievant's reported failure to acknowledge and take responsibility for increasing performance problems during the second half of 2019, in order to "correct course" upon a return to duty. Based on this examination, the agency separated the grievant from employment as of March 16, 2020. Following the initiation of the grievance, the single management step respondent further communicated that the grievant showed a serious judgment lapse by reporting to work with alcohol in his system and, during their meeting, did not appear to take responsibility for it. The agency declined to reinstate the grievant or to qualify the grievance for a hearing. The grievant has appealed the latter determination to EDR.

[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] The agency required a fitness-for-duty examination pursuant to its General Order ADM 14.10, *Fitness for Duty*.

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 employment, EDR assumes for purposes of this ruling that he experienced an adverse employment action.

Actions that automatically qualify for a hearing include the issuance of formal discipline, such as a Written Notice, and dismissals for unsatisfactory performance.[7] Other claims, including those involving separation, do not qualify for a hearing unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, a misapplication or unfair application of policy, or a sufficient factual basis to question the underlying circumstances of the termination.[8]

The agency's separation notice to the grievant explained that fitness for duty "is a condition of employment" with the agency and that the agency's psychiatrist had concluded that the grievant was not fit for duty. Indeed, 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]."[9] 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."[10] For example, an agency may remove an employee due to their "inability to perform the essential functions of the job after reasonable accommodation (if required) has been considered."[11] In such a case, "[f]inal notification of removal should be via memorandum or letter," and not by a Written Notice of formal discipline.[12]

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[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] *Id.* § 4.1(a); *see* Va. Code § 2.2-3004(A).
[8] *Id.* §§ 2.2-3004(A), 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[9] 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).
[10] DHRM Policy 1.60, *Standards of Conduct*, at 18.
[11] *Id.* 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).
[12] DHRM Policy 1.60, *Standards of Conduct*, at 18.

However, the grievant has indicated that he is able to perform the essential functions of his job and that the fitness-for-duty evaluation and his resulting removal were based on dissatisfaction with his job performance. This reasoning finds at least some support in the grievance record. In a statement made in support of a fitness-for-duty examination for the grievant, the grievant's supervisor detailed a pattern of deteriorating work performance throughout the year 2019. The supervisor's narrative noted that, after some "angry" and "adversarial" interactions with the grievant, he informed the grievant in August 2019 that the performance issues must be resolved, including "general awareness of [a]rea operations, repairing damaged relationships, supervisor schedule . . ., balancing professional obligations with personal needs, supervisor responsibilities . . ., personal vehicle maintenance and appearance, and routinely checking email while on and off duty." The supervisor noted marginal improvements until December 2019, when the grievant's irregular work attendance became a concern. Upon further investigation, the supervisor observed various indicators that the grievant was failing to keep up with his work responsibilities. These issues apparently led to the scheduling of the meeting on January 1, 2020, where the grievant was ultimately found to have reported to work with alcohol in his system.

These performance issues were determinative to the finding of the agency's psychiatrist that the grievant was not fit to return to duty. While acknowledging the grievant's completion of a 28-day rehabilitation program, the psychiatrist's report and conclusions appear to be significantly based on the grievant's work performance. Moreover, during the management steps, the agency's second step respondent expressed his concern about the grievant "reporting to work with alcohol in [his] system near noon on January 1, 2020," which he described as "demonstrative of serious judgment lapse issues" on the grievant's part. The response also noted that, on that date, the grievant had been scheduled to attend a meeting "to address our concerns about your poor performance to date . . . ."

Based upon a thorough review of the grievance record, the evidence presented raises a sufficient question whether the agency effectively dismissed the grievant from employment for unsatisfactory job performance – an action that automatically qualifies for a hearing.[13] Although the agency could assess the grievant's fitness for duty under its policy, the totality of the facts and circumstances surrounding the removal implicates the grievant's work performance to such an extent as to create a sufficient question whether the removal occurred in order "to correct or penalize behavior by enforcing applicable standards of conduct or performance."[14] In addition, the grievant has articulated various challenges to the validity of the fitness-for-duty evaluation and its results.[15] To the extent that the agency concluded the grievant was unable to perform the essential functions of his job, the record is silent as to whether management considered whether reasonable accommodations, such as additional leave time, could have allowed the grievant to become fit for duty.[16] While nothing in this ruling should be read to suggest that the agency's fitness-for-duty approach was necessarily improper, the grievant will have the opportunity at a hearing to prove that his removal was inconsistent with law and/or policy.

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[13] *Grievance Procedure Manual* § 4.1(a); Va. Code § 2.2-3004(A).
[14] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[15] The grievant appears to contend that, as an initial matter, the amount of alcohol found in his system on January 1, 2020 was too low to indicate intoxication or alcohol abuse. As to the fitness-for-duty assessment, the grievant disputes many of the performance-based considerations in the report, questions the citation to "rumors" that he abused alcohol in a non-work context, and notes various other factual discrepancies in the report.
[16] *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.

Accordingly, the facts presented by the grievant constitute claims that qualify for a hearing under the grievance procedure.[17] The grievance qualifies in full, including any alternative and 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.

Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those 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] *See Grievance Procedure Manual* § 4.1.
[18] *See* Va. Code § 2.2-1202.1(5).