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QUALIFICATION RULING

In the matter of the Department of Juvenile Justice
Ruling Number 2021-5181
February 2, 2021

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 September 30, 2020 grievance with the Department of Juvenile Justice (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is qualified for a hearing.

FACTS

On or about September 30, 2020, the grievant initiated a grievance challenging the agency's denial of his request for accommodations under the Americans with Disabilities Act ("ADA"). According to the grievant, he has medical conditions and other circumstances that increase his risk of severe complications from the COVID-19 virus, an ongoing pandemic.[1] The grievant provided the agency with medical documentation of these conditions and his "need[] to avoid [COVID-19] exposure." During the initial months of the pandemic, the grievant worked fully remotely and requested to continue doing so after the agency began efforts to resume in-person services in June 2020.[2] Although the agency approved a partial telework schedule for the grievant based on his request, he is currently required to work onsite one day per week.[3] The agency maintains that the grievant is able to perform the essential functions of his job without the requested accommodation of fully-remote work, and that fully remote work would impose an undue hardship on agency staff and operations. The agency head declined to qualify the grievance for a hearing, and the grievant now appeals that determination to EDR.

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[1] The World Health Organization confirmed that COVID-19 was a pandemic on March 11, 2020. On March 12, 2020, the Governor of Virginia declared a state of emergency to respond "to the potential spread of COVID-19, a communicable disease of public health threat." Exec. Order No. 51 (2020), *Declaration of a State of Emergency Due to Novel Coronavirus (COVID-19)*. As of the date of this ruling, the state of emergency remains in effect.

[2] *See generally* DHRM Policy 4.52, Public Health Emergency Leave (providing that, during a declaration of Communicable Disease of Public Health Threat, "[t]elework agreements should be executed for employees who can work at alternate locations to further promote social distancing."). As of June 15, 2020, the agency made efforts to resume in-person services to some extent, based in part on court schedules and general public guidance from the Governor of Virginia. Nevertheless, the agency facilitated a partial telework schedule for the grievant following that date.

[3] The grievant's normal workweek is four 10-hour days; thus, he currently works three days remotely and one day onsite.

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.[4] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[5] Thus, claims relating to issues such as the means, methods, 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 improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[6] 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.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[7] Typically, then, a 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."[8] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9]

In this case, the grievant contends that the agency has violated mandatory provisions of the ADA and related state policy by failing to reasonably accommodate medical conditions that make in-person work unduly hazardous for him during the COVID-19 pandemic.[10] As a general rule, the ADA requires an employer to make reasonable accommodations to the known physical or mental limitations of a qualified employee with a disability, unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business [or government]."[11] "Reasonable accommodations" include "[m]odifications or adjustments that

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[4] *See Grievance Procedure Manual* § 4.1.
[5] Va. Code § 2.2-3004(B).
[6] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[7] *See id.* § 4.1(b)
[8] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[9] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted). For purposes of the grievance procedure's qualification standard, EDR has previously considered an agency's failure to reasonably accommodate an individual with a disability, in violation of the ADA, to satisfy the adverse-employment-action standard if sufficiently alleged. *See, e.g.*, EDR Ruling Nos. 2017-4559, 2017-4560.
[10] *See generally* 42 U.S.C. §§ 12101 through 12213; DHRM Policy 2.05, *Equal Employment Opportunity* ("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*. . ."). 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 . . . ." 42 U.S.C. § 12102(1).
[11] 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.").

enable [an employee] with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[12] In order to determine the appropriate reasonable accommodation, it may be necessary for the employer "to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[13] Under the ADA, an employer is not required to approve the exact accommodation requested by an employee if some other accommodation is available that will allow him to perform the essential functions of his position.[14]

The grievant alleges that he has one or more medical conditions that put him "at high risk, serious harm and possibly death if [he] contract[s] COVID-19." He further contends that the agency's COVID-19 protocols do not adequately protect him from infection, given his increased risk, because coworkers and visitors can and have been exposed to the virus and may report to work before they are aware of such exposure and/or infection. In addition, he alleges that coworkers and visitors sometimes fail to wear a mask in the agency's facilities, to wear masks properly, and/or to practice appropriate social distancing. In one instance, he alleges, another employee tested positive for the virus four days after meeting with the grievant in person at work. As a result, the grievant claims: "On the one day [per week] that I have had to work in-person, I lock myself in my office for the entire day, only coming out to stretch my legs or to use the rest room." While this grievance was pending, the grievant alleges, two people close to him have died from COVID-19, and he is now receiving regular therapy "to help [him] deal with the anxiety [he is] now experiencing as a result of working in an environment that is a potential danger to [his] health."

