

Issue: Qualification – Separation from State (Layoff/Recall); Ruling Date: October 19, 2017; Ruling No. 2018-4623; Agency: Department of Juvenile Justice; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Juvenile Justice
Ruling Number 2018-4623
October 19, 2017

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) on whether her August 28, 2017 grievance with the Department of Juvenile Justice (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant was employed at one of the agency’s facilities as a Program Support Technician.¹ In May 2016, she received notice from the agency that her position had been scheduled for abolishment due to the planned closure of the facility at which she worked. The agency offered the grievant and other affected employees at the facility the option to either retain or waive their placement and recall rights in connection with their layoff.² Employees whose positions were scheduled for abolishment were required to notify the agency of their decision by returning a waiver form no later than May 25, 2016. The grievant submitted a form stating that she wanted to waive her placement and recall rights on or about May 25, 2016. Affected employees were permitted to revoke their decision to waive placement and recall rights until June 1, 2016.³

The grievant filed a grievance on or about August 28, 2017, alleging that another employee at her facility had recently been allowed to revoke his waiver of placement and recall rights, and was being placed in a position at the agency’s headquarters. The grievant argues the agency has misapplied and/or unfairly applied policy by not allowing her and other employees to revoke their waivers after June 1, 2016. After proceeding through the management resolution

¹ The grievant was laid off while this ruling was pending.

² Employees who waived placement and recall rights also did not receive preferential hiring cards for use before and after they were laid off, but remained eligible for severance pay and other layoff-related benefits. In addition, employees who chose to waive placement and recall rights received quarterly bonuses in addition to their regular salaries.

³ It appears the grievant attempted to rescind her waiver in December 2016 and was notified that she would not be permitted to do so because the revocation period had passed.

steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EEDR.

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.⁴ Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.⁵ Thus, claims relating to issues such as to the methods, means, and personnel by which work activities are to be carried out, as well as layoff, position classifications, hiring, promotion, transfer, assignment, and retention of employees within the agency “shall not proceed to a hearing” unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.⁶

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁷ 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.”⁸ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁹ Here, the grievant has experienced an adverse employment action because she was laid off.

In this case, the grievant argues that the agency has not complied with the provisions of DHRM Policy 1.30, *Layoff*. Specifically, the grievant asserts that the agency has inconsistently applied the policy by allowing at least one agency employee to revoke his decision to waive placement and recall rights after June 1, 2016, while she and other employees were not permitted to do so. In general, there is nothing to prohibit an agency from offering employees the option to waive their placement and recall rights in connection with a planned workforce reduction.¹⁰ To the extent the grievant is alleging that the agency should have allowed her and other employees to revoke their waivers after June 1, 2016, EEDR has reviewed nothing to suggest that the one-week revocation period of May 25, 2016 to June 1, 2016 was unreasonable or inconsistent with policy.¹¹ Moreover, it does not appear that the comparator employee cited by the grievant was

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

⁵ See Va. Code § 2.2-3004(B).

⁶ *Id.* §§ 2.2-3004(A), (C); *Grievance Procedure Manual* § 4.1(c).

⁷ See *Grievance Procedure Manual* § 4.1(b).

⁸ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁹ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

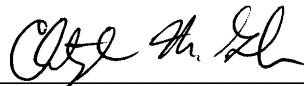
¹⁰ See DHRM Policy 1.30, *Layoff*; Layoff Policy Exceptions 2009, <http://www.dhrm.virginia.gov/docs/default-source/hrpolicy/assets/layoffpolicyexceptionsaug2009.pdf?sfvrsn=2>.

¹¹ DHRM policy guidance states that employees “should be given a reasonable period of time” to revoke a waiver of placement and recall rights. Layoff Policy Exceptions 2009, <http://www.dhrm.virginia.gov/docs/default-source/hrpolicy/assets/layoffpolicyexceptionsaug2009.pdf?sfvrsn=2>.

permitted to rescind his waiver. In August 2017, the agency identified a business need for a newly-created position at its headquarters. The comparator employee was working at the grievant's facility in a position scheduled for abolishment. The position in which the comparator employee worked was similar to the position that was to be created at headquarters. Instead of recruiting for the new position, the agency decided to revoke the abolishment of the comparator employee's position and transfer it, along with the comparator employee, to its headquarters. In other words, the comparator employee did not revoke his waiver of placement and recall rights; rather, the agency determined that the position should not be abolished due to identified business needs. Based on these facts, EEDR finds that the grievance does not raise a question as to whether the agency's exercise of discretion was inconsistent with the provisions of the state policy relating to the layoff process, or its treatment of other similarly situated employees.

The grievance procedure accords much deference to management's exercise of judgment, particularly decisions as to what work units will be affected by layoff and the business functions to be eliminated or reassigned. Thus, a grievance that challenges an agency's determination like this does not qualify for a hearing unless there is sufficient indication that it was plainly inconsistent with other similar decisions by the agency, or that the decision was otherwise arbitrary or capricious.¹² Although the grievant disagrees with the agency's actions, she has not presented evidence sufficient to support her assertion that the agency misapplied and/or unfairly applied any mandatory provision of policy, that the agency's actions were so unfair that they amounted to a disregard of the intent of any applicable policy, or that the layoff process was conducted in a manner that was otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on this basis.

EEDR's qualification rulings are final and nonappealable.¹³



Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

¹² See *Grievance Procedure Manual* § 9 (defining an arbitrary or capricious decision as one made “[i]n disregard of the facts or without a reasoned basis).”

¹³ Va. Code § 2.2-1202.1(5).