

Issue: Qualification/Discrimination/Sex; Ruling date: June 25, 2003; Ruling #2003-057 and 2003-095; Agency: Department of Corrections; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF THE DIRECTOR

In the matter of Department of Corrections

No. 2003-057, 2003-095

June 25, 2003

The grievant has requested a ruling on whether her October 30, 2002 and November 5, 2002 grievances initiated with the Department of Corrections (DOC or the agency) qualify for hearing. The October 30, 2002 grievance alleges misapplication of the layoff policy. The November 5, 2002 grievance alleges gender discrimination in the application of the layoff policy. Specifically, the grievant claims that a male employee was offered a position at Correctional Center A after the agency had notified her that there were no available positions at that facility. As relief for both grievances, the grievant requests retirement effective January 1, 2003 and severance benefits. For the reasons discussed below, these grievances do not qualify for hearing.

FACTS

The grievant was employed in a non-security position at Correctional Center B. In April 2002, a budget reduction plan proposed the closure of Correctional Center B in June 2003. On August 13 and 14, 2002, employees were notified that Correctional Center B was being placed in layoff status in anticipation of a revised December 2002 closure date.

On September 27, 2002, employees at Correctional Center B were informed by an employee bulletin that the placement process would begin on September 30, 2002. This bulletin also stated that security and medical personnel would be placed prior to non-security personnel. According to the agency, placement of non-security personnel was delayed temporarily because additional pending budget cuts would potentially impact placement options for non-security employees. Placement of Center B employees began on September 30, 2002.

The grievant was hired by the Commonwealth of Virginia on November 16, 1966 and was the most senior employee at Correctional Center B. On October 28, 2002, the grievant was offered placement in a non-security position at Correctional Center C. Upon being offered the position at Center C, the grievant claims that she repeatedly

inquired as to any placement opportunities at Center A instead.¹ Due to the alleged unavailability of placement options for the grievant at Center A, on October 30, 2002, the grievant accepted the non-security position at Center C. The grievant maintains that many employees with less seniority than she were offered security positions at Center A after she was told there were no available placement options for her at that facility. The agency claims that only those non-security employees who had experience in security or supervising or counseling inmates were offered security positions at Center A and that the grievant did not have the requisite experience. Additionally, the agency asserts that the grievant indicated she was not interested in a security position.

On November 20, 2002, the grievant rescinded her placement at Center C and chose to retire effective January 1, 2003. Thereafter, on February 11, 2003, the third step respondent asked the grievant if she would accept a security position if it were offered to her. The grievant claims the position offered was a security position at Center A, which she turned down.

DISCUSSION

Misapplication of Layoff Policy

For a grievance claiming a misapplication of policy or an 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. If a claim of unfair application of policy or policy misapplication is qualified and proven at a hearing, the relief that a hearing officer can order is limited and may include directing the agency to comply with applicable policy.²

In her October 30, 2002 grievance, the grievant claims that employees who were laid off from Center B were not placed into new positions by seniority. The applicable policy is Department of Human Resource Management (DHRM) Policy No. 1.30, Layoff and DOC Procedure 5-39 *Layoffs; Reductions in Work Force*. Policy 1.30 states that after initial notice, but prior to final notice of layoff, the agency shall attempt to identify internal placement options for its employees.³ “After an agency has identified all employees eligible for placement, an attempt must be made to place them by **seniority** to any valid vacancies agency-wide in the current or a lower Pay Band.”⁴ A valid vacancy is defined as a “vacant classified position that is fully funded and has been approved by the appointing authority to be filled.”⁵ Valid vacancies may include part-time or restricted

¹ The grievant asserts that she desired to be placed at Center A because of its location and her preference to work at a male institution.

² See *Grievance Procedure Manual* § 5.9(a)(5), page 15.

³ See DHRM Policy No. 1.30, page 10.

⁴ *Id.* (emphasis added).

⁵ *Id.* at page 6.

positions.⁶ Placements shall 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.⁷

In the present case, it appears that security personnel at Center B were offered placement prior to the grievant despite the grievant's seniority at Center B.⁸ Therefore, the agency appears to have misapplied the layoff policy. However, there are some cases where qualification is inappropriate even if an agency has misapplied policy and the grievant has suffered a potential adverse employment action. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate where the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In the present case, the requested relief (retirement with severance benefits) is not permitted by policy and other effectual relief is unavailable.⁹ After accepting a placement option that would not have required relocation nor a reduction in salary,¹⁰ the grievant later rescinded her acceptance. An employee who declines such a vacancy is not entitled to severance benefits under DHRM's Layoff and/or Severance Benefits policies.¹¹ Thus, a hearing officer would not have the authority to grant or recommend severance benefits, as that would be inconsistent with policy.¹² Because a hearing could not provide the grievant with any meaningful relief, this issue is not qualified for hearing.

Gender Discrimination

Grievances that may qualify for a hearing include those alleging discrimination on the basis of sex.¹³ To qualify such a grievance for hearing, however, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient

⁶ *Id.*

⁷ *Id.* at page 10.

⁸ A chart detailing the placement of Center B employees shows that the grievant is the most senior employee at Center B, yet was placed subsequent to other Center B employees. Moreover, in Employee Briefing Notes #3 dated September 27, 2002, DOC informs Center B employees that the placement process will begin on September 30, 2002 and that placement of security and medical personnel will occur prior to placement of non-security personnel.

⁹ During this Department's investigation, the grievant informed the investigating Consultant that she only wanted severance benefits as relief and did not wish to be reinstated to any position within the Department of Corrections.

¹⁰ The grievant claims that her job placement at Center C resulted in a reduction in salary due to additional travel costs. However, DHRM Policy 1.30 specifically exempts location of position as a factor in determining whether a reduction in salary has occurred. DHRM Policy 1.30, page 13

¹¹ See DHRM Policy 1.30, page 13, (“[a]n employee who declines a classified vacancy in the same or lower Pay Band that (1) would not require relocation or (2) would not result in a reduction in salary will be separated (separated-layoff) and will not be entitled to other benefits under this policy or to severance benefits.”) See also DHRM Policy 1.57 Severance Benefits.

¹² See *Grievance Procedure Manual* § 5.9, page 15 and Va. Code § 2.2-3006.

¹³ See *Grievance Procedure Manual*, § 4.1(b)(2), page 10.

question as to whether an adverse employment action resulted from prohibited discrimination based on the grievant's protected status, in other words, that because of her gender the grievant was treated differently than other "similarly-situated" employees. If the agency provides a legitimate, nondiscriminatory business reason for its actions, the grievance should not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext or excuse for discrimination.¹⁴

The grievant claims that a male employee was offered a position at Center A after the grievant was allegedly told repeatedly that there were no available positions at that facility. According to the grievant, management's action constitutes gender discrimination. The agency claims that while there were corrections officer positions available at Center A when the grievant was offered placement, the grievant did not have the requisite experience for such a position and did not indicate any interest in security positions. The grievant disputes the agency's allegations.

As a female, the grievant is a member of a protected class. Thus, the grievant must present facts that establish that the alleged discriminatory act occurred *because of* her gender. However, the grievant has presented no evidence to support her claim that the action was based on her gender, and in fact admits that both male and female employees were offered positions at Center A after the grievant was told there were no such positions. Mere allegations, without more, are not enough to support a claim of gender discrimination. In addition, the grievant has failed to come forward with any evidence to establish that she was treated differently than other similarly-situated employees because of her sex. Accordingly, this issue does not qualify for hearing.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, she should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that she does not wish to proceed.

Claudia Farr
Director

¹⁴ *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000).

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