Issue: Qualification – Separation from State (Layoff); Ruling Date: July 9, 2015; Ruling No. 2015-4164; Agency: College of William and Mary; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of the College of William and Mary
Ruling Number 2015-4164
July 9, 2015

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 27, 2015 grievance with the College of William and Mary (the "College") is qualified for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant was employed by the College as a Stewardship Officer. On March 31, 2015, the grievant apparently received a "Notice of Layoff or Placement" form from the College, notifying her that her position was scheduled for abolishment and that her layoff would be effective May 1, 2015. The grievant filed a grievance challenging the abolishment of her position and her layoff on April 27, 2015. After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the College President to qualify the grievance for hearing. He denied the request, and the grievant now appeals that determination to 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]

[1] *See Grievance Procedure Manual* §§ 4.1(a), (b).
[2] *See* Va. Code § 2.2-3004(B).
[3] *Id.* §§ 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 College misapplied policy in laying her off. 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 DHRM Policy 1.30, *Layoff* (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 appears to argue that the College improperly identified her position for abolishment because it did not take into account her seniority and job duties, and also has not demonstrated a financial need to eliminate her position. In determining how to implement the 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

[4] *See Grievance Procedure Manual* § 4.1(b).
[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*.
[10] *Id.*
[11] *Id.*
[12] *Id.*

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.[13]

In this case, the College identified a need to increase the return on investment on the money going toward development and alumni relations. As a result, the College concluded it needed to do a "better job of streamlining processes and realigning resources . . . ." As part of this process, the College purchased a new software package that will eliminate "the data entry portion" of the grievant's position. Ultimately, the College concluded that "[t]he agency and business need to realign positions in favor of a front-facing, revenue generating development officer and to streamline back-end business processes called for elimination of the [grievant's] position." The College was not required to consider the grievant's seniority in selecting her for layoff because she was the only affected employee in her particular work title and Role.

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.[14] 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 College misapplied the Layoff Policy by not offering her an internal placement. 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 current or a lower Pay Band and for which they are minimally qualified.[15] The College was unable to find an available open position that the grievant agreed to accept. The grievant has not identified any available positions for which she is qualified, and the College states that its Human Resources Department has worked with, and will continue to work with, the grievant in identifying any appropriate job vacancies. As there is insufficient evidence that the College has failed to meet its obligations regarding placement, the grievance does not qualify for a hearing on this basis.

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[13] *Id.*
[14] *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)."
[15] DHRM Policy 1.30, *Layoff.*

Discrimination

The grievant argues that the College chose to lay her off because of her age. 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.[16] 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.[17]

In this case, the grievant asserts that to her knowledge she is the only employee over sixty, and she is the only employee who was laid off. The College, however, has demonstrated that legitimate business reasons led to her layoff, as discussed above. While the grievant may disagree with the decision to lay her off, such disagreement alone does not establish that the College's real reason for her layoff was discriminatory, and there is otherwise insufficient evidence to show that the College's stated business reasons were pretextual. Accordingly, the grievance does not qualify for a hearing on this basis.

Retaliation

The grievant also claims that her layoff was retaliatory because she raised concerns about the failure of other employees to follow College policy regarding document sharing. 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;[18] (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.[19] Ultimately, to support a finding of retaliation, EDR must find that the protected activity was a but-for cause of the alleged adverse action by the employer.[20]

The grievant claims that after raising her concerns regarding the documents, her supervisor "sees [her] as a hindrance" or believes that "maybe [the grievant is] difficult"; and she suggests that such views led to her layoff. Assuming, for the purposes of this ruling only, that

[16] *See Grievance Procedure Manual* § 4.1(b).
[17] *See* Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. Apr. 8, 1998).
[18] *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)(4).
[19] *See, e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[20] *See id.* (citing Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013)).

the grievant engaged in protected activity by engaging in the conduct she describes, there is insufficient evidence to show that the College's business reasons are pretextual or that the "but for" cause of her layoff was retaliation. Accordingly, the grievant's claim of retaliation does not qualify for hearing.

CONCLUSION

For all the foregoing reasons, the grievant's April 27, 2015 grievance is not qualified for hearing. EDR's qualification rulings are final and nonappealable.[21]

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Office of Employment Dispute Resolution

[21] Va. Code § 2.2-1202.1(5).