Issues: Qualification - Separation from State (Layoff); Discrimination (Age, Gender, Race); and Retaliation (Other Protected Right); Ruling Date: June 21, 2013; Ruling No.2013-3631; Agency: State Board of Elections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the State Board of Elections
Ruling Number 2013-3631
June 21, 2013

The grievant has requested a ruling on whether her April 2, 2013 grievance with the State Board of Elections (the "agency") is qualified for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On March 8, 2013, the grievant received a "Notice of Layoff or Placement" form from the agency, notifying her that her position as an Administrative and Office Specialist III was scheduled for abolishment and that her layoff would be effective March 25, 2013. On the form, the agency stated that there were currently no placement opportunities available within the agency. Beginning on March 11, the agency placed the grievant on pre-layoff leave until her layoff became effective on March 25. The grievant filed a grievance challenging the abolishment of her position and her layoff on April 2, 2013. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to the Office of Employment Dispute Resolution ("EDR").

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]

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

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 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] In this case, the grievant has experienced an adverse employment action because she was laid off.

Misapplication/Unfair Application of Policy

The grievant asserts that the agency misapplied policy in laying her off for several reasons. She specifically claims that: (1) the agency improperly identified her position for abolishment; (2) the agency did not offer her an internal placement before her layoff became effective; and (3) she did not receive preferential employment rights prior to or after her layoff became effective. 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.

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 . . . ."[7] 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.[8] During the time between Initial Notice and Final Notice of Layoff, the agency shall attempt to identify internal placement options for its employees.[9] 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."[10] 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."[11]

The grievant argues that the agency improperly identified her position for abolishment because it did not take into account her seniority and job duties, and also did not conduct a written study recommending positions to be abolished. In determining how to implement the

[4] *See Grievance Procedure Manual* § 4.1(b).
[5] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[7] DHRM Policy 1.30, *Layoff*.
[8] *Id*.
[9] *Id*.
[10] *Id.*
[11] *Id.* (emphasis in original).

Layoff Policy, 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]."[12] Positions to be impacted by layoff are not chosen based on the length of service of members in those positions, nor is a formal committee or study group required as part of the layoff process. Seniority is a factor in the layoff process in only two situations: (1) agencies select employees who perform "substantially the same work" in the same "work unit, geographic area, and Role" for layoff from least senior through most senior, and (2) agencies offer internal placements to employees who are impacted by layoff by based on seniority.

In this case, agency management evaluated its budgetary needs and the grievant's job responsibilities and concluded that those duties could either be automated or shifted to other employees. For example, the grievant's Employee Work Profile stated that 60% of her core responsibilities involved "producing voter history and registration data and the delivery of that data to clients." She also assisted with answering telephone calls and entering voter registration data, and occasionally performed other duties. The agency is currently developing a process to automate the grievant's primary duty, the production and delivery of voter history and registration data, and has divided her other duties among several employees. In other words, the agency determined that the grievant's core job responsibilities were no longer needed because of the impending automated process, and that the remainder of her duties could be effectively reassigned to other employees. Furthermore, because the grievant was the only affected employee in her particular work title and Role, the agency was not required to consider her seniority in selecting her for layoff. After conducting this analysis, the agency decided that the grievant's position should be abolished.

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.[13] While the grievant may disagree with the agency's assessments, she has not presented evidence sufficient to support her assertion that other positions should have been abolished rather than her own, or that the agency's actions were otherwise arbitrary or capricious. Further, the grievant has not demonstrated that the agency misapplied and/or unfairly applied any mandatory provision in the Layoff Policy, or that the decision to abolish her position was so unfair that it amounted to a disregard of the Layoff Policy's intent. Accordingly, the grievance does not qualify for a hearing on this basis.

In addition, the grievant asserts that the agency misapplied the Layoff Policy by not offering her an internal placement with the agency. The Layoff Policy states that "[d]uring the time between Initial Notice and Final Notice of Layoff," agencies must identify internal placement options for employees and attempt to place them by seniority to positions in their

[12] *Id.*
[13] *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)."

current or a lower Pay Band and for which they are minimally qualified.[14] The grievant states that there is currently an open position in Mail Processing and that the agency hired a Training Coordinator shortly before she received her Notice of Layoff or Placement. She argues that there was an intentional "manipulation in the timing" of her layoff to avoid placing her in the Training Coordinator position. A review of the agency's recent job postings shows that there are currently no Mail Processing positions available.[15] Furthermore, and regardless of the alleged manipulation in the timing of her layoff, the grievant was not an appropriate candidate for placement in the Training Coordinator position; it was in Pay Band 4, while the grievant's position was in Pay Band 3. As a result, the grievance does not qualify for a hearing on this basis.

