



JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of the University of Virginia
Ruling Number 2024-5646
February 7, 2024

The grievant seeks a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management as to whether his September 25, 2023 grievance with the University of Virginia (the “university” or “agency”) qualifies for a hearing. For the reasons set forth below, EDR finds that the grievance is not qualified for a hearing.

FACTS

The grievant is a long-time employee for the university bookstore and is currently employed as Director of Business Development and Purchasing. Due to the COVID-19 pandemic, the university’s operations went entirely virtual in March of 2020 and did not return to in-person classes until Fall of 2021. The grievant has been working entirely remotely since October 20, 2020, following a temporary telework agreement, and because of ongoing medical issues. On May 11, 2023, the university’s telework agreement expired and university employees were no longer able to fully perform their jobs in a remote setting. The university therefore notified the grievant on May 22 to return to in-person work on or around July 5.¹

Due to ongoing medical issues, the grievant requested that he continue to work 100-percent remotely from home beyond the July return-to-work date. The university placed him on paid administrative leave from July 10 through August 31, 2023, while they considered his request. On August 31, the university notified the grievant that they were denying his request for 100-percent telework “due to the tasks and responsibilities required of [his] supervisory position.” Because of a scheduled vacation immediately following that time on leave, the university expected the grievant to return to the office on September 12, 2023.

Following this determination, the grievant filed a grievance on September 25. He argues that he has been able to effectively perform his role from home for the past three years, contending that it is not essential for him to begin working in-person. He also argues that his medical condition, supported by doctors’ certifications, makes working entirely remotely a necessity for his health. As relief, the grievant requests that he is granted the ability to work 100-percent remotely and that

¹ There are conflicting accounts in the record on whether the agency mandated a return to in-person work by July 5 or July 7, but that discrepancy has no bearing on this ruling.

he receives paid administrative leave while his request/grievance is being considered. 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.² Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.³ 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.⁴

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁵ 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."⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁷

Misapplication of State Policy

The grievant contends that the university improperly or unfairly applied policy by stating that the grievant cannot perform the essential functions of his role if he worked fully remotely, despite him adequately performing his role remotely for the past three years. Specifically, he states that his duties have remained stagnant since around 2016, and that he has not had any supervisory roles, such as having any subordinates that report to him, since that time. While he acknowledges that his job description does include some supervisory duties, he contends that he is not required to actually perform these duties. He also adds that at a certain point when he still worked in-person, he was no longer invited to managerial meetings, indicating that before remote work was an issue, he no longer served any supervisory capacities. Overall, the grievant is arguing that the university's assertion that he must work in-person to perform his essential functions is inaccurate, and that they are attempting to "reimagine[]" his job and various duties in a way to prevent 100-percent telework.

² See *Grievance Procedure Manual* § 4.1.

³ Va. Code § 2.2-3004(B).

⁴ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁵ See *Grievance Procedure Manual* § 4.1(b).

⁶ *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)).

⁷ *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").

Conversely, the university argues that the grievant's position "is a front facing position which certain duties require him to be present for" and that "[d]uring his temporary work from home period the duties that he could not perform w[ere] covered by different employees within the unit." The university adds that the grievant was one of three employees who were asked to return on-site, and that currently, all university bookstore employees are reporting to work on-site other than the grievant. The university does confirm that the grievant does not currently have any subordinates directly reporting to him, due to his most recent subordinate having recently left the position without replacement. However, the university clarifies that his leadership role nonetheless requires him to provide in-person support for the staff if they have questions or need training, and that such staff includes direct reports if relevant. Essentially, the university is making the argument that regardless of whether the grievant currently has any supervisory roles or direct reports, he is still expected to be on-site in case his leadership capabilities are ever needed.

The grievant's position has some merit in that the university has not provided any clear explanation showing exactly what supervisory roles, specifically direct reports, are currently required from the grievant. His argument that he has been able to adequately perform his duties remotely for over three years also has merit. 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.⁸ In that effort, and pursuant to the termination of the temporary full-telework agreement, the university determined that employees at the grievant's management level are no longer able to adequately perform their duties entirely from home. Employees with this type of work are deemed "field-facing," meaning "work [that] is best completed in the office and in the field, even if some tasks can be accomplished remotely."

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.*⁹

While the grievant's position as it was defined in the past may have been entirely workable from a remote setting, the university recently determined that positions of his type – those that include supervisory duties in a brick-and-mortar location such as a bookstore – are ineligible for 100-percent telework due to their field-facing nature. In the absence of an improper motive, management has discretion to change the organizational approach for how employees perform their work. The grievant nonetheless argues that the university has not provided clear evidence outside of these assertions that his presence is indeed required, relying solely on job descriptions given at the time the grievant accepted the job, as well as more up-to-date descriptions that outline the frequency of the types of duties expected of him. However, it also appears that the university has sought to be consistent and determined that the other two employees in positions performing the type of work the grievant performs are ineligible for 100-percent telework.

In addition to the issue of telework agreements themselves, an employee must be able to perform the "essential functions" of their job with or without reasonable accommodations as

⁸ DHRM Policy 1.61, *Teleworking*, at 1-2.

