

Issue: Qualification – Separation from State (Layoff); Ruling Date: April 21, 2009;  
Ruling #2009-2267; Agency: Department of Corrections; Outcome: Not Qualified.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling No. 2009-2267  
April 21, 2009

The grievant has requested a ruling on whether her January 8, 2009 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

This grievance concerns the grievant's challenge to certain issues related to the closing of the facility where she used to work. As a result of the closure and the elimination of the grievant's job, the grievant was offered a position in the regional office. This job had the same title and salary she held at the closed facility. However, the regional office was approximately 50 miles from her home and would require a longer commute than she previously had. As such, the grievant initiated this grievance on January 8, 2009.

The Placement Summary distributed to employees described the process of placing employees from closed facilities. The Placement Summary provided that an employee would be first offered placement in a position in the same pay band at the same or lower level as the employee's current position if the employee was at least minimally qualified to perform the job functions of the new position. Further, the position must be accepted if 1) it does not require relocation and 2) there is no reduction in pay. Otherwise, the employee forfeits rights under the Layoff Policy, including, for example, severance benefits. Relocation was not deemed to be required under the Placement Summary if the new position was in the same geographic area (required an increase in commute of 50 miles or less).<sup>1</sup> Based on a review of addresses, a commute from the grievant's current residence to the regional office is just under 50 miles.

The grievant maintains that one of her co-workers (Employee A) from the closed facility, who previously held the same type of position, was more senior and should have been offered the position in the regional office first. The Placement Summary provides that if there are multiple employees minimally qualified for a position, the position is offered to the most senior employee. The agency, however, determined that Employee A was not minimally qualified for the regional office position. As such, Employee A was not offered the job. The grievant argues that Employee A was minimally qualified.

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<sup>1</sup> These requirements are consistent with the agency's Layoff Policy.

The grievant also argues that her placement in the regional office did effectively require a reduction in pay because of the increased commuting time. She also is no longer provided a free meal that she received at the closed facility. The grievant now requests qualification of her grievance for hearing.

### DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.<sup>2</sup> Further, complaints relating solely to layoff<sup>3</sup> “shall not proceed to a hearing.”<sup>4</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>5</sup> In this case, the grievant claims that the agency misapplied or unfairly applied 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. Because the evidence does not raise a sufficient question as to whether the agency misapplied or unfairly applied policy, this grievance does not qualify for hearing, as explained further below.

#### *Seniority*

It is understandable that the grievant suggests that Employee A was at least minimally qualified for the position in the regional office, which had the same job title as that held by both the grievant and Employee A at the closed facility. However, the agency states that the regional office position supports a manager who is in charge of the finances of the region. The agency determined that Employee A did not meet the minimum qualifications of the position because of such duties.

The grievance procedure accords much deference to management’s exercise of judgment, including management’s assessment of the job qualifications of employees. However, even though agencies are afforded great flexibility in making selection decisions, agency discretion is not without limitation. Rather, this Department has repeatedly held that even where an agency has significant discretion to make decisions, 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>6</sup>

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<sup>2</sup> Va. Code § 2.2-3004(B).

<sup>3</sup> Although the grievant was not laid off, the closing of the facility and her placement in the regional office implicated the provisions of the layoff policies.

<sup>4</sup> Va. Code § 2.2-3004(C).

<sup>5</sup> See Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.

<sup>6</sup> See, e.g., EDR Ruling 2008-1879; EDR Ruling No. 2007-1651.

Arbitrary or capricious is defined as a decision made “[i]n disregard of the facts or without a reasoned basis.”<sup>7</sup>

Here, even though Employee A’s position and the regional office position had the same job titles, it does not necessarily mean that the positions had identical duties or required identical skills. The grievant’s suggestion that she has not been assigned complex tasks in her current job in the regional office position is also not persuasive. While it may be the case that the grievant has not yet been asked to do particularly complicated assignments, the position nevertheless assists a regional manager in charge of financial matters, which was the reason the agency determined that Employee A was not minimally qualified for the position. The grievant’s evidence does not show that the agency’s determination that Employee A was not minimally qualified was arbitrary or capricious, or inconsistent with other agency decisions. As such, there is no basis to dispute the agency’s assessment.<sup>8</sup>

#### *Increased Costs to Grievant*

The grievant argues that because of the increased commuting distance to her new job and the loss of a fringe benefit (free meal), her compensation has decreased. As such, the grievant asserts that her assignment, in effect, did require a reduction in pay and therefore, her move to the regional office did not meet that criterion in the Placement Summary.

First, the agency’s determination that the placement of the grievant in the regional office position did not require relocation appears consistent with the agency’s Layoff Policy.<sup>9</sup> It appears that the regional office position was in the same geographic area as the grievant’s former position, as that area is defined by agency policy.

Further, while this Department understands the grievant’s argument, the Placement Summary, agency policy, and DHRM Policy 1.30 all refer to a reduction in salary or pay only, and not to an action that affects total compensation or an increase in expenses. The grievant’s salary has not changed, though her expenses most assuredly have. However, the agency’s determination that the grievant did not experience a “reduction in salary” appears accurate and consistent with the applicable policies.

#### *Denied Severance Benefits*

The grievant also challenges the choice put before her by the agency: 1) take the offered position in the regional office, or 2) layoff without severance benefits. However, it appears that the agency’s statements were correct. The agency offered the grievant placement in a position

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<sup>7</sup> *Grievance Procedure Manual* § 9.

<sup>8</sup> Similarly, to the extent the grievant is suggesting that she was not minimally qualified for the regional office position, the materials submitted by the grievant do not suggest that the agency’s determination that she was qualified was arbitrary or capricious.

<sup>9</sup> DHRM Policy 1.30 does not provide a definition of when relocation is required. However, the agency Layoff Policy does, which was the same standard utilized in the Placement Summary. This Department has found nothing that would support a finding that the standard applied by the agency was inconsistent with law or policy.

that she was at least minimally qualified for, that did not reduce her salary, and did not require her to relocate, as defined by policy. DHRM Policy 1.30 provides that “[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.” The agency’s policy and statements appear to be consistent with this provision of state policy. The grievant was not entitled to severance benefits if she did not accept the regional office position. Though the grievant may disagree with the agency’s decision and the effect it has had, the grievant has not presented any evidence suggesting that the agency has failed to follow policy, and this Department finds no such evidence. As such, this grievance 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, 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 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