

Issue: Qualification – Compensation (Position Classification); Ruling Date: July 29, 2009; Ruling #2010-2365; Agency: Department of Alcoholic Beverage Control; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Alcoholic Beverage Control
Ruling No. 2010-2365
July 29, 2009

The grievant has requested qualification of her March 16, 2009 grievance with the Department of Alcoholic Beverage Control (the agency) regarding the reclassification of her position. For the reasons set forth below, the grievance does not qualify for hearing.

FACTS

Prior to February 25, 2009, the grievant had been classified in Pay Band 4, with the Role Title of General Administration Supervisor I/Coordinator I and a Work Title of License Technician. Other employees in the agency were assigned similar support roles as the grievant, but were classified in Pay Band 3, with Role Title of Administrative & Office Specialist III and Work Title of Program Support Technician. As a License Technician, however, the grievant's Employee Work Profile (EWP) included investigative functions, while the EWPs of Program Support Technicians did not. After February 25, 2009, the grievant's investigative functions were removed, and she was reclassified in Pay Band 3, with the Role Title Administrative & Office Specialist III and a Work Title of Administrative Technician. Because the grievant's salary fell within Pay Band 3, her salary did not decrease.

The agency implemented the February 25, 2009 reclassification because it had determined that the primary investigators should be Special Agents, not License Technicians. As such, the agency adjusted the level of responsibility of the License Technicians to eliminate specific investigative duties. The agency also sought to consolidate the License Technicians and Program Support Technicians under one new Working Title, Administrative Technician, which was classified as an Administrative & Office Specialist III in Pay Band 3, to reflect their common roles and responsibilities.

The grievant initiated her March 16, 2009 grievance to challenge the realignment and her reduction in Pay Band. The grievant asserts that she is performing the duties of her previous position and a Program Support Technician. It appears that the job duties listed on her former and new EWPs are very similar. However, it does appear, consistent with the agency's intention, that investigative responsibilities have been removed.

DISCUSSION

Although state employees with access to the grievance procedure may grieve anything related to their employment, only certain grievances qualify for a hearing.¹ By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as position classifications, hiring, promotion, transfer, assignment, and retention of employees within the agency “shall not proceed to hearing” unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.² In this case, the grievant claims that the realignment and reduction in Pay Band may have been a misapplication or unfair application of policy.

For the grievant’s claim to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy provision or whether the challenged action, in its totality, is so unfair as to amount to a disregard of the intent of the applicable policy. Further, the grievance procedure accords much deference to management’s exercise of judgment, including management’s assessment of the degree of change, if any, in the job duties of a position. However, even though agencies are afforded great flexibility in making decisions such as those at issue here, 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.³

The grievance procedure also 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

¹ See *Grievance Procedure Manual* § 4.1.

² Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

³ 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.

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 Indus., 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).

Even assuming, however, that the grievant's reclassification constituted an adverse employment action,⁸ it does not appear that the agency's realignment violated a mandatory policy provision or was without a reasoned basis. Rather, the agency sought to redefine and consolidate the job responsibilities of employees who provide administrative support to investigating agents, job responsibilities that had been previously spread across different Role and Work Titles. The reclassification distinguished the responsibilities of administrative support positions from those of special agents (who had investigative duties) and organized the support employees under common Role and Work Titles. While the grievant is understandably concerned about the changes in her job, it cannot be said that the agency lacked a reasoned basis for the realignment.

Further, DHRM Policy 3.05 specifically allows an agency to lower an employee's Pay Band, by means of a "Downward Role Change."⁹ Under that policy, an employee's salary "remains unchanged unless it exceeds the maximum of the lower assigned Salary Range."¹⁰ The grievant's salary fell within Pay Band 3 and, thus, remained unchanged. Based on a review of the job classification structure provided on DHRM's website, this Department can find no inconsistencies in classifying the grievant's position in her redefined Role of Administrative & Office Specialist III. The description provided for that Role, especially when compared to the description of her previous Role, General Administration Supervisor I/Coordinator I, appears to match the grievant's current redefined position more closely. Even though the grievant's job duties are very similar to her previous position, the investigative responsibilities have been removed, which was part of the agency's stated purpose for the realignment of these roles.

In summary, it appears that the agency's realignment was executed properly under policy and in no way arbitrary or capricious. 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 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 and file a notice of appeal with the circuit court pursuant to 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 wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

⁸ On the one hand, the grievant's salary was not decreased in the realignment, so there has been no immediate adverse action. However, by reducing the grievant's Pay Band, her salary ceiling has been reduced. Consequently, there is some basis to suggest that an adverse employment action has occurred. Nevertheless, this issue need not be reached in this ruling because the grievance would not otherwise qualify for a hearing.

⁹ DHRM Policy 3.05, *Compensation* (defining "Role Change" as "[a] non-competitive action in which a position is changed to a different Role in a higher, lower or same Pay Band.").

¹⁰ *Id.*