

Issues: Qualification – Discrimination (Race and Gender) and Separation from State (Layoff); Ruling Date: September 26, 2008; Ruling #2009-2116;
Agency: Department of Minority Business Enterprise; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Minority Business Enterprise
Ruling No. 2009-2116
September 26, 2008

The grievant has requested a ruling on whether her July 15, 2008 grievance with the Department of Minority Business Enterprise (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant was formerly an assistant to a Senior Manager with the agency. On June 16, 2008, the grievant was notified that her position was being eliminated pursuant to a restructuring of the agency. The abolishment was to be effective June 30, 2008. According to the agency, the duties previously performed by the grievant were absorbed by others within the agency. The grievant was granted two weeks of pre-layoff leave and given notice of her rights under the applicable policies.

The grievant initiated her July 15, 2008 grievance to challenge the layoff. She argues that the agency failed to offer to transfer her to other positions within the agency. The grievant states that there were Certification Specialist positions that were open at the time of her layoff and that the agency was in the process of hiring for one such position in a wage capacity. The grievant argues that the agency should have transferred her to one of these other open positions or converted the wage position into a full-time salaried position.

The grievant has also alleged that the Senior Manager's decision to eliminate her position was discriminatory based on gender and race. The grievant describes certain alleged conduct by the Senior Manager regarding other agency employees and statements he allegedly made in the workplace. The grievant states that the Senior Manager has made comments involving issues of race and alleges that the Senior Manager justifies the statements "by saying he is black so he can say things like that." The grievant also alleges that the Senior Manager gave a white male a large pay increase without any change in his job duties, while another black male employee was given additional duties without a pay increase. In addition, the grievant has described certain allegedly "sexist" statements made by the Senior Manager and his treatment of some female co-workers.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.¹ Further, complaints relating solely to layoff “shall not proceed to a hearing.”² Accordingly, challenges to such decisions do not qualify for a hearing unless the grievant presents evidence raising a sufficient question as to whether the agency misapplied or unfairly applied policy, or discrimination, retaliation or discipline improperly influenced the decision.³ In this case, the grievant claims discrimination and that the agency misapplied or unfairly applied policy.

Misapplication or Unfair Application of Policy

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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁴ Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.⁵ 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.”⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁷ Because the grievant raises issues regarding the abolishment of her job, the grievant has sufficiently alleged an adverse employment action.

The Department of Human Resource Management (DHRM) Layoff Policy addresses the issue of placement opportunities within an agency prior to layoff.⁸ The intent of DHRM Policy 1.30 is to allow “agencies to implement reductions in work force according to uniform criteria when it becomes necessary to reduce the number of employees or to reconfigure the work force.”⁹ Policy mandates that each agency identify

¹ Va. Code § 2.2-3004(B).

² Va. Code § 2.2-3004(C).

³ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.

⁴ *See Grievance Procedure Manual* § 4.1(b).

⁵ While evidence suggesting that the grievant suffered an “adverse employment action” is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an “adverse employment action.” For example, consistent with recent developments in Title VII law, this Department substitutes a lessened “materially adverse” standard for the “adverse employment action” standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.

⁶ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁷ *See, e.g., Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁸ DHRM Policy 1.30, *Layoff*.

⁹ *Id.*

employees for layoff in a manner consistent with its business needs and the provisions of the Layoff Policy.

The Layoff Policy also provides that during the time between Initial Notice and Final Notice of Layoff, the agency shall attempt to identify internal placement options for its employees.¹⁰ According to the Layoff Policy, after an agency identifies all employees eligible for placement, the agency must attempt to place them by seniority in any valid vacancies agency-wide in the current or a lower Pay Band.¹¹ Additionally, 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.”¹² If such a position is offered and declined by the employee, the agency is under no obligation to consider additional placement options for the employee.¹³

The agency states that it had no open positions for which the grievant was eligible to transfer. The grievant has pointed to allegedly open Certification Specialist positions, one of which was recruited as a wage position around the time she was laid off. First, it is not clear that the grievant was qualified for such a job. However, more importantly, nothing in DHRM Policy 1.30 appears to require that the agency convert such a wage position into a classified, salaried position for the grievant. Furthermore, the other open Certification Specialist positions were not true open positions. The agency has no intention of filling those jobs, except possibly on a temporary, wage basis because the functions served by those positions are to be eventually outsourced. Therefore, the grievant was not eligible to be transferred into a Certification Specialist position because none were open to be filled as a classified position.

The grievant has the burden to establish that the agency misapplied or unfairly applied DHRM Policy 1.30. Though the grievant may disagree with how the agency has reorganized, the grievant has not presented any evidence suggesting that the agency has failed to follow policy, and this Department finds no such evidence. The grievant’s arguments do not indicate that the reorganization and layoff determinations were inconsistent with other decisions made by the agency or otherwise arbitrary or capricious. There is no basis to qualify this grievance for hearing as to the misapplication or unfair application of policy claim.

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination on the bases asserted by the grievant, race and/or gender.¹⁴ 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

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* (emphasis in original).

¹³ *Id.*

¹⁴ See *Grievance Procedure Manual* § 4.1(b).

within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.¹⁵

The grievant has supported her discriminatory layoff claim by describing certain comments the Senior Manager allegedly made and other instances of his conduct alleged to have been motivated by race and/or gender. Although some statements, according to the grievant, involved issues of race, the evidence presented by the grievant is not sufficient to raise a question that race might have been a motivating factor in the reorganization or layoff. Though these statements, if they occurred, would have been inappropriate and insensitive, they do not appear to support a negative intent on the basis of race. The allegations are stronger with respect to gender. The Senior Manager's alleged sexist comments and treatment of two other female agency employees, as described by the grievant, raise questions.

The Agency, however, has provided legitimate business reasons for the elimination of the grievant's position. According to the agency, the grievant's position was abolished as part of a broader reorganization because her duties could be assumed by other employees and enable cost savings to the agency. This is an appropriate business related rationale for laying the grievant off. Although the grievant's allegations raise questions about the appropriateness and insensitivities of the Senior Manager's behavior on the basis of gender, the business reasons for eliminating the grievant's position are compelling. Further, it appears that the plan of reorganizing the agency had begun before the Senior Manager arrived at the agency. These early plans had reportedly targeted the grievant's position for elimination. Although the Senior Manager appears to have had involvement in the later stages of the reorganization and in allowing the grievant's position to be eliminated, the fact that the plan was begun before the alleged discriminatory actor was involved is highly supportive of the agency's stated rationale. Therefore, because there is insufficient evidence to indicate that the agency's explanation for the reorganization and layoff was pretextual, the grievant has not raised a sufficient question of discrimination to 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, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal pursuant to the provisions of Va. Code § 2.2-3004(E). If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request

¹⁵ See *Hutchinson v. INOVA Health System, Inc.*, Civil Action No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *4 (E.D. Va. April 8, 1998).

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the appointment of a hearing officer unless the grievant notifies the agency that she does not wish to proceed.

Claudia T. Farr
Director