

Issue: Qualification/Management Actions – transfer (non-disciplinary), Separation from state – layoff; Ruling Date: January 21, 2005; Ruling #2004-910; Agency: Virginia Department of Transportation; Outcome: not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Virginia Department of Transportation
Ruling Number 2004-910
January 21, 2005

The grievant has requested a ruling on whether her August 25, 2004 grievance with the Virginia Department of Transportation (VDOT or the agency) qualifies for hearing. She alleges that the agency misapplied and/or unfairly applied policy by rescinding an offer for a job transfer made in conjunction with a layoff. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed with the agency in an Administrative Office Support III position. In May 2004, the agency announced that the grievant's position would be outsourced and offered her an Administrative & Office Specialist III position at another agency facility. The grievant promptly accepted the agency's offer. The grievant was subsequently advised by the agency that she would not be assigned to the position she had been offered and had accepted, but would instead be assigned to another, as-yet-undetermined position. The grievant states that when she was advised of this decision, the agency explained that the position she had been offered was a more advanced position than the one she held and would soon be upgraded to an office manager position.

On August 25, 2004, the grievant initiated a grievance challenging the agency's decision to rescind its offer of the Administrative and Office Specialist III position. After the first-step respondent denied the grievant's request for relief, the grievant advanced the grievance to the second step. In an apparent effort to settle the grievance, the agency offered the grievant an alternative, newly-created Administrative and Office Specialist III position. The newly-created position would have been a lateral transfer from the grievant's current position, and she would have received the same pay in the newly-created position as she would have in the first Administrative and Office Specialist III position offered. Further, the newly-created position would be within commuting distance from the grievant's home, although it would require an increased commuting time of approximately 16 minutes more than the initial Administrative and Office Specialist III position. The grievant considers this new position to be significantly less favorable than the position first offered, because she believes it offers less opportunity for advancement and would require a longer commute. She therefore advanced her grievance to the third resolution step.

The third-step respondent again denied the grievant's request for relief and encouraged the grievant to accept the alternate position. In her written response, the third-step respondent explained that the decision to offer the grievance the Administrative and Office Specialist III position was the result of a failure to communicate between the agency's Human Resources Department and Division management, which resulted in Human Resources being unaware of the Division's intent to reclassify the position. The third-step respondent also noted that after reclassification of the Administrative and Office Specialist III position first offered to the grievant, it would no longer be in the grievant's current pay band.

After receiving the third-step response, the grievant requested that the agency qualify her grievance for hearing. The agency denied the grievant's request. The grievant now requests qualification by this Department.

DISCUSSION

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—in this case DHRM Policy No. 1.30, "Layoff."¹ In addition, the grievant must show that as a result of the alleged misapplication or unfair application, she suffered an adverse employment action.² The grievant alleges that the agency has misapplied and/or unfairly applied policy by refusing to place her in the Administrative and Office Specialist III position she was first offered, and that its actions have resulted in an adverse impact on her employment.

As the grievant has implicitly conceded, no provision of DHRM Policy 1.30 addresses an agency's obligation to honor an offer of transfer to a specific vacancy or an agency's ability to rescind such an offer once accepted.³ While the grievant's frustration over the agency's actions is understandable, in the absence of an express limitation on an agency's right to rescind an accepted offer of transfer, we cannot conclude that the agency has violated any mandatory provision of DHRM Policy 1.30.

Moreover, there is no evidence that the agency's actions were so unfair as to amount to a disregard of the intent of the layoff policy. Although the grievant asserts that another employee affected by the layoff was allowed to transfer into an Administrative and Office Specialist III position at a different facility, she admits that she has no evidence that the agency intends to upgrade or reclassify the position offered to the other employee. Further, the grievant has presented no evidence that the agency's decision to reclassify the position she

¹ There is no agency-specific layoff policy.

² For purposes of this analysis, we assume, without deciding, that the conduct alleged by the grievant would constitute an adverse employment action.

³ See Grievant's appeal of the agency's qualification decision, dated November 8, 2004 ("Please site [sic] the specific policy that states VDOT can make an offer[,] have an acceptance to that offer and then choose not to honor it.")

was initially offered was made in bad faith or with any improper motive.⁴ Accordingly, this grievance is not qualified for a hearing.

We note, however, that while the agency was free in its discretion to rescind the position initially offered to the grievant, the grievant retains her rights under the layoff policy and the agency's duties toward the grievant pursuant to that policy continue. This ruling in no way limits the grievant's right to bring a subsequent grievance if, in the future, the agency fails to act in accordance with the layoff policy.

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 the qualification determination to the circuit court, the grievant 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 wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

Gretchen M. White
EDR Consultant

⁴ To the extent the claim made by the grievant is contractual in nature, it falls outside the grievance procedure administered by this Department and must be pursued, if at all, through judicial means.