Issue: Qualification – Separation from State (layoff); Ruling Date: July 25, 2017; Ruling No. 2018-4582; Agency: Department of Behavioral Health and Developmental Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution[1]

QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2018-4582
July 25, 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 his May 25, 2017 grievance with the Department of Behavioral Health and Developmental Services (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 Health Care Technologist II, a position in Pay Band 4. On or about April 27, 2017, the grievant was notified that his position was scheduled for abolishment, effective May 27, 2017. On a Notice of Layoff or Placement Form, the grievant was offered the option to either accept a Direct Service Associate II position in Pay Band 2 with a reduced salary or be placed on leave without pay-layoff. The grievant declined the placement offer. While the grievant's layoff was pending, he applied for a position as a Lead Residential Supervisor at the facility. On May 23, 2017, the agency notified the grievant that it had determined he was not minimally qualified for the position.

The grievant filed a grievance on May 25, 2017, alleging that the agency had misapplied and/or unfairly applied state policy in relation to his layoff, specifically in relation to the agency's placement offer and selection process for the Lead Residential Supervisor position. After proceeding through the management resolution 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.[2] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] Thus, claims relating

[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. The *Grievance Procedure Manual* has now been updated to reflect this Office's name post-merger as the Office of Equal Employment and Dispute Resolution.
[2] *See Grievance Procedure Manual* §§ 4.1(a), (b).
[3] *See* Va. Code § 2.2-3004(B).

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.[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] Here, the grievant has experienced an adverse employment action because he was laid off.

Misapplication and/or Unfair Application of Policy

In this case, the grievant claims that the agency has not complied with the provisions of DHRM Policy 1.30, *Layoff* (the "Layoff Policy"). Specifically, the grievant argues he should have been offered a placement in the Direct Service Associate II position, which is in a lower pay band, without a reduction in his salary. The grievant further asserts that the agency improperly determined he was not minimally qualified for a Lead Residential Supervisor position for which he applied before his layoff became effective. Finally, the grievant argues that other employees at the facility have been offered placements and either retained their former salaries or received salary increases.

The intent of the Layoff Policy is to allow "agencies to implement reductions in the work force according to uniform criteria when it becomes necessary to reduce the number of employees or to reconfigure the work force . . . ."[8] The Layoff Policy mandates that each agency "identify employees for layoff in a manner consistent with their business needs" and the policy's provisions, including provisions governing placement opportunities within an agency prior to layoff.[9] "During the time between Initial Notice and Final Notice of Layoff, the agency shall attempt to identify internal placement options for its employees."[10] After an agency identifies all employees eligible for placement, the agency must attempt to place them "by seniority to any valid vacancies agency-wide in the current or a lower Pay Band."[11] The placement must be "in the highest position available for which the employee is *minimally qualified* at the same or lower level in the same or lower Pay Band, regardless of work hours or shift."[12]

---

[4] *Id.* §§ 2.2-3004(A), (C); *Grievance Procedure Manual* § 4.1(c).
[5] *See Grievance Procedure Manual* § 4.1(b).
[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[8] DHRM Policy 1.30, *Layoff*.
[9] *Id*.
[10] *Id*.
[11] *Id.*
[12] *Id.*

The Layoff Policy additionally provides that "[e]mployees who are placed in positions that are in lower Pay Bands normally will retain their salaries if the salaries are within the employee's new Pay Band. . . . However, if funding constraints exist, the agency may reduce the salary to the maximum immediately or offer a lower salary upon placement."[13] In this case, the Direct Service Associate II position was the only available placement for which the grievant was minimally qualified. While the grievant could have been offered the placement and been permitted to retain his former salary, the agency notified the grievant that budget constraints at the facility prevented it from offering the placement without a reduction in salary. While the grievant's frustration with the agency's decision is understandable, this exercise of discretion, based on an assessment of available funding and business needs, was consistent with the provisions of the Layoff Policy.

