

Issue: Qualification – Separation from State (Layoff); Ruling Date: December 15, 2008; Ruling #2009-2179; Agency: Department of Veterans Services; Outcome: Not Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Veterans Services  
Ruling No. 2009-2179  
December 15, 2008

The grievant has requested a ruling on whether her October 16, 2008 grievance with the Department of Veterans Services (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant initiated her October 16, 2008 grievance to challenge the elimination of her position and subsequent layoff. The grievant asserts that the layoff was in retaliation for participating in the grievance process and for other protected activities identified in her July 4, 2008 grievance.<sup>1</sup> The agency states that as a budget reduction measure the grievant's position was identified for elimination. The agency maintains that there are very few positions in the agency that were both funded by the General Fund and did not involve direct services to veterans, a core mission of the agency. Consequently, the grievant's position, according to the agency, was one of the few that was selected for elimination. The grievant disputes the agency's statements as pretext and argues that other positions, such as those with higher salaries and/or other contract/wage positions, should have been eliminated instead of her position. Having proceeded through the management steps without receiving relief, the grievant now seeks qualification of her grievance for hearing.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>2</sup> Further,

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<sup>1</sup> For a discussion of the various protected activities engaged in by the grievant, see EDR Ruling No. 2009-2090. The grievant has specifically raised these as additional grounds in her October 16, 2008 grievance to support her retaliation claim. Although this Department will address the grievant's retaliation claims based on the protected activities identified in her July 4, 2008 grievance, the specific agency actions raised as part of that grievance have already been addressed in EDR Ruling No. 2009-2090 and are not a part of this ruling. To the extent the grievant could even raise those substantive matters (such as alleged pay inequities, etc.) again, the grievant has submitted nothing additional that would change this Department's analysis in EDR Ruling No. 2009-2090.

<sup>2</sup> Va. Code § 2.2-3004(B).

complaints relating solely to layoff “shall not proceed to a hearing.”<sup>3</sup> 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.<sup>4</sup> In this case, the grievant claims retaliation and, effectively, 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. The Department of Human Resource Management (DHRM) Layoff Policy allows “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.”<sup>5</sup> Policy mandates that each agency identify employees for layoff in a manner consistent with its business needs and the provisions of the Layoff Policy. As such, the policy states that before implementing layoff, agencies must:

- determine whether the entire agency or only certain designated work unit(s) are to be affected;
- designate business functions to be eliminated or reassigned;
- designate work unit(s) to be affected as appropriate;
- review all vacant positions to identify valid vacancies that can be used as placement options during layoff, and
- determine if they will offer the option that allows other employee(s) in the same work unit, Role, and performing substantially the same duties to request to be considered for layoff if no placement options are available for employee(s) initially identified for layoff.<sup>6</sup>

The grievant argues that her position should not have been abolished because there were other employees with higher salaries than hers as well as wage and contract positions that should have been eliminated instead.

An agency’s decisions as to what work units to be affected by layoff and the business functions to be eliminated or reassigned are generally within the agency’s discretion. However, even though agencies are afforded great flexibility in making such

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<sup>3</sup> Va. Code § 2.2-3004(C).

<sup>4</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

<sup>5</sup> DHRM Policy 1.30, *Layoff*.

<sup>6</sup> *Id.*

decisions, agency discretion is not without limitation. Rather, this Department has repeatedly held that even where an agency has significant discretion to make decisions (for example, an agency's assessment of a position's job duties), qualification is warranted where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.<sup>7</sup>

The agency states that it identified administrative functions in the central office, of which the grievant's were included, for elimination or reassignment<sup>8</sup> because those functions were not direct services to veterans, the agency's core mission. The grievant disputes the agency's position by stating that she provided direct services to veterans through her work as the Constituent Affairs Liaison and through her support to the agency head and other senior management staff. It is unclear, however, how the grievant's "support" role could arguably be construed as direct services to veterans. Further, it appears that the grievant's constituent affairs duties, to the extent they might be considered direct services to veterans, were not significant enough to sustain her position, as the duties were able to be reassigned to another agency employee.<sup>9</sup> The grievant's arguments do not raise any indication that the agency's decisions were arbitrary or capricious.

The grievant has also submitted a listing of many contract/temporary administrative support positions still filled at the agency. It is assumed the grievant has submitted this information to show that the agency eliminated her administrative position, but still continues to employ many administrative support staff. However, the grievant has the burden to establish that the agency misapplied or unfairly applied DHRM Policy 1.30. The listing of these positions does not demonstrate that the agency's identification of the grievant's position for layoff was inconsistent with other agency decisions or otherwise arbitrary or capricious. For instance, no information has been submitted to show what tasks these other administrative support staff perform, whether they related at all to the grievant's duties, or if these other employees provided direct services to veterans. As such, there is insufficient evidence to dispute the agency's business-related rationale as applied to the grievant's former position.

Though the grievant may disagree with the agency's decisions, the grievance presents no evidence suggesting that the agency failed to follow policy, and this Department finds no such evidence. There is no indication that the reassignment and layoff determinations were inconsistent with other decisions made by the agency or

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<sup>7</sup> See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); see also, e.g., EDR Ruling 2008-1879.

<sup>8</sup> Some of the grievant's former job duties were eliminated, while some were reassigned. For instance, it appears the agency has utilized a temporary wage employee to perform some administrative tasks such as answering phones.

<sup>9</sup> See also EDR Ruling No. 2009-2090 (finding that grievant's constituent affairs duties were not so substantial to find that the agency was arbitrary or capricious in refusing to grant her an increase in pay for taking on those additional duties).

otherwise arbitrary or capricious. There is no basis to qualify this grievance for hearing as to the misapplication or unfair application of policy claim.

### *Retaliation*

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;<sup>10</sup> (2) the employee suffered a materially adverse action;<sup>11</sup> and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.<sup>12</sup> Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.<sup>13</sup>

The grievant has clearly engaged in protected activities, including filing a grievance, filing complaints with the State Employee Fraud, Waste and Abuse Hotline, and filing a complaint with the EEOC.<sup>14</sup> However, the grievant has presented insufficient evidence of a causal link between the grievant's protected activities and her layoff. Further, the agency has explained that the grievant's position was identified for elimination because it did not involve direct services to veterans. As discussed above, the grievant's arguments disputing the agency's rationale are either unpersuasive or unsupported. 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 retaliation 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

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<sup>10</sup> See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

<sup>11</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); see, e.g., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

<sup>12</sup> See, e.g., *EEOC v. Navy Fed Credit Union*, 424 F.3d 397, 405 (4<sup>th</sup> Cir. 2005).

<sup>13</sup> See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

<sup>14</sup> See Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

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

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Claudia T. Farr  
Director