Issue: Qualification – Discrimination (disability); Ruling Date: June 24, 2011; Ruling No. 2011-2998; Agency: Virginia Employment Commission; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Virginia Employment Commission
Ruling Number 2011-2998
June 24, 2011

The grievant has requested a ruling on whether his March 2, 2011 grievance with the Virginia Employment Commission (the agency) qualifies for a hearing. For the reasons stated below, this grievance does not qualify for a hearing.

FACTS

In February 2011, the grievant was transferred to Facility P as a result of his former work location, Facility C, being closed. Based on medical documentation, the grievant has requested as a reasonable accommodation that his commute to work not exceed 30 minutes. According to the grievant, his travel time to Facility P exceeds this amount. As such, the grievant submitted his March 2, 2011 grievance seeking a reduced commute through work at another facility. The agency has no other permanent facility closer to the grievant's home. However, the agency utilizes space in a few offices on specific days each week. The agency has allowed the grievant to work two days at these alternative locations. The agency states that it has no business need to expand its offerings at these offices beyond that which the grievant is already working. As such, the grievant is required to work at Facility P three days each week.

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, the grievant has essentially asserted a claim of discrimination on the basis of disability and the agency's failure to provide an accommodation thereto.

[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] For purposes of this ruling only, it will be assumed that the grievant has alleged 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' [sic]," the relevant law governing disability accommodations.[7] 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. 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 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."[9] For purposes of this ruling, it is presumed that the grievant's condition meets the definition of "disability."

As a general rule, if an employee is disabled under the ADA, an employer must make "reasonable accommodations" unless the employer can demonstrate that the accommodation "would impose an undue hardship on the operation of the business [or government]."[10] "Undue hardship" is defined as a "significant difficulty or expense incurred by [an agency]" upon consideration of certain established factors, including the "impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform

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[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*.

[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(1).

[10] 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.").

their duties and the impact on the facility's ability to conduct business."[11] 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."[12]

Even assuming for purposes of this ruling only that the agency was under a duty to accommodate issues affecting an employee's commute, there is no reasonable accommodation available that would place the grievant in a work location less than 30 minutes from his home. There is no permanent facility closer to the grievant's home to which he could be transferred. In addition, the agency states it has no business need to expand its offerings at the alternate office locations where the grievant works two days each week. Consequently, the evidence fails to raise a sufficient question of disability discrimination or failure to reasonably accommodate on the part of the agency by denying grievant's request for a transfer to another facility.

The grievant has also requested the ability to telework on a full-time basis. While in many instances telework could be a reasonable accommodation,[13] this is not such a case. The grievant's position requires direct contact with members of the public in the office. Although job restructuring, part-time or modified work schedules, reassignment and "other similar accommodations for individuals with disabilities" are considered reasonable accommodations,[14] some courts have held that an accommodation is unreasonable if it requires the elimination of an "essential function."[15] Absent significant restructuring of the grievant's position, it appears that his job could not be performed from home. As such, permanent full-time telework is not a reasonable accommodation for the grievant's position.

This grievance does not raise a sufficient question that the agency has failed to provide a reasonable accommodation under the ADA and/or related policy. Whether any other accommodations are needed or required is not addressed by this ruling. This Department only considered the issue of the impact on the grievant's commute. This grievance does not qualify for a 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 Department's qualification 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 with the circuit court pursuant to Va. Code § 2.2-3004(E). If the court should qualify this grievance,

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[11] 29 C.F.R. § 1630.2(p).
[12] 29 C.F.R. § 1630.2(o)(3)
[13] *E.g.*, EEOC Fact Sheet, Work at Home/Telework as a Reasonable Accommodation, *available at* http://www.eeoc.gov/facts/telework.html (last modified Oct. 27, 2005).
[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)).

within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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Claudia T. Farr
Director