With regard to the Lead Residential Supervisor position, the grievant's application for the position indicated that he had an Interagency Placement Screening Form ("Yellow Form"). Yellow Forms are "provided to employees when they are notified that they will be affected by layoff" and may be "used . . . to secure preferential consideration over applicants from outside an agency for positions for which they are *minimally qualified* in the same or lower Pay Band."[14] The Layoff Policy states that "[a]n agency must hire an applicant who is determined by agency management to be *minimally qualified* when presented with a 'Yellow Form,' unless the agency chooses to hire through the competitive recruitment process an applicant who currently is an agency employee."[15] Here, the agency determined that the grievant was not minimally qualified for the Lead Residential Supervisor position. As support for its decision, the agency explained to the grievant that there were "inconsistencies in [his] employment history" that resulted in his application being screened out of the pool of qualified applicants. Specifically, the agency explained to the grievant that he had listed the "incorrect name of [his] supervisor," misrepresented that he worked in a position as a supervisor, and provided inaccurate dates of past employment with the agency. EEDR has reviewed the information provided by the parties and it appears that the agency accurately identified discrepancies in the grievant's application as compared with his Employee Work Profile and employment history. The grievance procedure accords much deference to management's exercise of judgment, including management's assessment of applicants during a selection process. Having considered the noted issues with the information provided by the grievant in his job application, EEDR finds the agency's decision that the grievant was not minimally qualified for the Lead Residential Supervisor position was consistent with the provisions of DHRM Policy 2.10, *Hiring*.

In addition, the grievant's assertion that other similarly situated employees at the facility were offered placements and either retained their former salaries or received salary increases is unpersuasive. Having reviewed the information presented by the parties, it does not appear that the grievant and the comparator employees are sufficiently similarly situated such that the agency's action here could be considered inconsistent in this case. For example, two of the employees identified by the grievant worked at different facilities and were offered lateral transfers as placements in lieu of layoff, and a third employee was selected for promotion and given a salary increase as part of a selection process. The agency has further provided information that, at the time the grievant was laid off, five other employees were also identified

[13] *Id.*
[14] *Id.*
[15] *Id.*

for layoff and offered placements with reduced salaries, like the grievant. Based on these facts, EEDR finds that the grievance does not raise a question as to whether the agency's treatment of the grievant during the layoff process was inconsistent with its treatment of other similarly situated employees.

In summary, 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 the resulting determination was plainly inconsistent with other similar decisions by the agency, or that the decision was otherwise arbitrary or capricious.[16] Although the grievant disagrees with the agency's assessments, he has not presented evidence sufficient to support his assertion that the agency misapplied and/or unfairly applied any mandatory provision in the Layoff Policy, that the agency's actions were so unfair that they amounted to a disregard of the intent of the Layoff 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.

Discrimination

The grievant appears to further argue that the agency has engaged in "discriminatory employment practice[s]" in relation to his layoff. Grievances that may be qualified for a hearing include actions that occurred due to discrimination on the grounds of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, genetics, disability, or veteran status.[17] For a claim of discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for a hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[18]

In this case, the grievant does not appear to have identified a protected status on which the alleged discrimination was based. Moreover, even assuming the grievant had specified a protected status, EEDR has found no reason to conclude that the layoff process was conducted improperly here, as discussed more fully above. While the grievant may disagree with the agency's decision to lay him off, such disagreement alone does not establish that the agency's actions in relation to his layoff was discriminatory, and there is otherwise insufficient evidence to show that the agency's stated business reasons were pretextual. To qualify for a hearing, a grievance must present more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. There are no such facts here, and, accordingly, the grievance does not qualify for a hearing on this basis.

---

[16] *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)."
[17] *See, e.g.*, Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.
[18] *See, e.g.*, Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

EEDR's qualification rulings are final and nonappealable.[19]

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

[19] Va. Code § 2.2-1202.1(5).