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QUALIFICATION RULING

In the matter of Virginia Polytechnic Institute and State University
Ruling Number 2020-5120
August 19, 2020

The grievant seeks a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") as to whether this grievance with Virginia Polytechnic Institute and State University (the "University" or "agency") qualifies for a hearing. For the reasons set forth below, EDR finds that the grievance is not qualified for a hearing.

FACTS & PROCEDURAL HISTORY

The University's dining services division had within its operations for many years a catering unit. The catering unit operated a variety of events for the University and some external customers based on contracts and requests. For instance, the catering unit provided food services for certain large and small campus events, catering at the University's arts center, and club-level catering for the University's stadium during football season, among other events. The catering department operated under a self-funded budget and had not generated sufficient revenue to cover its costs in earlier years, but in the past two years, it is reported that the catering unit was supporting itself. However, the pandemic eroded the catering unit's current and future business prospects. Furthermore, the University's athletics department had awarded a contract to provide food services to a different contractor.

The pandemic forced the University to reduce dining services operations in a variety of ways. With students no longer on campus and normal summer activities not occurring, the University took various actions that impacted staff across dining services, including terminations, layoffs, and furloughs. The University at first decided to furlough the catering unit staff. However, that decision was apparently changed due to the long-term sustainability of catering as a function of dining services. On June 2, 2020, the catering unit's full-time staff were informed they were being laid off because the entire unit was being eliminated.[1] The catering unit remained employed until the effective date of the layoffs: June 30, 2020. The University was unable to offer placement options to any of the full-time employees in the catering unit and, consequently, all of these individuals were separated from employment with the University.

[1] A number of part-time and student employees of the catering unit also lost their positions.

The grievant filed the current grievance challenging the elimination of the catering unit and the resulting layoff. The grievance was filed directly with EDR. Although normally such a grievance would be filed as an expedited grievance with the University,[2] the University elected to waive any management resolution steps and allow EDR to proceed to review the grievance at the qualification stage. Accordingly, the purpose of this ruling is to determine whether there is a basis to qualify the grievance for a hearing under the grievance statutes.

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.[3] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[4] Thus, claims relating to issues such as layoff 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.[5] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must 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 applicable policy's intent.

Further, while grievances that allege retaliation or other misapplication of policy may qualify for a hearing, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."[6] Typically, then, 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8] The grievant has unquestionably challenged an adverse employment action.

The relevant policy at issue is the University's *Layoff Policy for Staff*, No. 4240 ("Layoff Policy"). The Layoff Policy "defines a specific sequence of layoff, placement/preferential hiring rights, and benefits for eligible employees affected by layoff."[9] "After identifying the work that is no longer needed or that must be reassigned, the employees within the same work unit, geographic area, and role title who are performing substantially the same work . . . are selected for layoff" according to the sequence defined by the policy.[10] Once the employees impacted by layoff are identified, "the Division of Human Resources will attempt to place the employees with placement rights in other salaried staff positions at the same or lower pay band for which they are minimally

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[2] *See Grievance Procedure Manual* § 3.4
[3] *See id.* § 4.1.
[4] Va. Code § 2.2-3004(B).
[5] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[6] Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).
[7] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[9] Layoff Policy § 2.0.
[10] *Id.* § 2.1.

qualified."[11] The grievant has alleged various issues with the layoff and placement decisions, which are discussed below.

The grievant challenges the University's decision to eliminate the catering unit rather reviewing the entirety of dining services to determine those who would be affected by layoff.[12] The Layoff Policy states:

> Prior to implementing layoff, the university must determine which work units will be affected. Normally the work unit is defined as the academic or administrative department in which the position(s) identified for abolishment is located. In some situations, it may be reasonable to define the work unit in a way other than the department. Factors such as organizational structure, business operations, funding sources, and circumstances precipitating the need for a workforce reduction or re-organization may be considered when defining the work unit.[13]

This policy language provides the University with significant discretion to define the applicable work unit in the manner done here. Although employees who work in the catering unit and other dining services functions perform similar food-related tasks, the catering unit has a different function and a separate self-funding source. Accordingly, there appear to be relevant factors listed in the policy that would support the University's decision to define the catering unit as the work unit to be impacted by layoff.