⁹ *Id.* at 1.

defined by the American Disabilities Act (“ADA”). Under the ADA, a job function may be “essential” when:

the reason the position exists is to perform that function, when there aren’t enough employees available to perform the function, or when the function is so specialized that someone is hired specifically because of his or her expertise in performing that function. If an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. Other relevant evidence can include the employer’s judgment as to which functions are essential, the amount of time spent on the job performing the function, the consequences of not requiring the incumbent to perform the function, and the work experience of people who hold the same or similar job.¹⁰

The evidence in the record shows that the grievant’s job description does include supervisory roles. The university has also consistently affirmed their judgment that being able to work on-site (at least on some days) is an essential function for an employee with the grievant’s role. The university has demonstrated a reasonable position in that a bookstore employee being able to work on-site, whose duties include being available to assist on-site staff, and potentially direct reports, is an essential function. Conversely, however, the grievant does offer the fact that he has been working remotely for over three years with no issues in performance, and that his job duties have not changed since before he began working remotely.

Weighing these factors, EDR finds that the university has presented enough evidence that working on-site at least on some occasions is an essential function of the grievant’s job, but there is insufficient evidence to suggest that he needs to work on-site at all times. The university’s contention that the grievant must be available to perform these supervisory roles as needed going forward, regardless of him having any current direct reports or the fact that he has been performing his job remotely for years, is sufficient to require at least some on-site attendance as essential. However, without more clearly-defined expectations as to the grievant having any direct reports, or any indication as to his duties not being able to be performed remotely, the grievant should be able to work remotely at least some days of the week if supported by an updated ADA accommodation request, as explained further below.

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.¹¹ Although the grievant disagrees with the university’s assessment of whether his duties require to work on-site, EDR finds that his grievance does not raise a sufficient question as to whether the university misapplied and/or unfairly applied policy or was otherwise arbitrary or capricious. It appears instead that the university’s

¹⁰ *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 579-80 (4th Cir. 2015) (citing 42 U.S.C. § 12111(8); 29 C.F.R. §§ 1630.2(n)(2), 1630.2(n)(3)) (internal quotation marks omitted) (finding that “providing customer service” was not necessarily one of a court clerk’s essential job duties, even though it was listed in her job description); *see* 29 C.F.R. app. § 1630.2(n) (“The inquiry into whether a particular function is essential . . . focuses on whether the employer actually requires employees in the position to perform the functions” that are considered essential); *see also* *Stephenson v. Pfizer, Inc.*, 641 F. App’x 214, 220 (4th Cir. 2016); *EEOC v. Womble Carlyle Sandridge & Rice*, 616 F. App’x 588, 594 (4th Cir. 2015) (employee’s personal experience of the job is not a dispositive factor in determining whether a function of the job is essential).

¹¹ Va. Code § 2.2-3004(B).

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.

ADA Accommodation Process

While EDR does not find there to be a sufficient question of whether the grievant is entitled to full telework accommodations, we nonetheless recommend that the grievant consider resubmitting an ADA accommodation request for partial telework if such an accommodation is medically approved. It is noted that the grievant has made clear throughout the grievance and communication with EDR that he is not willing to accept any accommodation less than full telework, and because the university has made clear that they would not allow for that, he has declined the option to apply for accommodations.

The reasoning for the grievant's firm request to work fully remotely is due to his existing medical conditions. The grievant has made clear throughout the grievance process that he currently struggles with a neurological condition, for which his medical providers recommended working from home for symptom management. The grievant previously submitted an accommodation request for fully remote work for this reason but it was ultimately denied. The grievant supplemented this request with doctors' certifications recommending that he be able to work from home at least temporarily. Regardless, the university stated that despite these valid health concerns, because working entirely from home would interfere with his essential functions that have been discussed, they could not grant his request and informed him that he may request alternate accommodations.

There does not seem to be any dispute or questioning by the university as to the legitimacy of the grievant's health concerns. It is apparent that the sole reason for the university denying the grievant's telework request is because his ability to work on-site is an essential function of his position. This rationale is consistent with EDR precedent and ADA policy. "[T]he ADA does not require an employer to reassign any of the essential functions of a disabled employee, nor does it require an employer to hire additional employees to perform an essential function."¹² The ADA only requires that the agency attempt to provide sufficient accommodations for the employee to perform the function.¹³

It would therefore follow that the grievant may submit a new request for ADA accommodations in an attempt to receive as many telework days as the university is able to provide, and to potentially also explore any on-site accommodations that could provide any additional benefit to the grievant in the performance of his duties. But within the scope of this ruling, EDR cannot qualify the grievance for a hearing as to the grievant's request to work fully remotely.¹⁴ For the foregoing reasons, EDR cannot find that the grievant has raised a sufficient question that he is entitled to such an accommodation, at least to the degree that a hearing is warranted.

¹² *Stephenson*, 641 F. App'x at 219.

¹³ *Id.*

¹⁴ EDR's ruling on these issues only determines whether there is evidence raising a sufficient question to qualify the grievance for a hearing. It does not address, and has no bearing on, whether other legal or equitable remedies may be available to the grievant. Similarly, to the extent the grievant pursues or is pursuing other accommodations, EDR's ruling has no bearing on those matters other than to encourage pursuing such accommodation requests.

Paid Administrative Leave

Finally, there is the matter of the grievant requesting paid administrative leave for the duration of his grievance being considered and reviewed. As to this request of paid leave covering the entire scope of the grievance process, EDR has no authority to grant this request.

EDR's qualification rulings are final and nonappealable.¹⁵

Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁵ Va. Code § 2.2-1202.1(5).