Although it appears that the agency has granted significant accommodations to the grievant thus far, upon a thorough review of the record EDR concludes that the grievant's allegations create a sufficient question whether the ADA entitles the grievant to additional reasonable accommodation that the agency has denied. The record presents no dispute that the grievant is a qualified individual with a disability who has requested a reasonable accommodation to allow him to perform the essential functions of his job.[15] Instead, the parties dispute whether the agency must grant the specific accommodation requested by the grievant, *i.e.* full-time telework, and whether further accommodations beyond what the agency has already provided would be unreasonable or create an undue hardship.

The agency contends that the grievant's current schedule of partial telework is a reasonable accommodation that allows him to perform the essential functions of his position and that, in any event, full-time telework would impose an undue hardship on the agency's operations. The agency has maintained that the grievant is the "only Intake Officer" in the office where he works and, as such, when the grievant is teleworking, "other employees working in the office need to assist [him] in the intake process, such as printing [documents], swearing in citizens, escorting citizens to a

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[12] 29 C.F.R. § 1630.2(o)(1)(iii); *see* 42 U.S.C. § 12111(9)(B).
[13] 29 C.F.R. § 1630.2(o)(3).
[14] *See id.* pt. 1630 app. § 1630.9 (stating that an employer should conduct an individualized assessment of the employee's limitations and the job, then "select and implement the accommodation that is most appropriate for both the employee and the employer"); *see also* EEOC Fact Sheet, *Work at Home/Telework as a Reasonable Accommodation*, https://www.eeoc.gov/facts/telework.html.
[15] *See* 42 U.S.C. §§ 12111(8), 12112(a); 29 C.F.R. § 1630.2(m).

conference room to set up a FaceTime call for the intake interview, and providing copies of the intake documents to citizens." The agency alleges that these other employees "[h]aving to perform these tasks for [the grievant] takes away from their productivity." According to the grievant's former supervisor,[16] the grievant's in-office presence was required in order "to meet the demands of our fast-paced court process which can involve several families needing attention in rapid succession." Nevertheless, the agency made extensive arrangements for the grievant to continue a remote intake process during two other days of his four-day workweek, wherein families are given a mobile device they can use to communicate with the grievant. However, the former supervisor noted that when the grievant works remotely on these days, "other staff have to take time out of their work schedule to" retrieve documents and conduct intake screening. More generally, the agency asserts that certain of the grievant's duties have already been delegated to other employees to accommodate the grievant's partial telework and that his schedule already prevents him from providing as-needed coverage for other employees onsite. The agency also notes that the grievant's job requires hard-copy file management and back-up staffing for the office's front desk, which are in-person requirements.

The grievant disputes that the agency requires his regular presence onsite on any workdays, given the systems and equipment now in place that allow him to perform intake duties remotely. The grievant claims that, during his onsite workday, all of his interactions are remote and he typically does not see anyone, whether coworkers or clients, all day. He alleges that, regardless of his location, the support staff person in his office "perform[s their] duties as usual" – namely "collecting demographic information from citizens . . . for purposes of civil intake," then "provid[ing the citizens] with a general information form and input[ting] the information into the [agency's] data gathering system," then "email[ing] the numbers that are generated to [the grievant], at which point [he] generate[s] petitions." Following this transaction, the grievant claims, he "contacts the [office support staff person] and advise[s them] to allow the citizen(s) to enter the conference room where they meet with [the grievant] via . . . iPad . . . ." Following this initial intake, the grievant "generate[s] and print[s] the petitions to the printer in the conference room" and "direct[s] the petitioner to remove it from the printer." He continues to interact with them remotely to "answer any questions they may have, swear the petitioner in, direct the petitioner to sign the documents, and direct the petitioner to the clerk of the court's office to file the petition." Ultimately, he contends, he takes the same remote approach onsite that he does while teleworking, but from inside his locked office. According to the grievant, his civil intake work – the vast majority of his job – does not generate paper file-management responsibilities. While he concedes that other duties may require occasional hard-copy filing and that he may be expected to cover office duties on a contingent basis, he disputes whether these incidental tasks require him to be onsite for a full 10-hour workday. As a result, he objects to the agency's continuing, even if limited, requirement for him to work onsite regularly, increasing his exposure to COVID-19 that may be spread unwittingly by employees and other individuals at the facility.

