

Issues: Compliance – Grievance Procedure (30-Day Rule), and Qualification – Separation from State (Layoff); Ruling Date: June 10, 2013; Ruling No. 2013-3627; Agency: Department of Juvenile Justice; Outcome: Grievant in Compliance; Not Qualified.



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

COMPLIANCE AND QUALIFICATION RULING

In the matter of the Department of Juvenile Justice
Ruling Number 2013-3627
June 10, 2013

The grievant has requested a compliance ruling on whether his April 30, 2013 grievance with the Department of Juvenile Justice (the “agency”) was timely initiated. Because this grievance is at the stage of the management resolution process at which the grievant could appeal to EDR for a qualification determination, this ruling will also address whether the grievance qualifies for a hearing. For the reasons discussed below, this grievance was timely filed, and does not qualify for a hearing.

FACTS

On or about February 11, 2013, the grievant received a “Notice of Layoff or Placement” form from the agency, notifying him that his position as a Trades Technician IV was scheduled for abolishment. On the form, the agency offered the grievant the option of a placement as a Trades Technician III with a reduced work title and role, but with no reduction in salary, or being placed on separated-layoff. The placement offered was at a different facility, but did not require the grievant to relocate. The grievant accepted the placement and signed the Notice of Layoff or Placement form on February 13, 2013.

The grievant filed a grievance challenging the abolition of his former position and his placement offer on April 30, 2013. The grievant was officially transferred on May 3, 2013. On May 25, 2013, a position as a Trade Technician IV at the grievant’s new facility became available. Because the grievant had recall rights to this position, the agency offered it to him and he accepted.

After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. In its qualification decision, the agency also administratively closed the grievance due to noncompliance with the grievance procedure, stating that it was not timely filed because the grievant signed the Notice of Layoff or Placement form on February 13, 2013, but did not file the grievance until April 30, 2013, more than 30 calendar days afterwards. The grievant now appeals that determination to the Office of Employment Dispute Resolution (“EDR”).

DISCUSSION

Compliance

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he knew or should have known of the event or action that is the basis of the grievance.¹ When an employee initiates a grievance beyond the 30 calendar-day period without just cause, the grievance is not in compliance with the grievance procedure and may be administratively closed.

Here, the event that forms the basis of the April 30, 2013 grievance is the grievant's placement into a role with a reduced work title and role at a different facility. According to the agency, the grievant knew of this placement on February 13, 2013, the day he signed the Notice of Placement or Layoff, and thus he should have initiated his grievance within 30 calendar days of that date, or not later than March 15, 2013. As EDR has previously held, however, the event forming the basis of such a grievance is the actual effective date of the placement, not a grievant's receipt of the Notice of Placement or Layoff that such an action will likely occur in the future.² Although the grievant accepted the placement on February 13, 2013, he was not required to initiate a grievance challenging the placement process until that process was complete, which occurred when his transfer became effective on May 3, 2013.

Rather than requiring a grievant to separately challenge individual actions leading up and contributing to a placement due to layoff, the interests of uniformity support allowing a grievant who is offered placement through the layoff process to grieve that placement once it is final. An employee is not prevented from initiating a grievance prior to the actual date of placement, but he is not required to do so. Consequently, as long as a grievant has initiated a grievance within 30 calendar days of his/her effective date of placement, the grievance will be considered timely. The grievant in this case initiated the grievance on April 30, 2013, before the effective date of his placement, and thus the challenge to his placement is timely. Furthermore, because the agency administratively closed the grievance in its response denying qualification for a hearing, EDR will also now address the grievant's arguments as to whether the grievance qualifies for a hearing.

Qualification

By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as layoff, 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 For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be

¹ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4.

² EDR Ruling No. 2011-2707; EDR Ruling No. 2010-2623; EDR Ruling No. 2010-2416. The grievant's Notice of Placement or Layoff indicates that his placement would become effective on or before June 10, 2013. In challenges to layoffs, EDR has used the effective date of layoff (or placement) as the day the 30-day filing clock begins to run because circumstances can change from the time the employee receives his Notice of Placement or Layoff and the time that he is actually laid off or begins work in the new position.

³ Va. Code § 2.2-3004(C); *see Grievance Procedure Manual* § 4.1(b), (c).

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.

The intent of Department of Human Resource Management (“DHRM”) Policy 1.30 (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”⁴ The Layoff Policy mandates that each agency identify employees for layoff in a manner consistent with business needs and the policy’s provisions, including provisions governing placement opportunities within an agency prior to layoff.⁵ During the time between Initial Notice and Final Notice of Layoff, the agency shall attempt to identify internal placement options for its employees.⁶ 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.”⁷ 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.”⁸

The grievant appears to argue that the agency did not consider his seniority in determining which positions at his facility should be abolished and which should remain. The Layoff Policy, however, does not state that agencies must select positions to be impacted by layoff based on seniority. Instead, agencies identify “work that is no longer needed or that must be reassigned” in a manner that is “consistent with their business needs and the provisions of [the Layoff Policy].”⁹ Agencies consider seniority only in two situations: (1) employees who perform “substantially the same work” in the same “work unit, geographic area, and Role” are selected for layoff from least senior through most senior, and (2) employees who are impacted by layoff are offered internal placements based on seniority. In this case, the agency determined that the duties of the grievant’s position could be absorbed by other positions that would remain in place at the facility. The grievant was the only employee at the facility in his particular work title and role. Because no other positions shared those characteristics, the grievant was the only affected employee, and thus there was no reason for the agency to consider seniority under policy. As a result, the agency did not misapply or unfairly apply the Layoff Policy in making and implementing its decision to abolish the grievant’s position and offer him an internal placement option, and the grievance does not qualify for a hearing.

EDR’s qualification rulings are final and nonappealable.¹⁰



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⁴ DHRM Policy 1.30, *Layoff*.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* (emphasis in original).

⁹ *Id.*

¹⁰ Va. Code § 2.2-1202.1(5).