



EMILY S. ELLIOTT
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 Virginia Department of Health
Ruling Number 2020-5114
October 2, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether her April 16, 2020 grievance with the Virginia Department of Health (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is qualified for a hearing.

FACTS

The grievant works at one the agency’s health districts. Prior to the events of this grievance, her job responsibilities included human resources administration and executive support for the health district’s director, who is responsible for the management of two neighboring health districts. In December 2019, the agency announced a reorganization of job duties for its human resources staff using a Shared Business Services (“SBS”) model. The SBS reorganization was intended to standardize human resources practices and service delivery across the agency’s health districts.

The grievant met with agency management in mid-February 2020 to discuss how the SBS reorganization would affect her health district. The grievant alleges that, during this conversation, management explained that it planned to reassign certain job duties between her and a colleague who works at another office supervised by the district director. Like the grievant, the colleague’s responsibilities at the time included executive support and human resources administration. The agency planned to redistribute human resources and executive support between the two employees so that one employee was responsible for human resources tasks and the other was responsible for executive support. The grievant alleges that management told her she would be allowed to choose which reassignment she would like because of her seniority, and that she expressed her desire to continue with human resources administration.

Due to a family emergency, the district director was unexpectedly out of the office from February 21 through March 10. On March 12, 2020, the Governor of Virginia declared a state of emergency to respond “to the potential spread of COVID-19, a communicable disease of public

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health threat.”¹ The grievant claims that she asked for permission to purchase a laptop and equipment to telework due to COVID-19, and that the district director advised her to direct her request to SBS management because of the impending reorganization. The grievant alleges that she received approval to purchase the equipment using SBS funding.

The grievant stayed home from work on March 30 because she was experiencing possible symptoms of COVID-19. She requested permission to telework and self-isolate at her home for several days. On April 1, management denied the grievant’s request to telework and notified her that, as of April 10, she would be laterally reclassified to a new Role, in which she would be responsible for providing administrative support for the two health districts and the district director. The grievant’s colleague, meanwhile, would be reclassified to a new Role in a higher Pay Band and given responsibility for human resources administration. The agency initially told the grievant that her new work title would be Executive Secretary; it later clarified that her work title would be Administrative Staff Specialist. The agency confirmed that the grievant’s salary and Pay Band would not change as a result of the lateral reclassification.

On April 2, the grievant sought medical treatment based on her symptoms and was tested for COVID-19. She tested negative for the virus and, over the course several conversations with management in the ensuing days, was ultimately instructed to self-isolate at home until April 20. The grievant’s absence from March 30 through April 20 appears to have been covered as Public Health Emergency Leave (“PHEL”).² On April 12, during her approved period of PHEL, the grievant exchanged emails with an employee who had questions about using leave. The grievant alleges that the agency accused her of approving leave for that employee, which was outside the scope of her position, and reprimanded her for performing work while she was on leave even though it was a common practice for her and other employees to monitor their phones and email accounts outside of regular working hours.

The grievant filed a grievance on April 16, 2020, disputing the agency’s decision to reclassify her to a different Role in the same Pay Band as part of the SBS reorganization and alleging that the agency’s decision constituted retaliation based on her use of PHEL. As relief, the grievant seeks to “remain in [her] current role . . . and fall under SBS reporting and supervision” and to “have the option to telework as much as possible” due to her health concerns about COVID-19. The grievant further requests a work environment in which she is “valued and not treated with hostility.”

Following the management resolution steps, the agency head determined that the grievance record did not contain evidence demonstrating that a misapplication of policy had occurred or supporting the grievant’s allegation of retaliation. As a result, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR. While this

¹ Exec. Order No. 51 (2020), *Declaration of a State of Emergency Due to Novel Coronavirus (COVID-19)*. The Commissioner of the Virginia Department of Health had declared the COVID-19 virus a Communicable Disease of Public Health Threat on February 7, 2020. The World Health Organization confirmed that COVID-19 was a pandemic on March 11, 2020.