At the qualification stage, EDR must conclude that these competing accounts of the grievant's precise duties and the impact of remote work on his colleagues create a sufficient factual question whether the agency's current requirement for the grievant to work onsite for one full workday is consistent with the requirements of the ADA and related state policy. The grievant has

[16] The grievant's former supervisor apparently left that role during the course of the grievance process, but the record includes a substantial explanation of her efforts to accommodate partial telework for the grievant while declining to approve full telework.

sufficiently alleged that he has one or more medical conditions that increase the risk to his health of working onsite during the pandemic, such that working onsite for a full 10 hours does not adequately accommodate his high risk of severe COVID-19 complications should he be infected. Although the record suggests substantial effort by the agency to mitigate the risks of virus transmission and to accommodate telework, the grievant alleges that the practical realities of onsite work nevertheless increase his exposure to infection by a highly transmissible, evolving, and potentially deadly pandemic virus. Further, the record presents a sufficient question whether the grievant is able to perform his essential functions remotely as a reasonable accommodation that does not unduly burden the other staff in his office.[17] Especially in light of the steps taken to facilitate remote intake by the grievant during the pandemic, the intake duties listed in the grievant's Employee Work Profile are inconclusive as to whether onsite work is essential for ADA purposes under the circumstances. Acknowledging that the agency disagrees with the grievant's view of his impact on other employees, EDR cannot resolve this factual dispute at the qualification stage, based on the grievance record at this time. Instead, a hearing officer will be able to determine whether the grievant's essential job functions require him to be present onsite for a full workday weekly, whether his current partial-telework schedule reasonably accommodates his circumstances, and whether further expanding the grievant's telework schedule would create an undue hardship on the agency's operations based on ADA principles.

CONCLUSION

The facts presented by the grievant constitute a claim that qualifies for a hearing under the grievance procedure.[18] Because the grievant has raised a sufficient question as to whether the agency misapplied or unfairly applied policy regarding the grievant's entitlement to a reasonable accommodation under the requirements of the ADA and related state policy, the grievance qualifies for a hearing on these grounds.

Before this case proceeds to a hearing, EDR would encourage both the grievant and agency to seek resolution of the grievance through further discussion. The agency has demonstrated a willingness to work with the grievant on his accommodations in this case, which is commendable. Likewise, the grievant appears to be open to discussion on this topic. EDR would further note that some of the factual disputes identified in this ruling could support the possibility of a feasible middle ground wherein the grievant is provided more ability to telework without it being a full-time telework schedule as originally requested while still meeting the agency's needs in the office.

At the hearing, the grievant will have the burden of proof as to the agency's misapplication or unfair application of policy.[19] If the hearing officer finds that the grievant has met this burden, they may order corrective action as authorized by the grievance statutes and grievance procedure,

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[17] Essential functions are the "fundamental job duties" of the employee's position, and may be essential, for example, because "the reason the position exists is to perform that function," because a limited number of employees can perform that function, or because it is "highly specialized." 29 C.F.R. §§ 1630.2(n)(1), (2); *see* 42 U.S.C. § 12111(8). "The inquiry into whether a particular function is essential . . . focuses on whether the employer actually requires employees in the position to perform the functions" that are considered essential. 29 C.F.R. app. § 1630.2(n). In determining what functions are essential, factors such as the employer's judgment as to what functions are essential, written job descriptions, the amount of time spent performing particular functions, and past or present work experience of others in the same or similar jobs are relevant. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n)(3).

[18] *See Grievance Procedure Manual* § 4.1.

[19] *Rules for Conducting Grievance Hearings* § VI(C).

including restoration of benefits such as leave.[20] 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.

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

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[20] Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* § VI(C).
[21] *See* Va. Code § 2.2-1202.1(5).