

Issues: Qualification - Separation from State (Layoff), and Retaliation (Fraud, Waste, and Abuse); Ruling Date: February 5, 2013; Ruling No. 2013-3462; Agency: Department of Housing and Community Development; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the Department of Housing and Community Development
Ruling Number 2013-3462
February 5, 2013

The grievant has requested a ruling on whether her July 19, 2012 grievance with the Department of Housing and Community Development (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

Prior to the grievant's layoff, the grievant was employed as the Associate Director of the Technical Assistance and Services Office (TAS Office) within the Division of Building and Fire Regulation at the agency. In 2007, the agency's Division of Building and Fire Regulation was reorganized "to have more of a team approach to include generalists with technical expertise in multiple areas that could work on team projects and collaborate more in the administrative functions of the unit. At that time, the Division consisted of 47 employees that included the State Fire Marshall Office." According to the agency, "[s]hortly after implementation of this reorganization several major events changed the concept of this structure and eventually rocked the basis of its very foundation (i.e., loss of 31 positions in [State Fire Marshall Office] move, retirements, recession, loss of adequate funds, etc.)." As a result, the Division of Building and Fire Regulation was left with seventeen staff members in June 2012, which consisted of seven managers, three administrative assistants, one business manager, and six line staff. The agency alleges that the organizational structure was "ineffective to the overall functioning of the division." Therefore, agency management made several recommendations to improve division efficiencies, including the elimination of the TAS Office because there was no longer a need for that level of "management and oversight from a span of control, duties assigned, programs, or from a supervision standpoint," especially in light of the State Fire Marshall Office departure.

As a result, the agency head approved a proposed reorganization plan for the Division of Building and Fire Regulation shortly after June 8, 2012. The agency's reorganization "resulted in the elimination of functions, the absorption of functions by other units/positions, and the eliminations of positions that were determined no longer needed." Three positions were eliminated, including the Associate Director of the TAS Office position, which the grievant held. Shortly thereafter, the affected employees were notified of their layoffs in accordance with the

Department of Human Resource Management's Layoff Policy. The Division of Building and Fire Regulation reorganization was finalized in August 2012. The agency asserts that "[t]he outcome of the reorganization has increased efficiencies and customer satisfaction."

The grievant initiated her grievance on July 19, 2012, challenging the agency's reorganization process for the Division of Building and Fire Regulation and alleging agency policy was misapplied during the restructuring of the Division. In addition, the grievant alleges the agency engaged in "preferential employment/hiring practices as well as personal favoritism among management staff" in its layoff sequence. Moreover, the grievant alleges that the agency retaliated against her because she had previously voiced concerns about certain allegedly questionable business and financial practices with agency management and the Virginia Department of Accounts.

The July 19th grievance proceeded through the management resolution steps without resolution and was denied qualification by the agency head on September 19, 2012. The grievant now seeks a qualification determination from the Office of Employment Dispute Resolution (EDR).

DISCUSSION

Although state employees with access to the grievance procedure may grieve anything related to their employment, only certain grievances qualify for a hearing.¹ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out as well as position classifications, hiring, promotion, transfer, assignment, and retention of employees within the agency 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, or whether a performance evaluation was arbitrary or capricious.³

Misapplication or Unfair Application of Policy

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Importantly, the grievance procedure accords much deference to management's exercise of judgment, including decisions as to what work units will be affected by layoff and the business functions to be eliminated or reassigned. Such matters are generally within the agency's discretion. Agency discretion is not without limitation, however. EDR has repeatedly held that even where an agency has significant

¹ See *Grievance Procedure Manual* § 4.1 (a) and (b).

² See Va. Code § 2.2-3004(B).

³ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

discretion to make decisions (for example, an agency's assessment of a position's job duties), qualification is warranted only where the grievance 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.⁴

The Department of Human Resource Management (DHRM) Layoff Policy allows "agencies to implement reductions in work force according to uniform criteria when it becomes necessary to reduce the number of employees or to reconfigure the work force."⁵ Policy mandates that each agency identify employees for layoff in a manner consistent with its business needs and the provisions of the Layoff Policy. As such, the policy states that before implementing layoff, agencies must:

- determine whether the entire agency or only certain designated work unit(s) are to be affected;
- designate business functions to be eliminated or reassigned;
- designate work unit(s) to be affected as appropriate;
- review all vacant positions to identify valid vacancies that can be used as placement options during layoff, and
- determine if they will offer the option that allows other employee(s) in the same work unit, Role, and performing substantially the same duties to request to be considered for layoff if no placement options are available for employee(s) initially identified for layoff.⁶

