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QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2023-5456
October 27, 2022

The grievant seeks a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management as to whether his July 27, 2022 grievance with the Virginia Department of Transportation (the “agency”) qualifies for a hearing. For the reasons set forth below, EDR finds that the grievance is not qualified for a hearing.

FACTS

On or about July 27, 2022, the grievant submitted a grievance challenging the agency’s decision to deny him the ability to telework. The grievant reports that he had previously teleworked one to two days per week for 15 years. Although the grievant’s working title is “Senior Surveyor,” the grievant states he has not completed field work in 20 years and is not a “front facing” or “field” employee. Nevertheless, following revisions to the Commonwealth’s telework policy, the grievant has been denied telework completely. The grievance has proceeded through the management resolution steps without any relief being granted. The agency head declined to qualify the grievance for a hearing, and the grievant appealed 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.¹ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² 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.³

¹ See *Grievance Procedure Manual* § 4.1.

² Va. Code § 2.2-3004(B).

³ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁴ Thus, typically, the 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.”⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁶ We do not reach the question of whether the denial of telework is an adverse employment action as the matter can be resolved on other grounds.

The grievant principally argues that his position is misclassified, that he is not in a “front facing” position, and, as such, he should be permitted to telework. The grievant’s position has some merit in that he had reportedly been permitted to telework one to two days per week for 15 years. However, with the issuance of the Commonwealth’s updated telework policy, a new telework framework was created and all existing telework agreements were to be reviewed and replaced.⁷ In that effort, the agency determined that employees in positions like the grievant’s were determined to no longer be eligible for telework. All employees of the survey section of the agency below the level of manager are ineligible for telework.

The state telework policy provides:

*Eligible positions are determined by the type of work and job requirements of the position, as defined by heads of agencies. Determinations for telework eligibility will be focused on the job requirements and the ability of the individual employee to perform work duties assigned to the individual and the team.*⁸

The agency determined that most of the positions in the survey section involve field work and, hence, determined all of these positions to be ineligible. While the grievant points out that his work assignments do not involve much field work, it appears that the agency has sought to be consistent and determined that all survey employees in positions at the grievant’s level are ineligible for telework. While the telework policy would allow the agency the flexibility to make exceptions where warranted based on the type of work and job requirements of an individual position, there is nothing in the policy that requires such a result. Similarly, EDR cannot find a mandatory policy provision violated by the agency in this instance for attempting to make a blanket application to all positions of a particular section and category.

As stated above, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁹ Although the grievant disagrees with the agency’s assessment of how to determine telework eligibility for his position, EDR finds that his grievance does not raise a sufficient question as to whether the agency misapplied and/or

⁴ See *Grievance Procedure Manual* § 4.1(b).

⁵ *Ray v. Int’l Paper Co.* 909 F.3d 661, 667 (4th Cir. 2018) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)).

⁶ *Laird v. Fairfax County*, 978 F.3d 887, 893 (4th Cir. 2020) (citing *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007)) (an adverse employment action requires more than a change that the employee finds “less appealing”).

⁷ DHRM Policy 1.61, *Teleworking*, at 1-2.

⁸ *Id.* at 1.

⁹ Va. Code § 2.2-3004(B).

unfairly applied policy, or was otherwise arbitrary or capricious. It appears instead that the agency's determination of telework eligibility for the grievant's position is consistent with the discretion granted by policy. Accordingly, the grievance does not qualify for hearing on this basis.

EDR's qualification rulings are final and nonappealable.¹⁰

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¹⁰ Va. Code § 2.2-1202.1(5).