² See DHRM Policy 4.52, *Public Health Emergency Leave*; Policy Guide – DHRM Policy 4.52, *Public Health Emergency Leave (COVID-19 ONLY)*, Mar. 26, 2020.

grievance is pending, the agency has placed the reassignments of the grievant and her colleague on hold. Although both employees are currently working in the positions they held before the SBS reorganization, EDR will address the issues in this grievance based on the agency's explanation of how the reorganization will affect their job duties going forward.

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.³ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁴ Claims relating to issues such as the methods, means, 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 or agency policy may have been misapplied or unfairly applied.⁵

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁶ Thus, typically, a 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."⁷ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁸ For purposes of this ruling only, EDR concludes that the grievant has alleged an adverse employment action because the agency's reorganization appears to have impacted her opportunities for advancement and career progression.

The central issue in this grievance is the agency's decision to reclassify the grievant's position to a different Role in the same Pay Band. The grievant alleges that the reclassification is a demotion rather than a lateral reassignment because her job duties will consist solely of administrative support, while her human resources duties have been removed. In response, the agency maintains that its reclassification of the grievant and her colleague was consistent with the discretion granted under policy and its business needs pursuant to the stated purpose of the SBS reorganization agency-wide. The agency denies that the reassignment of duties had a retaliatory motive and asserts instead that management decided to implement these changes in February 2020, before the grievant's use of PHEL. The agency contends that the district director's unexpected absence and subsequent events surrounding COVID-19 led to delayed communication and miscommunication with the grievant about the SBS reorganization.

³ See *Grievance Procedure Manual* §§ 4.1 (a), (b).

⁴ See Va. Code § 2.2-3004(B).

⁵ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁶ See *Grievance Procedure Manual* § 4.1(b).

⁷ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁸ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

For the grievant's claim to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy or whether the challenged action, in its totality, is so unfair as to amount to a disregard of the intent of the applicable policy. The General Assembly has recognized that the Commonwealth's system of personnel administration should be "based on merit principles and objective methods" of decision-making.⁹ In addition, the Commonwealth's classification plan "shall provide for the grouping of all positions in classes based upon the respective duties, authority, and responsibilities," with each position "allocated to the appropriate class title."¹⁰ These statutes evince a policy that would require state agencies and institutions to allocate positions having substantially the same duties and responsibilities to the same role. Importantly, the grievance procedure accords much deference to management's exercise of judgment, including management's assessment of the degree of change, if any, in the job duties of a position. While agencies are afforded great flexibility in making decisions such as those at issue here, agency discretion is not without limitation. Rather, EDR has repeatedly held that even where an agency has significant discretion to make decisions (for example, classifying a position in a particular Role), qualification is warranted where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.¹¹

Pursuant to DHRM Policy 3.05, *Compensation*, a Role Change is "[a] non-competitive action in which a position is changed to a different Role in a higher, lower, or same Pay Band."¹² Significantly, the policy further explains that

Role [C]hanges normally occur when there has been a gradual change of duties which are assigned over an extended period of time or to correct a prior misclassification. Immediate and significant changes in duty assignments should be addressed through the establishment of a new position which is then competed[.]¹³

Although it is not mandatory for a Role Change to reflect a gradual change in duties over time instead of an "immediate and significant" modification to job responsibilities, Policy 3.05 clearly expresses a preference for the former over the latter. There is no dispute that the SBS reorganization was more akin to an "immediate and significant" modification of the grievant's and her colleague's job responsibilities, rather than the correction of a prior misclassification.

Before the SBS reorganization, the grievant and her colleague shared responsibility for human resources administration and executive support for their health districts. The agency has indicated that it chose to reassign responsibility for human resources administration to a single employee in the grievant's district to better suit its business needs. The grievant formerly worked in a Human Resource Analyst I position in Pay Band 4; the colleague worked as an Administrative

⁹ Va. Code § 2.2-2900.

¹⁰ *Id.* § 2.2-103(B)(1).

¹¹ See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as "[i]n disregard of the facts or without a reasoned basis"); see also, e.g., EDR Ruling 2010-2365; EDR Ruling No. 2008-1879 (and rulings cited therein).

¹² DHRM Policy 3.05, *Compensation*, at 6.