Based on a review of the submitted documentation, it does not appear that the agency's action violated a mandatory policy provision or was without a reasoned basis. Rather, the agency sought to restructure the Division of Building and Fire Regulation due to "several major events" that "changed the concept of [the 2007 organizational] structure and eventually rocked the basis of its very foundation need," especially in light of the fact that thirty positions were eliminated when the State Fire Marshall Office moved out of the Division. Moreover, the agency submitted detailed documentation reflecting what work units would be affected and what business functions would be eliminated or reassigned during the reorganization. In addition, the agency appears to have reviewed its vacant positions to determine if there was a placement option for the grievant and subsequently determined not to offer other employees the option to consider layoff in lieu of the grievant because "[t]here was no one performing substantially the same duties in [the TAS Office]."

The grievant also alleges the agency displayed "preferential employment/hiring practices" as well as "personal favoritism among management staff" in its layoff sequence because it decided to retain a less-senior, probationary employee within the Division of Building and Fire Regulation instead of the grievant. However, the grievance fails to raise a sufficient question as to whether the agency's reorganization was arbitrary or capricious. For example, one

⁴ See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); see also, e.g., EDR Ruling No. 2008-1879 and EDR Ruling No. 2011-2856.

⁵ DHRM Policy 1.30, *Layoff*.

⁶ *Id.*

of the primary objectives of the reorganization was to eliminate the TAS Office work unit, yet maintain the state building code administrative work unit. As such, it cannot be said that the agency lacked a reasoned basis in deciding to eliminate two positions within the TAS Office work unit and to only eliminate one administrative position within the state building code administrative work unit.

We also note the retained employee's Employee Work Profile (EWP) reflects that her role title is Architect/Engineer Manager II (State Buildings Code Director), within the state building code administrative work unit, and primarily oversees building inspections, manufactured and industrialized buildings, applying building codes, and investigating complaints of violations of code. The grievant's role title in her former EWP was Program Administration Manager III (Associate Director), within the TAS Office work unit, and primarily oversaw technical assistance, training programs, and administrative business functions. Moreover, the grievant's 2006 initial vacant job position notification also reflected the grievant's position as Program Administration Manager III (Associate Director of TASO), contrary to the grievant's allegations. Hence, the grievant has failed to raise a sufficient question as to whether the agency's decision to retain the probationary employee was arbitrary or capricious; rather, the agency's decision appears to have been based on that individual's work unit, role title, and job responsibilities.

While the grievant may disagree with the agency's rationale for the reorganization, such disagreement does not mean that these actions were plainly inconsistent or otherwise arbitrary or capricious. EDR has reviewed nothing in this case that supports the grievant's contentions. Even if the State Building Code Director absorbed some of the grievant's duties, it does not appear that this position was performing substantially the same work as the grievant's position such that the layoff sequence would have been implicated between the two. As such, this grievance does not qualify for hearing.

Retaliation

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;⁷ (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity;⁸ 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

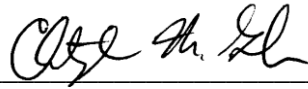
⁷ See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

⁸ As noted in EDR Ruling Nos. 2013-3446, 2013-3447, although for the past six years EDR has used the "materially adverse action" standard for retaliation claims, we are returning to the "adverse employment action" standard for the assessment of all claims, including retaliation, as to whether they qualify for hearing. See Va. Code § 2.2-3004(A).

stated reason was a mere pretext or excuse for retaliation.⁹ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹⁰

In this case, the grievant alleges agency management retaliated against her when it laid her off. Specifically, she alleges the agency retaliated against her because she had voiced her concerns about "questionable business and financial practices" to the agency and to the Virginia Department of Accounts. Reporting an incidence of fraud, abuse, or gross mismanagement is clearly a protected activity.¹¹ However, the grievance does not raise a sufficient question as to whether there was a causal link between the protected activity and the grieved action. Rather, as discussed above, the layoff and reorganization decisions appear to have been based on appropriate assessments of the relevant positions and accomplished based on reasonable business needs. Although the grievant's layoff was an adverse employment action, the agency has offered a reasonable explanation as to why it eliminated her position. The grievant has not provided any indication that the agency's explanation is pretextual. As such, the grievant's claims of retaliation do not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.¹²



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⁹ *E.g.*, *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005); *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000).

¹⁰ *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

¹¹ *See Va. Code § 2.2-3004(A); Grievance Procedure Manual § 4.1(b)(4).*

¹² *Va. Code § 2.2-1202.1(5).*