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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2021-5237
August 3, 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 her February 5, 2021 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

During the course of 2020, all Correctional Education teachers, like the grievant, were authorized to work remotely, which the grievant did. On December 10, 2020, the grievant, along with other staff in her unit, were informed that all employees who had telework agreements and wanted to continue to telework needed to submit a request for extension form for approval. The grievant sought to continue teleworking, but her request was apparently denied.[1] On December 23, 2020, the Superintendent informed all Correctional Education staff that all medical telework agreements needed to be resubmitted for approval. The Superintendent's letter required that "requests will need to be specific in terms of medical limitations being transitory and having limited impact on major life activities in ordinary circumstances which may weaken the immune system due to current treatment, which may result in you developing serious complications if infected with COVID-19." A deadline of January 8, 2021 was given, and medical documentation was required to be submitted with the request.

On December 28, 2020, the grievant communicated with management her concern that she would not be able to meet the January 8 deadline as her current physician was no longer able to keep her as a patient. The grievant was also on leave at the time and not scheduled to work again until January 4, 2021. The grievant sought an extension of the deadline on January 8 to submit the medical documentation from a physician to continue teleworking.[2] At the same time, the grievant

[1] EDR has not been provided a record that reflects the denial or basis therefor.

[2] On January 6, 2021, the grievant was also advised of a denial of an earlier (November 2020) request based on a short doctor's note that appears to have been submitted as a basis for telework. The November 2020 request did not meet the then-current standard the agency was applying for its assessment of medical telework requests because the standard had not been communicated at the time the grievant had submitted the doctor's note (November 2020). The circumstances of this request will not be addressed further in this ruling as it is moot for the reasons described below.

developed an illness that precluded her from being eligible to come to the workplace. The grievant submitted medical documentation from a provider on January 20, 2021, seeking to extend her ability to telework. The grievant was notified on February 1, 2021, by email, that her request to telework was denied. The basis for this determination appears to be that the medical documentation submitted did not support that the grievant is "under a current treatment that is resulting in the suppression of your immune system which makes you at greater risk to infection and must not be in public places due to the pandemic while you are under this treatment." Although the agency determined that any disability demonstrated in the documentation did not justify telework, the agency indicated that the grievant was to be provided a "work area that is away from others and can be routinely disinfected." Thereafter, the grievant states she reported to the workplace on February 2, 2021.

Although the grievant returned to the workplace, she continued to seek approval to telework due to a disability. As a result, she filed her grievance on or about February 5, 2021. The grievant's basis for her request is that her medical condition and other circumstances that increase her risk of severe complications from COVID-19, an ongoing pandemic.[3] In responding to the grievance, the agency states that the grievant's "request to telework is no longer operationally effective," and that her "job duties cannot be fulfilled at home." The grievance record does not detail what job duties the grievant was unable to perform at home. However, a letter to the grievant from the Assistant Superintendent states, "[w]hile educational practices are limited at this time, our efforts and energy should still be spent assisting our colleagues at the facility by helping to maintain safety and security. We need to be present at our job ready to work if necessary, and promote teamwork and oneness." The grievance proceeded through the management steps without altering the agency's original determination denying the grievant's request to telework. The agency head declined to qualify the grievance for a hearing, and 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.[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,

[3] 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 the events at issue in this ruling, the state of emergency was in effect.
[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).

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]

Finally, qualification may not be appropriate even if a grievance challenges a management action that might ordinarily qualify for a hearing. For example, an issue may have become moot during the management resolution steps, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.[10]

Telework

In this case, the grievant contends that the agency has violated mandatory provisions of the Americans with Disabilities Act ("ADA") and related state policy by failing to reasonably accommodate medical conditions that make in-person work unduly hazardous for her during the COVID-19 pandemic.[11] 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]."[12] "Reasonable accommodations" include "[m]odifications or adjustments that 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."[13] 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

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[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*, *e.g.*, EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.
[11] *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).
[12] 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.").
[13] 29 C.F.R. § 1630.2(o)(1)(iii); *see* 42 U.S.C. § 12111(9)(B).

