

Issue: Qualification – Separation from State (unable to meet work conditions); Ruling
Date: June 1, 2011; Ruling No. 2011-2960; Agency: Department of Corrections;
Outcome: Qualified for Hearing.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2011-2960
June 1, 2011

The grievant has requested a ruling on whether his March 3, 2011 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

Due to a medical condition, the grievant states that he needs to have close access to a restroom and requested an accommodation under the Americans with Disabilities Act (ADA) to work posts that are near a restroom. Because there are certain posts that are either not close to a restroom or require an on-duty employee to be relieved by another employee, which can take time, the grievant requested not to have to work certain posts. Though the agency granted a temporary accommodation, the permanent request was eventually denied. The agency states that an essential duty of the grievant's position is that he be able to work all posts, and proposed that the grievant could use a device or a diaper to work those other posts. The grievant did not accept those offers as reasonable, and refused to work any posts without quick access to a restroom. As a result, the agency determined that the grievant could not perform the essential duties of his position, i.e., work all posts, and terminated his employment.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.¹ 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 challenging his termination, the grievant has asserted claims of misapplication of policy, discrimination on the basis of disability, and the agency's failure to provide his requested accommodation of being assigned only to posts with quick access to a restroom.

¹ Va. Code § 2.2-3004(B).

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”² Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.³ 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.”⁴ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁵ In this case, the grievant lost his job, which is clearly an adverse employment action.

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*.”⁶ Under DHRM Policy 2.05, “‘disability’ is defined in accordance with the ‘Americans with Disabilities Amendments Act’,” the relevant law governing disability accommodations.⁷ Like DHRM Policy 2.05, the ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual’s disability. 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.⁸ An individual is “disabled” if she “(A) [has] a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment.”⁹

For purposes of this ruling, it is presumed that the grievant’s condition meets the definition of “disability.” There are sufficient facts to raise a question that the grievant meets this definition, especially in light of the broad interpretation of “disability” under the ADA.¹⁰ Based on the grievant’s assertions, he has a physiological condition that impacts a bodily function. The determination of whether an impairment “substantially limits” a major life activity “is not meant to be a demanding standard” or require “extensive analysis.”¹¹ Consequently, there has been sufficient evidence presented on this issue for the qualification stage. The focus of this ruling is whether the grievant can perform the essential functions of the job with or without “reasonable accommodation.”

² See *Grievance Procedure Manual* § 4.1(b).

³ While evidence suggesting that the grievant suffered an “adverse employment action” is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an “adverse employment action.” For example, consistent with recent developments in Title VII law, this Department substitutes a lessened “materially adverse” standard for the “adverse employment action” standard in retaliation grievances. See EDR Ruling No. 2007-1538.

⁴ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁵ See, e.g., *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁶ DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).

⁷ 42 U.S.C. §§ 12101 *et seq.*

⁸ 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m). The “essential functions” are the “fundamental job duties of the employment position the individual with a disability holds or desires.” 29 C.F.R. § 1630.2(n).

⁹ 42 U.S.C. § 12102(2).

¹⁰ E.g., 29 C.F.R. § 1630.1(c)(4).

¹¹ 29 C.F.R. § 1630.2(j).

The agency asserts that because the grievant was not able to work all posts he could not perform the essential functions of his position. Whether a function is essential is evaluated on a case-by-case basis by examining a number of factors. The ADA provides that consideration shall be given to the employer's judgment as to what functions of a job are essential and the employer's written description for that job.¹² Other factors to consider are: (1) the amount of time spent on the job performing the function, (2) the consequences of not requiring the incumbent to perform the function, (3) the terms of any collective bargaining agreement, (4) the work experience of past incumbents in the job, and (5) the current work experience of incumbents in similar jobs.¹³ Where an employee is unable to perform the essential functions of his position, he may nevertheless be entitled to reasonable accommodation by the agency. Although job restructuring, part-time or modified work schedules, reassignment and "other similar accommodations for individuals with disabilities" are generally considered reasonable accommodations,¹⁴ an accommodation is unreasonable if it requires the elimination of an "essential function."¹⁵ The grievant's requested accommodation that he not be required to work certain posts would effectively eliminate a job function that the agency asserts is essential for all employees in the grievant's position. Consequently, if the grievance raises a sufficient question as to whether working all posts is an essential function for the grievant's position, this case will qualify for a hearing.

The agency maintains that the ability to work all posts is a requirement of the position, as stated in the position's conditions of work document. While such a document weighs heavily in support of the agency's position, under the ADA, the realities of the work environment at the grievant's facility must also be assessed. Here, while each employee appears to work different posts, and a particular post does not appear to be guaranteed, there does not appear to be a regularly defined system of rotation through all posts for all employees, at least during the time period at issue in this case. In addition, the facts are in dispute as to whether all employees in the grievant's position can fully work all posts. The grievant asserts there are many employees at the facility who are unable to work all posts. The agency indicates that these employees work all posts without restriction. However, the grievant states, for example, that one such employee has limited use of one side of his body and another employee must carry a nebulizer due to a medical condition and is incapable of performing strenuous activity. While the agency states that these employees are working all posts, the information presented by the grievant raises a sufficient question for purposes of qualification as to whether these employees could reasonably perform some of the more demanding or physically intensive posts or duties that could be required of a corrections officer. The grievance thus raises a sufficient question as to whether all employees in the grievant's position are indeed required to be able to fully work all posts and, consequently, whether working all posts is truly an essential function. As such, the grievant's claims of

¹² 42 U.S.C. § 12111(8).

¹³ 29 C.F.R. § 1630.2(n)(3).

¹⁴ 42 U.S.C. § 12111(9)(B).

¹⁵ *Hill v. Harper*, 6 F. Supp.2d 540, 544 (E.D. Va. 1998)(citing *Hall v. U.S. Postal Service*, 857 F.2d 1073, 1078 (6th Cir. 1988)).

misapplication of policy and/or discrimination on the basis of a disability qualifies for a hearing.¹⁶

CONCLUSION

For the reasons set forth above, the grievant's March 3, 2011 grievance is qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B. In addition, because the grievant's claim of misapplication of policy and/or discrimination on the basis of a disability qualifies for hearing, this Department deems it appropriate to send all alternative theories and claims raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

This ruling is not meant to indicate that the grievant was improperly dismissed, that discrimination has occurred, and/or that the agency violated policy in any way. Indeed, no part of this ruling is meant to suggest that this Department has found sufficient evidence to establish the grievant's case. This ruling only determines that the grievance qualifies for hearing. Further, any factual findings or assumptions made in this ruling are not binding on the hearing officer eventually appointed in this case.

Claudia T. Farr
Director

¹⁶ This ruling has not addressed whether the agency's proposed accommodations (using a device to urinate in or wearing a diaper) are reasonable, or whether the grievant's proposed accommodation (working only those posts with quick access to a restroom) poses an undue burden on the agency. Such issues are facts-driven and best determined by a hearing officer.