

Issue: Qualification/grievant claims age discrimination/misapplication of layoff policy;
Ruling Date: December 27, 2005; Ruling #2006-1109; Agency: Office of
Comprehensive Services for At-Risk Youth and Families; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Office of Comprehensive Services for
At-Risk Youth and Families
Ruling Number 2006-1109
December 27, 2005

The grievant has requested a ruling on whether her April 15, 2005 grievance with the Office of Comprehensive Services for At-Risk Youth and Families (OCS or the agency) qualifies for hearing. The grievant claims that the agency discriminated against her on the basis of age and misapplied and/or unfairly applied the layoff policy. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

Prior to her layoff, the grievant was employed as a Program Administration Manager III with OCS. In her capacity as Program Administration Manager III at OCS, the grievant oversaw the agency's local government assistance and compliance activities and directed and supervised a staff of five in carrying out this function.

According to the agency and the Department of Human Resource Management (DHRM), the Director of OCS and the Secretary of Health and Human Resources jointly requested that DHRM conduct an organizational and staffing study of OCS (the study).¹ At the conclusion of the study, DHRM determined that there were too many layers of management for an agency of this size (i.e., 12 employees) and recommended organizational, staffing and employee compensation changes. One organizational change recommended by DHRM was the elimination of the grievant's management position; the only position recommended for abolition as a result of the study. The study also recommended that some OCS employees receive in-band adjustments and that all OCS employee work profiles (EWP's) and performance plans be revised to reflect any changes in duties and/or reporting relationships.

¹ The agency's stated purpose for the study was to (1) "[a]ssess the organizational structure and recommend improvements that align it with the organization's mission and goals"; (2) "[a]nalyze functional/staff assignments"; (3) "[a]ssess layers of management"; (4) "[a]ssess staffing needs"; (5) "[r]eview business practices that help or hinder the accomplishment of objectives"; (6) "[a]nalyze employee duties and responsibilities and obtain staff input regarding improvements in organizational performance"; and (7) "[a]ssess the classification and pay of all employees."

Accordingly, on March 16, 2005, OCS informed the grievant that her position was being abolished and she would be laid off effective May 24, 2005. The following day, the grievant met with a member of the human resources department at the Department of Social Services (DSS) regarding her impending layoff.² At this meeting, the grievant was allegedly provided a copy of the Interagency Placement Screening Forms (“Yellow Form”) as well as a listing of position vacancies within DSS in the grievant’s current pay band. The grievant subsequently applied and interviewed for two of the vacancies on the list provided. The grievant was notified on May 6, 2005 that she had not been selected for either of the two positions.

On May 12, 2005, the grievant was offered and accepted placement within DSS as a Program Administration Specialist III. The grievant’s salary and benefits remained the same; however, unlike her Program Administration Manager III position with OCS, the grievant no longer has supervisory responsibilities in her new DSS position.

DISCUSSION

Age Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination on the basis of age.³ 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 age. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, unless there is sufficient evidence that the agency’s professed business reason was merely a pretext for discrimination.⁴

The grievant alleges that she was the only OCS employee laid off and that all the employees she supervises as well as another manager at OCS, who were not laid off, are younger than her. The agency denies that age played a role in the grievant’s layoff and presented a legitimate, nondiscriminatory reason for the grievant’s layoff: the agency is small and needed to streamline its management structure, reduce the number of its supervisory layers, and speed communication between the OCS Director and the team of employees the grievant supervised. The grievant has not presented any evidence which would suggest the agency’s stated reasons for the grievant’s layoff are in fact a pretext for age discrimination. As the grievant has failed to make this showing, her claim of age discrimination does not qualify for hearing.

² OCS is a relatively small agency and relies upon other larger state agencies to provide its various operating functions. DSS provides all human resource and personnel functions for OCS and as such, was responsible for processing the grievant’s impending layoff as well as assisting her in the placement process.

³ See *Grievance Procedure Manual* § 4.1(b).

⁴ *Hutchinson v. INOVA Health System, Inc.*, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. 1998)(citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

Misapplication of Policy/Unfair Application of 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.

The applicable policy in this case is Department of Human Resource Management (DHRM) Policy 1.30 *Layoff*. The intent of DHRM Policy 1.30 is to allow “agencies to implement reductions in workforce according to uniform criteria when it becomes necessary to reduce the number of employees or to reconfigure the work force.”⁵ Policy mandates that each agency identify employees for layoff in a manner consistent with its business needs and the provisions of the layoff policy.

Before implementing a layoff, agencies must: (1) determine whether the entire agency or designated work unit(s) are to be affected; (2) designate business functions to be eliminated or reassigned; (3) designate work unit(s) to be affected as appropriate; and (4) review all vacant positions to identify valid vacancies that can be used as placement options during layoff.⁶ After identifying the work or business function to be affected, “agencies must select employees for layoff within the same work unit, geographic area, and Role, who are performing substantially the same work,⁷ according to the following layoff sequence: . . . the least senior through the most senior full-time classified employee.”⁸ Significantly, seniority comes into play only among employees in the same work unit, geographic area, and Role who perform substantially the same work. In this case, the grievant was the only employee with her Role title (Program Administration Manager III) in her work unit (technical assistance and compliance). Therefore, her seniority with respect to other employees at OCS is not a determining factor under state policy. While the grievant may disagree with management’s decision to abolish her position, state policy grants to agency management alone the authority and responsibility of “identifying the work that is no longer needed or that must be reassigned.”⁹ Management is afforded great discretion when making such determinations. As long as those determinations are based on legitimate business considerations and not on impermissible factors, management’s decisions regarding the elimination or reassignment

⁵ DHRM Policy 1.30, page 1 of 21 (effective 9/25/00, revised 8/10/02).

