Issue: Qualification – Separation from State (layoff); Ruling Date: September 1, 2017; Ruling No. 2018-4606; 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

QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2018-4606
September 1, 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 June 22, 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 Human Resource Analyst I. On or about April 27, 2017, the grievant was notified that her position was scheduled for abolishment, effective May 25, 2017. The grievant filed a grievance on June 22, 2017, alleging that the agency had misapplied and/or unfairly applied state policy in relation to her layoff and that discrimination and retaliation improperly influenced its decision to select her position for layoff. 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.[1] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] 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.[3]

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

[1] *See Grievance Procedure Manual* §§ 4.1(a), (b).
[2] *See* Va. Code § 2.2-3004(B).
[3] *Id.* §§ 2.2-3004(A), 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[4] *See Grievance Procedure Manual* § 4.1(b).

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] Here, the grievant has experienced an adverse employment action because she 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 that she had more seniority than another employee in her department whose position was not abolished as of the date of her grievance. The grievant claims that, pursuant to the Layoff Policy, that employee should have received notice of layoff before she did. The grievant also alleges that an agency manager indicated "substitution" would be offered to her, but ultimately she did not receive a substitute placement offer.

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 . . . ."[7] 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.[8] Further, agencies must "select employees for layoff within the same work unit, geographic area, and Role, who are performing substantially the same work,", from "the least senior through the most senior full-time classified employee."[9]

In this case, the agency indicates that, on April 27, 2017, fourteen full-time classified employees were given notice of layoff, effective the same date as the grievant. The agency states that, pursuant to the closing of the facility, two main areas of the grievant's job responsibilities, recruitment and workers' compensation claims, had declined significantly. Thus, there was no longer a business need for the grievant's position. With respect to the employee with less seniority than the grievant, the agency argues that no misapplication of policy occurred, as the other employee was in a different role and did not perform substantially the same work as the grievant. As to the grievant's ability to "substitute" for a retiring employee, the agency states that no business need for the retiring employee's position existed, and thus, that position was not filled. While the grievant's frustration with the agency's decision to abolish her position is understandable, this exercise of discretion, based on an assessment of agency business needs, was consistent with the provisions of the Layoff Policy.

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, in the absence of misapplication or unfair application of a mandatory policy provision, a grievance that challenges an agency's determination like this does

[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] DHRM Policy 1.30, *Layoff*.
[8] *Id*.
[9] *Id*.

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.[10] Although the grievant disagrees with the agency's assessments, she has not presented evidence sufficient to support her 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 argues that her layoff was discriminatory, essentially alleging that the agency chose to lay her off because she was the only white employee in her unit and the closest to retirement age. Grievances that may be qualified for a hearing include actions related to discrimination on the grounds of race, color, religion, political affiliation, age, disability, national origin or sex.[11] To qualify such a grievance for hearing, there must be 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. 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.[12]

In this case, the grievant asserts that she was discriminated against based upon her age and race. While the grievant may disagree with the agency's decision regarding her selection for layoff, this disagreement does not render the agency's decision discriminatory. Here, the grievant has not provided evidence raising a sufficient question that the agency selected her for layoff because of her membership in any protected class. Moreover, the fact that the employees whose positions were not abolished may be younger or of a different race than the grievant does not, without more, indicate pretext sufficient to overcome the agency's legitimate non-discriminatory reasons for its actions. A mere allegation of discrimination, without more, is not appropriate for adjudication by a hearing officer. Accordingly, the grievance does not qualify for a hearing on this basis.

Retaliation

The grievant claims that her layoff was retaliatory because she criticized her supervisors regarding a selection process in which she was assisting with recruitment. For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[13] (2) the employee suffered an adverse

[10] *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)."
[11] *See Grievance Procedure Manual* § 4.1(b).
[12] *See* Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. Apr. 8, 1998).
[13] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[14] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[15]

In this instance, the grievant states that she had emailed two agency managers regarding their actions during a recruitment, advising that their actions were contrary to DHRM policy. She further alleges that, due to these managers' lack of knowledge regarding the Family and Medical Leave Act, agency employees sought clarification from the grievant herself, and for these reasons, the agency managers retaliated against her by selecting her position for layoff. However, even assuming that the grievant engaged in protected activity by having the conversations she describes, she has not presented facts that raise a sufficient question of a connection between her layoff and any such activity. Because there is not a factual basis to support the grievant's allegation of retaliation, the grievance does not qualify for a hearing on this basis.

EEDR's qualification rulings are final and nonappealable.[16]

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[14] *E.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).
[15] *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981).
[16] Va. Code § 2.2-1202.1(5).