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QUALIFICATION RULING

In the matter of the Virginia Community College System
Ruling Number 2020-4964
August 28, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR")[1] at the Virginia Department of Human Resource Management ("DHRM") on whether his July 10, 2019 grievance with the Virginia Community College System (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS AND PROCEDURAL BACKGROUND

Beginning in 2012, the grievant was employed in a budget office ("Office 1") at one of the agency's community colleges. In 2015, the agency issued disciplinary action to the grievant and terminated his employment. The grievant filed a grievance with EDR to challenge his termination and, after a hearing on that matter, a hearing officer issued a decision ordering the agency to reinstate him to his former position or an equivalent position. In January 2016, the grievant was reinstated to a position in his former Role, but in a different budget office ("Office 2") than the position he had occupied prior to his termination.

On or about June 18, 2019, the agency notified the grievant that his position in Office 2 was scheduled for abolishment and that he would be laid off effective August 1, 2019. The grievant filed a grievance with the agency on July 10, 2019, challenging its decision to abolish his position and his impending layoff. More specifically, the grievant argues that, in 2016, the agency improperly reinstated him to a position in Office 2 rather than Office 1, and that the agency decided to abolish his position as a form of retaliation due to his past grievance activity. In a third step response dated July 29, 2019, the agency head determined that the grievance record did not contain evidence to demonstrate that the grievant's layoff was retaliatory or otherwise improper and declined to qualify the grievance for a hearing. The third step response further stated that the next procedural step available to the grievant would be an appeal to EDR.

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

The grievant then filed a dismissal grievance with EDR on July 30, 2019, challenging his layoff in essentially the same terms as those laid out in the July 10 grievance.[2] Under the grievance procedure, only "terminations due to formal discipline or unsatisfactory job performance" may be challenged by filing a dismissal grievance directly with EDR and proceeding directly to a hearing.[3] Because the grievant is disputing a management action that does not automatically qualify for a hearing,[4] the July 10 grievance that he filed with the agency was the correct method of challenging his layoff under the grievance procedure. Accordingly, and considering that the agency head has effectively denied the grievant's request for a hearing in the third step response, EDR will address the July 30 dismissal grievance as an appeal of the agency head's qualification decision.

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.[5] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[6] Thus, claims relating to issues such as 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.[7]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[8] 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."[9] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[10] In this case, the grievant has experienced an adverse employment action because he was laid off.

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[2] The grievant submitted an amended dismissal grievance to EDR on August 5, 2019, containing essentially the same allegations as both the July 10 grievance and the original July 30 dismissal grievance.
[3] *Grievance Procedure Manual* § 2.5.
[4] *See id.* § 4.1.
[5] *See id.* §§ 4.1(a), (b).
[6] *See* Va. Code § 2.2-3004(B).
[7] *Id.* §§ 2.2-3004(A), 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[8] *See Grievance Procedure Manual* § 4.1(b).
[9] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[10] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

Misapplication/Unfair Application of Policy

In his grievance, the grievant essentially contends that the agency has misapplied and/or unfairly applied DHRM Policy 1.30, *Layoff*, by abolishing his position and laying him off. For example, the grievant claims that his position is actually "not being abolished" because he has "been training two new probationary staff to perform [his] duties and to essentially replace [him]." In addition, the grievant appears to assert that his position should not have been abolished because the agency improperly reinstated him to a position in Office 2 in 2016, rather than returning him to his original position in Office 1. In support of this argument, the grievant alleges that he was not reinstated to a classified position in 2016, that the funding for his position "remained with [Office 1] following [his] reinstatement," and that he "did not voluntarily apply to work" in Office 2. 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*, 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 . . . ."[11] Policy 1.30 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.[12] During the time between Initial Notice and Final Notice of Layoff, the agency shall attempt to identify internal placement options for its employees.[13] 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."[14] 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."[15]

To the extent the grievant is attempting to challenge the agency's alleged failure to properly implement the 2015 hearing decision by reinstating him to a position in Office 2 rather than his former position in Office 1, EDR does not have the authority to address that claim. Under the grievance procedure, a hearing officer may order "[r]einstatement to the employee's former position or, if occupied, to an equivalent position,"[16] and the 2015 hearing decision reinstating the grievant stated the same. It appears as if the grievant's former position was no longer vacant when he was reinstated, and that the agency determined the position in Office 2 was equivalent to his former position. While not dispositive to the question of reinstatement, EDR also notes that the grievant's Role and salary were unchanged when he was reinstated. In any event, the grievance procedure provides that, if a grievant believes that his employing agency has not properly implemented a hearing officer's final decision, he may petition the

[11] DHRM Policy 1.30, *Layoff*.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* (emphasis in original).
[16] *Grievance Procedure Manual* § 5.9(a).

circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the decision.[17] As a result, any issues regarding the reinstatement of the grievant in 2016 are matters of implementation and cannot be considered by EDR in this ruling.[18]

What is clear, however, is that the information in the grievance record demonstrates that the funding for the grievant's position did not change as a result of his reinstatement in Office 2. According to the agency, the grievant worked in a classified position in Office 1 prior to his termination in 2015, and was reinstated to a classified position in Office 2 in 2016.[19] In May 2019, the agency identified several positions for abolishment due to changing business needs at the community college where the grievant worked, as well as the agency as a whole. In 2018, some job functions at the grievant's community college were shifted to an agency-wide Shared Services Center, with the result that fewer employees were needed on-site at the community college to perform those functions. Furthermore, the agency determined that budgetary and operational needs in Office 2 justified the elimination of that unit and the reassignment of the job responsibilities performed by employees in Office 2 to employees in Office 1. The restructuring process as a whole appears to have impacted four employees, including the grievant; three classified positions were abolished as of August 1, 2019. In other words, EDR's review of the grievance record indicates that the grievant's position was abolished based on a reasoned consideration of business needs at the community college, not because the agency failed to reinstate him to a classified position or to fund his position in Office 2 differently than his original position in Office 1.

Additionally, EDR has considered the grievant's allegation that the agency merely shifted his job responsibilities to two newly-hired in employees in Office 1, in what the grievant believes was a method of laying him off without actually eliminating his position. In 2018, the agency hired the two employees in question to work in Office 1. They were not recruited as part of the restructuring that resulted in the abolishment of the grievant's position. Indeed, the two employees were hired over six months before the restructuring was proposed by agency management. According to the agency, the grievant worked with these two employees on at least one project that involved staff from both Office 1 and Office 2, but he was not responsible for training them to perform his job. The agency has also indicated that, while it considered whether there were placement options available to the grievant in lieu of layoff, there were no vacant positions into which he could have been placed. Although the grievant's concerns about this issue are understandable, EDR has not reviewed evidence to suggest that the agency improperly reassigned the grievant's job tasks with the intent of avoiding its obligation to consider placement options in lieu of layoff under Policy 1.30. It appears instead that the agency appropriately exercised its discretion to reallocate job responsibilities consistent with Policy 1.30 and the business needs identified as part of the restructuring process discussed above.

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[17] Va. Code § 2.2-3006(D); *Grievance Procedure Manual* § 7.3(c).

[18] *Grievance Procedure Manual* § 2.4 (stating that a grievance may not "challeng[e] the agency's implementation of or failure to implement a hearing officer's decision"). Although it is unclear whether the grievant may still seek an implementation order because he has now been laid off, he should contact the appropriate circuit court for further information and guidance about any potential remedies related to implementation of the 2015 hearing decision.

[19] It appears that some employees in Office 2 worked in restricted positions that were funded, at least in part, through revenue generated by Office 2. The grievant was not reinstated to a restricted position.

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 action like this one 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.[20] While the grievant may disagree with the agency's assessments in this case, he has not presented evidence sufficient to support his assertion that other positions should have been abolished rather than his 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 Policy 1.30, or that the decision to abolish his position was so unfair that it amounted to a disregard of the intent of Policy 1.30. Accordingly, the grievance does not qualify for a hearing on this basis.

Retaliation

The grievant further argues that the agency laid him off to retaliate against him because he used the grievance procedure to challenge his termination in 2015, and was subsequently reinstated in 2016 pursuant to a hearing officer's order. For a claim of retaliation to qualify for hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[21] (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.[22] Ultimately, to support a finding of retaliation, EDR must find that the evidence presented raises a sufficient question whether the protected activity was a but-for cause of the alleged adverse action by the employer.[23]

The grievant indisputably engaged in protected activity in 2015 and 2016 by challenging his termination through the grievance procedure, and he experienced an adverse employment action in 2019 when the agency abolished his position and laid him off. However, the grievant has not presented evidence that raises a sufficient question as to whether the agency's actions were the result of a retaliatory motive, rather than legitimate operational needs at the community college. For example, over three years have passed since the grievant was reinstated, and the grievant does not appear to have made any other allegations of retaliation based on his previous grievance activity during that time. Most importantly, the agency has provided legitimate,

[20] *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").
[21] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the agency's 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).
[22] *See, e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[23] *See id.* (citing Univ. Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013)).

nonretaliatory business reasons for its decision to lay him off as part of a restructuring process that impacted at least three other employees, as discussed more fully above. Furthermore, and to the extent EDR may assume there was any retaliatory motive, there does not appear to be evidence raising a sufficient question that such a motive was the but-for cause of the grievant's layoff. Accordingly, the grievance does not qualify for a hearing on this basis.

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

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[24] *See* Va. Code § 2.2-1202.1(5).