⁶ See DHRM Policy No. 1.30, page 7 of 21 (effective 9/25/00, revised 8/10/02).

⁷ The following are factors considered by agencies in determining whether employees are performing “substantially the same work”: (1) positions are in the same work unit; (2) positions are in the same Role; (3) positions have the same work title; (4) positions are at the same reporting level in the organizational structure; (5) positions have the same SOC Code; and (6) positions have similar job duties, KSAs, and other job requirements, based on the position description or Employee Work Profile. See DHRM Policy 1.30, page 5 of 21 (effective 9/25/00, revised 8/10/02).

⁸ See DHRM Policy 1.30, pages 7-8 of 21 (effective 9/25/00, revised 8/10/02).

⁹ DHRM Policy No. 1.30, page 7 of 21 (effective 9/25/00, revised 8/10/02).

of work cannot be overturned through the grievance process.¹⁰ As discussed above in the section on age discrimination, in this case, it appears that the abolition of the grievant's management position was based upon legitimate business considerations (i.e., the agency's need to streamline its management structure) and not on an impermissible factor such as age.

Further, although the grievant asserts that policy would mandate that her position not be eliminated, because she supervises some of the "core functions" of the agency, such a mandate does not exist. Moreover, the agency would not have misapplied the layoff policy by awarding some of the remaining OCS employees upward salary adjustments or by hiring additional employees, as there is nothing in that or other state personnel policies that prohibits an agency from taking such actions when faced with a legitimate business need for an agency restructuring. The OCS Director denies the grievant's allegation that she planned to hire a friend to work at OCS, and the grievance presents no evidence to suggest that any hiring decision was made on the basis of friendship rather than merit.

By providing the grievant with the "Yellow Form" on March 17, 2005, the agency fulfilled its obligation under policy to present the grievant with written confirmation of her impending layoff. Further, it appears that the two impending positions at OCS which were referenced by the grievant as potential internal placement options, were not fully funded and approved by the appointing authority to be established prior to the grievant's placement in her current position within DSS.¹¹ Thus, these two potential positions were not "valid vacancies" as defined under policy and as such, the agency acted in accordance with policy by not offering either of the positions to the grievant during the layoff placement process.

The grievant also claims that OCS impermissibly failed to provide to her a written confirmation of her layoff and to identify internal placement options.¹² State layoff policy requires an agency to provide written notification to an employee of an impending layoff at least two weeks prior to the date of layoff or placement (initial notice of layoff).¹³ Further, "[w]hen employees are notified that they will be impacted by layoff, agencies must: issue Interagency Placement Screening Forms ("Yellow Form"), and ensure that

¹⁰ "Management reserves the exclusive right to manage the affairs and operations of state government." Va. Code § 2.2-3004 (B).

¹¹ According to the agency, the "Senior Technical Assistance Consultant" position was never established because the agency decided that it did not need a "senior" position. The other position, the "Technical Assistance Consultant" position, was approved to be established in June 2005, after the grievant's layoff and placement within DSS.

¹² The grievant claims that at the time of her layoff, the agency was in the process of establishing two new positions at OCS in the unit that she supervised: a "Technical Assistance Consultant" position and a "Senior Technical Assistance Consultant" position. When the grievant allegedly asked to be placed into one of these two positions, she claims she was told that she would not qualify because the positions were to be "clinical" positions.

¹³ See DHRM Policy 1.30, page 2 of 21 (effective 9/25/00, revised 8/10/02).

employees have access to the state vacancy listing”¹⁴ Prior to the final notice of layoff, the agency “shall attempt to identify internal placement options” for the employee(s).¹⁵ DHRM policy mandates that the agency make an attempt to place an employee by seniority to any *valid vacancies* agency-wide in the current or a lower Pay Band.¹⁶ A valid vacancy is “[a] vacant classified position that is fully funded and has been approved by the appointing authority to be filled.”¹⁷

In light of the above, this Department finds that the April 15, 2005 grievance fails to raise a sufficient question as to whether the layoff policy was misapplied. Likewise, the grievance fails to raise a sufficient question that the layoff policy was unfairly applied. In particular, the intent of the layoff policy is to allow an agency to abolish a position, based on uniform criteria, when it becomes necessary to reduce the number of employees or to reconfigure the work force. So long as the agency’s decision was based on its good faith judgment of its legitimate business needs, as appears to be the case here, the elimination of the grievant’s position does not amount to a disregard of the intent of 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 this determination to the circuit court, please 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 T. Farr
Director

Jennifer S.C. Alger
EDR Consultant

¹⁴ DHRM Policy 1.30, page 13 of 21 (effective 9/25/00, revised 8/10/02).

¹⁵ See DHRM Policy 1.30, page 10 of 21 (effective 9/25/00, revised 8/10/02).

¹⁶ *Id.* (emphasis added).

¹⁷ DHRM Policy 1.30, page 6 of 21 (effective 9/25/00, revised 8/10/02).