

Issue: Qualification – Management Actions (Non-Disciplinary Transfer); Ruling
Date: December 17, 2009; Ruling #2010-2439; Agency: Virginia Department of
Transportation; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Transportation
Ruling No. 2010-2439
December 17, 2009

The grievant has requested qualification of his August 19, 2009 grievance with the Department of Transportation (the agency) regarding the restructuring of his position. For the reasons set forth below, the grievance does not qualify for hearing.

FACTS

The agency is currently undertaking a vast restructuring. The grievant was affected by a part of the plan in that his position is to be restructured. The grievant's former working title was Transportation Assistant Right of Way Manager. In that role, he essentially supervised various areas of Right of Way in his region. In his new position, he will be a team leader for one of those areas of Right of Way. His pay band, role title, and salary remain the same. The grievant appears to challenge the restructuring, noting the "substantially different" job duties between the two positions, to argue that he should have received an initial notice of layoff in this restructuring, i.e., that the Layoff Policy¹ was implicated and he should have access to severance rights.

DISCUSSION

Although state employees with access to the grievance procedure may grieve anything related to their employment, only certain grievances qualify for a hearing.² 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.³

In this case, the grievant essentially claims that the restructuring of his position may have been a misapplication or unfair application of policy. For this claim to qualify for a hearing, there must be evidence raising a sufficient question as to whether management

¹ DHRM Policy 1.30, *Layoff*.

² See *Grievance Procedure Manual* § 4.1.

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

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. Significantly, 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. Agency discretion is not without limitation, however. 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.⁴

The grievance procedure also generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁵ Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.⁶ 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."⁷ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁸

Assuming for purposes of this ruling only that the restructuring of the grievant's position constituted an adverse employment action, it does not appear that the agency's action violated a mandatory policy provision or was without a reasoned basis. Rather, the agency has sought to restructure to meet stringent budget reduction goals. While the grievant is understandably upset with the changes in his job, it cannot be said that the agency lacked a reasoned basis for the restructuring. Nor has there been any evidence presented that the grievant was treated differently than others at the agency.

It is unclear whether state policy places any specific limitations on the degree to which an agency can alter an employee's position without implicating the Layoff Policy. However, even if the Layoff Policy did apply to the restructuring of the grievant's position, it does not appear that a theoretical application of that policy would alter the result in this case. Assuming that the grievant's newly restructured position would be the position offered to the grievant as pre-layoff placement,⁹ the grievant would only have had two options: 1) accept

⁴ 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.

⁵ See *Grievance Procedure Manual* § 4.1(b).

⁶ 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.

⁷ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁸ See, e.g., *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁹ DHRM Policy 1.30 provides that pre-layoff placement "shall 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." There is no

the position, or 2) decline the position and receive no severance benefits.¹⁰ In effect, the grievant has the same choice here. He has been cross-walked to the restructured position (equivalent to accepting the conceptual pre-layoff placement), while he still would have the ability to resign without severance benefits (equivalent to declining the conceptual pre-layoff placement). Therefore, even if the Layoff Policy applied here, it would not appear that the agency had misapplied or unfairly applied the Layoff Policy, as the same outcome is reached as with the grievant's current situation.

Though the grievant may disagree with the agency's decision and the effect it has had, the evidence presented does not raise a sufficient question of whether the agency misapplied or unfairly applied policy. 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

indication that there would have been any other position available higher than the grievant's restructured position without resulting in an increase in Pay Band.

¹⁰ "An 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." DHRM Policy 1.30, *Layoff*.