The grievant further argues that, both before and after her layoff became effective, she was not given preferential employment rights according to the Layoff Policy. The Layoff Policy states that an employee scheduled to be placed on leave without pay-layoff has the right to obtain a position "for which he or she is *minimally qualified* in another Executive Branch agency without competition . . . in the same or lower Pay Band as [his or her] current position", and that an employee on leave without pay-layoff has the right to obtain a position "for which he or she is *minimally qualified* in another Executive Branch agency without competition . . . in the same Role as [his or her] former position."[16] In furtherance of these rights, agencies provide Interagency Placement Screening Forms ("Yellow Forms") for employees to use prior to the effective date of layoff, and Preferential Hiring Cards ("Blue Cards") for employees to use after the effective date of layoff.[17] The agency presented the grievant with Yellow Forms and Blue Cards on March 8, 2013, the date that she received her Notice of Layoff or Placement. While agencies must facilitate an employee's search for employment in this way, they are not required to proactively search for positions on an employee's behalf, although it is in their economic interest to do so. However, it is ultimately the employee's responsibility to seek out and apply for vacant positions with other agencies. The agency fulfilled its obligations under the Layoff Policy and the grievance does not qualify for a hearing on this basis.

Discrimination

The grievant argues that her layoff was discriminatory, stating that the agency chose to lay her off because she is African-American, female, and over the age of forty. Grievances that may be qualified for a hearing include actions related to related to discrimination on the grounds of race, color, religion, political affiliation, age, disability, national origin or sex.[18] 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

[14] DHRM Policy 1.30, *Layoff*.
[15] The only position that has been filled since the grievant's layoff is one as a Senior Data Architect, which is not referenced in the grievance.
[16] DHRM Policy 1.30, *Layoff* (emphasis in original).
[17] *Id*.
[18] *See Grievance Procedure Manual* § 4.1(b).

will not be qualified for a hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[19]

In this case, the grievant's claims that the agency has laid off only African-American employees during the past three years, and that younger employees of other races were treated more favorably than her, could raise a question as to whether her layoff was based on discrimination. The agency, however, has demonstrated that legitimate business reasons led to her layoff, as discussed above. Furthermore, during the management response steps the agency noted that its current work force consists of approximately 41% minorities, 59% females, and 76% over the age of forty. While not dispositive on their own, these statistics, in combination with the details of the agency's business analysis, support the position that the grievant's layoff was based on legitimate, nondiscriminatory business reasons. While the grievant may disagree with the agency's decision to lay her off, such disagreement alone does not establish that the agency's reason for her layoff was discriminatory, and the grievant has not presented facts showing that the agency's business reasons were pretextual. Accordingly, the grievance does not qualify for a hearing on this basis.

Retaliation

The grievant claims that her layoff was retaliatory because the grievant criticized her supervisors about agency policies shortly before the agency notified her that it was abolishing her position. 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;[20] (2) the employee suffered an adverse 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.[21] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[22]

The grievant claims that she was "overheard questioning [her] supervisor and other managers for apparently misusing or abusing the telework policy." She also spoke with another employee about the agency "not providing legal guidance and support" to clients shortly before

[19] *See* Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. Apr. 8, 1998).
[20] *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).
[21] *E.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).
[22] *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981).

she received her Notice of Placement or Layoff.[23] Even assuming that the grievant engaged in protected activity by having the conversations she describes, she has not presented facts that establish a connection between her layoff and any such activity. The agency, for example, has noted that it made the decision to abolish her position before the grievant allegedly made the statement about legal guidance and support for clients. 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.

EDR's qualification rulings are final and nonappealable.[24]

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[23] In addition, it appears that the grievant engaged in protected activity by participating in the grievance process over two years ago. The grievant, however, has explicitly stated that she is not alleging retaliation based on past participation in the grievance process, and this ruling will not address that potential claim.
[24] Va. Code § 2.2-1202.1(5).