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."[14] 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 the employee to perform the essential functions of his position.[15]

This grievance addresses a particular set of circumstances that have effectively changed as to the grievant's current work environment such that the matters grieved are largely moot at this time. The grievant has returned to the workplace and does not appear to be seeking to telework full-time any longer. The grievant likely acknowledges that when educational activities resume in the coming months her presence in the workplace will be required to perform her job. Accordingly, because there are no active issues for which a hearing officer could provide relief as to the grievant's request to telework, this grievance does not qualify for hearing on this basis.[16]

Subsequent Events

Although not mentioned in her grievance, the grievant received a due process notice on or about February 4, 2021, which described the agency's intent to issue disciplinary action to the grievant for not returning to the workplace after allegedly being cleared to return on January 20 and continuing to telework instead.[17] The agency's position that the grievant was cleared to return likely relates to the grievant's notification of a negative COVID-19 test at that time, but it does not appear to take into account the doctor's note regarding telework submitted at the same time. The parties appear to have met on February 11 and the grievant received a counseling memo as a result of the situation instead of a formal disciplinary action.

EDR would note that a review of the events of this time period reflect confusion and a lack of clear communication. For example employees were given a short deadline to procure medical documentation by January 8, 2021. The grievant ultimately submitted medical documentation on January 20. The agency appears to take the position that the grievant was under an obligation to return to work immediately as she no longer had an approved telework agreement. Although this may have been communicated to the grievant by phone, there is no written documentation submitted to EDR that demonstrates she was directed to come to the workplace immediately. As the grievant was attempting to extend her telework approval due to her medical situation and the submission on January 20, 2021 was the first time she had submitted documentation under the agency's new requirements, the grievant appears to have considered it a reasonable approach to continue working remotely while awaiting a determination about her doctor's letter, in the absence of a clear directive to the contrary (if that was the case). Things appear to have resolved themselves once human resources formally denied the grievant's request on February 1 and the grievant returned to the workplace on February 2.

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[14] 29 C.F.R. § 1630.2(o)(3).

[15] *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.

[16] Nothing in this ruling is meant to prevent the grievant from requesting approval to telework in the future based on any changed circumstances or additional guidance from her medical provider, for example.

[17] Although it appears the grievant may have been instructed to return to work following denial of the earlier telework request on January 6, it was at that time that the grievant became ill and was unable to come to work.

Although the counseling memo was not grieved in the February 5 grievance, we would note that these events appear to describe a complex matter: an employee with a medical situation who had relied on telework for nearly a year, which was changed on short notice in an ongoing public health emergency with the potential for unclear consequences. To the extent there was a need for the grievant to be present at the workplace immediately to perform duties she could not perform at home, that justification is not apparent from the grievance record. The grievant appears to have continued to work from home during the period of concern, which does not appear to be disputed.

Future Matters

While this ruling was pending, information gathered from the grievant indicates that there may be additional need for accommodation in the grievant's job at the workplace. Therefore, we encourage the grievant and the agency to engage in an interactive process to identify those job duties for which the grievant may require accommodation, to identify potential accommodations, and/or to obtain any necessary medical documentation as may be required. For example, although the agency denied the grievant's request to telework, it appears to have acknowledged her medical concerns and granted an apparent accommodation to have her work in an area separated from others. In addition, a discussion as to what duties the grievant will be required to perform, and whether any accommodation would be needed, seems necessary. As stated, the grievance record does not describe what duties the grievant was unable to perform at home during the time when the grievant was not required to be teaching in a classroom.[18]

Relatedly, the grievant has also identified in her grievance the concern that some agency employees and others in the workplace do not wear face coverings appropriately as is apparently required in the grievant's facility. During the grievance resolution steps the agency has expressed its support for appropriate safety standards and directed the grievant to report any individuals she observes not following the rules. Beyond whether co-workers report other co-workers' noncompliance, EDR is hopeful that both upper management and/or appropriate safety staff at the facility will monitor and enforce compliance especially as the public health situation evolves. As stated, however, management is reserved the exclusive right to manage the affairs and operations of state government.[19]

CONCLUSION

For the reasons described above, the February 5, 2021 grievance does not contain claims for which relief could be granted by a hearing officer or claims that otherwise qualify for a hearing for the reasons described above.

EDR's qualification rulings are final and nonappealable.[20]

[18] Based on information available to EDR, educational activities involving in-person instruction for which the grievant is responsible had essentially ceased and are not scheduled to recommence until later this month.
[19] Va. Code § 2.2-3004(B).
[20] *See* Va. Code § 2.2-1202.1(5).

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