Because all employees in the catering unit were impacted by layoff, there is no issue with the layoff sequence in this case.[14] The grievant has alleged that "seniority" was not followed, but seniority is only an issue in determining the sequence of employees impacted by layoff within the work unit.[15] That employees in other areas of dining services with less seniority or who were still on probation retained their employment does not appear to be a violation of policy. By defining the work unit impacted as the catering unit, the University did not need to assess seniority between employees in the catering unit and those in other areas of dining services.[16]

EDR has also reviewed the University's decision that no employee in the catering unit could be placed into a vacant position. The circumstances that gave rise to the need to implement layoff also affected what positions were needed in dining services more widely. Further, the University was under a hiring freeze that impacted available positions. The Layoff Policy defines a "valid vacancy" as a "position that is fully funded, has been approved by Senior Administration to be filled, and is approved for posting by the hiring official after consultation with Human Resources."[17] The University's human resources division determined that there were no valid vacancies available for placement. Although the grievant has provided evidence that indicates there were open positions in dining services to which placement might be available, the documentation does not demonstrate that these positions were valid vacancies within the definition

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[11] *Id.* § 3.5.1.
[12] There is some indication that employees in other areas of dining services were also impacted. Regardless of this issue, EDR will analyze this question as if the catering department alone was impacted.
[13] Layoff Policy § 3.1 (emphasis in original).
[14] *See id.* § 3.3.
[15] *Id.*
[16] *Id.* §§ 2.1, 3.3.
[17] Layoff Policy § 4.0.

of that term under the policy. Furthermore, nothing in the policy authorizes the process of "bumping" less senior employees out of positions to place more senior employees impacted by layoff. Placement is only available to valid open positions. Accordingly, EDR cannot find that the University misapplied the policy in this regard.

The grievant has also identified a potential improper motivation in the University's determination that the catering unit was to be eliminated. There is evidence of conflict between the associate director and the catering unit. While this conflict is concerning,[18] the decisions at issue were also approved at levels far above the associate director. EDR is not persuaded that any existing conflict supplants the overriding long-term sustainability concerns the University identified to support its elimination of the catering unit. In light of the loss of a significant amount of work for the unit and reduced demand during the pandemic, the evidence presented suggests these legitimate factors, rather than personal animus, were the proximate cause of the layoffs.

In summary, 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 in this regard 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.[19] The grievant has not presented evidence sufficient to support an assertion that the agency misapplied and/or unfairly applied any mandatory provision in the Layoff Policy, that the agency's actions were so unfair that they amounted to a disregard of the intent of the Layoff Policy, or that the layoff process was conducted in a manner that was otherwise arbitrary or capricious. Even if EDR were to disagree with the business rationale for the University's decisions, the grievance procedure does not provide a basis to second-guess such matters absent indication of arbitrary or capricious conduct, which is not present here.

For the foregoing reasons, this grievance is not qualified for a hearing. Furthermore, there is no indication that the grievant has been denied any severance or other benefit under the Layoff Policy.[20] However, the grievant retains recall rights for 12 months from the effective date of layoff.[21] While on "leave without pay-layoff" status, the grievant retains grievance rights to challenge improper implementation, if any, of such recall rights or other benefits still due under the Layoff Policy. Accordingly, if the grievant wishes to challenge a failure to be recalled to a valid vacancy, for example, the grievant could file a new grievance with the University and ultimately for consideration by EDR.

EDR's qualification rulings are final and nonappealable.[22]

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[18] Although nothing presented in the grievance alleges either unlawful discrimination or retaliation, a layoff decision motivated by personal conflict could be qualified for a hearing as a misapplication or unfair application of the relevant layoff policy.

[19] *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)."

[20] The grievant raised the fact that pre-layoff leave was not granted. Though such leave is encouraged, the Layoff Policy does not *mandate* that pre-layoff leave be granted. Layoff Policy § 3.5.

[21] *Id.* § 3.5.4.

[22] *See* Va. Code § 2.2-1202.1(5).

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