

Issue: Qualification – Discrimination (disability); Ruling Date: April 11, 2011; Ruling No. 2011-2917; Agency: Department of Corrections; Outcome: Not Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION RULING OF DIRECTOR**

In the matter of the Department of Corrections  
Ruling Number 2011-2917  
April 11, 2011

The grievant has requested a ruling on whether his November 14, 2010 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons set forth below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Correctional Officer with the agency. Effective October 1, 2010, the agency revised its reasonable accommodation procedure to prohibit allowing employees, as an accommodation, to bring personal food inside the secure perimeter of a facility.<sup>1</sup> Prior to the new procedure's implementation, the grievant had been allowed to bring personal food items into the facility's secure perimeter, as an accommodation for his medical condition. The grievant's facility was granted a thirty day extension, until November 1, 2010, to allow affected staff such as the grievant to adjust to the "no food" mandate of the revised procedure and to verify with their physicians any need for an alternative accommodation.

Grievant's physician advised the agency that "[i]t is imperative that [grievant] have regular and frequent small meals and that he have ready access to food/drink or glucose tablets in the event of hypoglycemia." The grievant requested the agency to grant an "exceptional accommodation" under the new procedure that would allow him to bring his own food into the facility's secure perimeter. The agency denied that request on security grounds, and asserting that it had provided the grievant with several other options that abide with his physician's recommendations as well as the agency's new procedure and security concerns. Those options included allowing the grievant snack food such as sandwiches and fruit from the staff dining hall within the secure perimeter, at no cost and on an as-needed basis, as well as permission to carry glucose tablets with him at all times. The agency also offered the grievant the ability to take an additional half hour meal break (unpaid) to access food outside the secure perimeter if he so chose.

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<sup>1</sup> Department of Corrections Operating Procedure 101.5, Reasonable Accommodations, effective October 1, 2010. The agency's procedure states at IV(G)(3)(b): "[t]he following are examples of assistance or accommodations that CANNOT be made inside a facility's secure perimeter, on a security post, or for positions responsible for direct offender supervision ... (b) Allowing any prohibited items (including food items) inside the secure perimeter."

The grievant argues that the offered accommodations are unacceptable because the institutional food is “disgusting” and does not meet the medical standards for someone with his condition. He also asserts that the extra thirty minute meal break is unpaid and does not allow him enough time to leave the secure perimeter to get food and return to his post on time. Finally, the grievant states that bulk coffee is allowed entry into the secure perimeter, and questions why his personal food would be any different.

The November 14<sup>th</sup> grievance proceeded through the management resolution steps without resolution and was denied qualification by the agency head on February 15, 2011. The grievant now seeks a qualification determination from this Department.

### DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>2</sup> Thus, claims relating to issues such as the method, means 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 influenced management’s decision, or whether state policy may have been misapplied or unfairly applied. In this case, the grievant has asserted a claim of discrimination on the basis of the agency’s refusal to allow him to bring personal food items into the facility’s secure perimeter, which he claims is necessary to accommodate his disability.

The Department of Human Resource Management (DHRM) Policy 2.05 “[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, age, veteran status, political affiliation, genetics or *disability*.”<sup>3</sup> Under DHRM Policy 2.05, “‘disability’ is defined in accordance with the ‘Americans with Disabilities Amendments Act’,” the relevant law governing disability accommodations.<sup>4</sup> Like DHRM Policy 2.05, the Americans with Disabilities Act (ADA) prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual’s disability.

The ADA is intended to enable disabled persons to compete in the workplace based on the same performance standards and requirements that employers expect of persons who are not disabled.<sup>5</sup> Thus, under the ADA, an employer must provide a “reasonable accommodation” that allows a qualified person with a disability to perform the essential functions of his job. Importantly, however, an employee “is not entitled to the accommodation of his choice, but only to a reasonable accommodation,”<sup>6</sup> which, under the ADA, the employer has the discretion to

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<sup>2</sup> Va. Code § 2.2-3004(B).

<sup>3</sup> DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).

<sup>4</sup> 42 U.S.C. §§ 12101 *et seq.*

<sup>5</sup> Equal Employment Opportunity Commission ADA Technical Assistance Manual Addendum (10/29/02).

<sup>6</sup> *See* McKane v. UBS Financial Services, Inc., 363 Fed. Appx. 679, 681 (11<sup>th</sup> Cir. 2010)(unpublished). *See also* Santacrose v. CSX Transportation, Inc., 288 Fed. Appx. 655, 657 (11<sup>th</sup> Cir. 2008)(unpublished)(noting that an employer is “not obligated to fulfill” the employee’s “specific request.”)

choose.<sup>7</sup> For purposes of this ruling only, we will assume that the grievant is a qualified individual with a disability under the ADA and thus entitled to a reasonable accommodation.<sup>8</sup>

Here, it appears that the agency's offered accommodations to the grievant (snack food such as sandwiches and fruit from the staff dining hall within the secure perimeter, at no cost and on an as-needed basis, as well as permission to carry glucose tablets with him at all times) are reasonable and effective in that they adhere to the recommendations of the grievant's physician for regular and frequent small meals and ready access to food/drink or glucose tablets. The grievant's strong personal dislike for the food served at the staff dining hall does not render the agency's offered accommodations ineffective or unreasonable under the ADA.<sup>9</sup> Further, the grievant's assertion that the facility's food does not meet the medical standards for someone with his condition is not mentioned in his physician's written recommendations or supported by any other evidence. Because an employee is not entitled to the accommodation of his choice, but only a reasonable and effective one, we must conclude there is no basis to qualify this grievance for hearing.

#### APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal pursuant to the provisions of Va. Code § 2.2-3004(E). If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that he does not wish to proceed.

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Claudia T. Farr  
Director

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<sup>7</sup> See *Gratzl v. Office of the Chief Judges*, 601 F.3d 674 (7<sup>th</sup> Cir. 2010).

<sup>8</sup> A qualified individual is defined as a person with a disability, who, with or without reasonable accommodation, can perform the essential functions of the job. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n). An individual is disabled if he "(A) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment." 42 U.S.C. § 12102(2).

<sup>9</sup> Likewise, the agency's offered accommodation of as- needed dining hall food and glucose tablets is not rendered ineffective by the fact that the extra thirty minute meal break, also offered by the agency as an accommodation, would be unpaid, or that the facility allows bulk coffee supplies into the secure perimeter but not personal food of employees.