¹³ *Id.*

and Office Specialist in Pay Band 3. The agency has reassigned human resources administration tasks to the grievant's colleague and reclassified the colleague's position as a Human Resource Analyst I in Pay Band 4 by means of an Upward Role Change. The grievant's position, meanwhile, has been reclassified as a General Administration Coordinator I, also in Pay Band 4, as a Lateral Role Change.

Having carefully reviewed the parties' arguments and the evidence in the grievance record, EDR concludes that grievance raises a sufficient question whether the grievant's Lateral Role Change is a misapplication or unfair application of policy warranting qualification for a hearing. The grievant's Employee Work Profile ("EWP") prior to the SBS reorganization indicates that 55 percent of her position consisted of human resources administration and 45 percent consisted of administrative support for district management. The colleague's previous EWP allocated 49 percent of her position to human resources administration and 51 percent to administrative support. Following the SBS reorganization, the grievant will be responsible for providing administrative support 80 percent of the time, with 20 percent responsibility for serving as a "backup" for human resources administration when needed. The colleague's new EWP, meanwhile, consists of 100 percent human resources administration responsibilities.

The evidence before EDR suggests that there has been no significant change in the actual tasks to be performed by the grievant and her colleague, but rather a reallocation of existing job duties between a Pay Band 3 employee and a Pay Band 4 employee. The colleague's position was reclassified from Pay Band 3 to Pay Band 4 due to her assumption of human resources administration for the health districts. The agency therefore appears to have reassigned duties that are appropriately classified in Pay Band 4—responsibility for human resources administration¹⁴—from the grievant to her colleague. Indeed, the grievant's colleague was reclassified into the very Role occupied by the grievant prior to the SBS reorganization: Human Resource Analyst I. Responsibility for administrative support tasks, some of which was previously assigned to the grievant and some of which was previously assigned to her colleague, has been consolidated in the grievant's position. Under these circumstances, we find that, by reassigning responsibility for human resources administration to the grievant's colleague and reclassifying her position to a Role in Pay Band 4, the agency has effectively left the grievant to perform tasks that are equivalent to those of the colleague's previous Pay Band 3 position. As a result, EDR finds that the grievance raises a sufficient question whether the agency's reclassification of the grievant as a General Administration Coordinator I in Pay Band 4 is inconsistent with state policy.

In the remainder of her grievance, the grievant asserts that the agency's reclassification of her position constitutes retaliation for her use of PHEL while she was experiencing symptoms of COVID-19 in March and April 2020. She further alleges that management has engaged in acts of retaliation and workplace harassment because she complained about the reclassification of her position. More specifically, she argues that management denied her request to telework while on PHEL and unfairly reprimanded her for responding to emails while she was on PHEL. Because the grievant has raised a question whether the reclassification of her position is a misapplication

¹⁴ Human Resource Analyst I, the lowest-classified position in a human resources Role to which the grievant's colleague was reclassified, is in Pay Band 4. *See* DHRM Salary and Job Structure: Career Groups – Human Resource Services, <http://web1.dhrm.virginia.gov/itech/DHRMWebAssets/careergroups/admin/HumanResource19090.htm>.

or unfair application of policy and her additional arguments arise out of the reclassification, EDR deems it appropriate to send these alternative theories and claims for adjudication by a hearing officer to assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons discussed above, EDR finds that the facts presented by the grievant constitute a claim that qualifies for a hearing under the grievance procedure.¹⁵ Because the grievant has raised a sufficient question whether the agency misapplied or unfairly applied policy as to the reclassification of her position, the grievance qualifies for a hearing on these grounds.

At the hearing, the grievant will have the burden of proof.¹⁶ If the hearing officer finds that the grievant has met this burden, they may order corrective action as authorized by the grievance statutes and grievance procedure.¹⁷ This qualification ruling in no way determines that any of the grievant's claims are supported by the evidence, but only that further exploration of the facts by a hearing officer is warranted. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

EDR's qualification rulings are final and nonappealable.¹⁸

Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁵ See *Grievance Procedure Manual* § 4.1.

¹⁶ *Rules for Conducting Grievance Hearings* § VI(C).

¹⁷ Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* § VI(C).

¹⁸ See Va. Code § 2.2-1202.1(5).