

Issues: Qualification – Separation from State (Layoff) and Compliance – Grievance Procedure (Resolution Steps); Ruling Date: February 4, 2010; Ruling #2010-2492, 2010-2493; Agency: Department of Veterans Services; Outcome: Not Qualified, No Ruling on Compliance Issue.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Veterans Services
Ruling Nos. 2010-2492, 2010-2493
February 4, 2010

The grievant has requested a ruling on whether her October 23, 2009 grievance with the Department of Veterans Services (the agency) qualifies for a hearing. The grievant also raises an issue of alleged noncompliance by the agency. For the reasons discussed below, this Department concludes that the agency has not failed to comply with the grievance procedure and that this grievance does not qualify for a hearing.

FACTS

In October 2009, the grievant was notified that her position was being eliminated and that she was subject to layoff. The agency determined that the duties she performed could be performed by a part-time position, instead of the full-time position held by the grievant. The grievant was offered placement in this part-time position before and during the layoff process. However, the grievant declined the offer of placement. The agency also determined that the grievant's duties could be performed by current staff members and through the assistance of other service organizations. The agency eliminated the grievant's full-time position for the stated purpose of reducing its budget.

The grievant challenges her layoff as retaliatory, discriminatory, and a misapplication and/or unfair application of policy. In support, the grievant notes that though the agency had submitted the elimination of her position as a budget reduction strategy, it was not selected for inclusion in the Governor's budget reduction package. She also notes that one of her supervisors told the Board of Veterans' Appeals (BVA) that the agency intended to keep her office open with the grievant employed if the Governor did not select the proposal as a budget reduction measure. Further, the grievant claims that her layoff is inconsistent with statements by the agency head that budget reductions would be accomplished with layoffs as a "last resort."

In addition, the grievant asserts that the agency has improperly failed to notify benefit field offices and the BVA about the elimination of her position. The grievant further alleges that the agency has failed or will fail to comply with certain federal regulations in providing services to veterans. The agency denies the grievant's allegations.

DISCUSSION

Compliance

The grievant claims that the agency head's written response did not address all the issues in her grievance. However, the duties required of an agency head in responding to a grievance at the qualification stage are not the same as that of a step-respondent. While a step-respondent's written response must address the issues and relief requested,¹ there is no similar requirement imposed on the agency head.² The written response need only determine whether the grievance qualifies for hearing and advise the grievant of his/her procedural options,³ which the agency head's response did in this case. The grievant may disagree with the agency's determinations, but that does not support a finding that the agency has failed to comply with the requirements of the grievance procedure. This Department's rulings on matters of compliance are final and nonappealable.⁴

Qualification

Layoff

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.⁵ Further, complaints relating solely to layoff "shall not proceed to a hearing."⁶ Accordingly, challenges to layoff 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.⁷ In this case, the grievant appears to assert claims of discrimination, retaliation, and misapplication and/or unfair application of policy.

Misapplication and/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."⁸ Policy requires 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, agency management must:

- determine whether the entire agency or only certain designated work unit(s) are to be affected;

¹ *E.g.*, *Grievance Procedure Manual* § 3.2.

² *See* *Grievance Procedure Manual* § 4.2. An agency head has the discretion to address the issues and relief requested, but it is not a requirement. *See id.*

³ *Id.*

⁴ *See* Va. Code § 2.2-1001(5), 2.2-3003(G).

⁵ Va. Code § 2.2-3004(B).

⁶ Va. Code § 2.2-3004(C).

⁷ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.

⁸ DHRM Policy 1.30, *Layoff*.

- 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.⁹

In this case, agency management determined that the grievant's role only required a part-time position to perform the duties for BVA support. An agency's decisions as to what work units will 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 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.¹⁰

The elimination of the grievant's full-time position assisted with the agency's need to reduce its budget. The agency also states that the grievant's functions could be reassigned to other staff members and performed through the assistance of other service organizations. The grievant largely disputes her layoff on the basis that it was not included in the Governor's budget reduction plans, even though the agency had submitted the elimination of her position as one of the reduction measures. However, the Layoff Policy does not provide that an agency's layoff decision is contingent upon inclusion in a Governor's budget reduction package.¹¹ Here, the agency determined that the elimination of the grievant's position was necessary to reach the cost savings required by the Governor. Though the grievant may disagree with the agency's determinations, her arguments do not raise a sufficient question as to whether the agency misapplied the Layoff Policy. Rather, the agency's layoff decision appears to be based on business-related budget reduction decisions, and consistent with the applicable policy.

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination.¹² 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

⁹ *Id.*

¹⁰ 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.

¹¹ See DHRM Policy 1.30, *Layoff*; see also Va. Code § 2.2-602 (“[T]he Governor shall exercise no authority with respect to the selection or tenure of office of any individual employed ... except when the Governor is the appointing authority.”).

¹² See *Grievance Procedure Manual* § 4.1(b).

described within the grievance were the result of prohibited discrimination based on a protected status.¹³ In this case, the grievant has not presented any indication that the layoff was based on a protected status. Consequently, this claim does not qualify for a hearing.

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;¹⁴ (2) the employee suffered a materially adverse action;¹⁵ 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 evidence raising a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.¹⁶ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹⁷

The grievant states that she reported to her supervisors and higher level management problems with another agency employee and other issues of concern in the workplace. The grievant's reports could possibly be viewed as protected activity.¹⁸ In addition, the loss of her job is a materially adverse action.¹⁹ However, while the grievant claims that her position was eliminated because of her reports, she has presented no evidence of a causal link between her reports to management and her layoff; in other words, she cites to no evidence to support her position that the agency's layoff decision was motivated by retaliation. While proximity in time between a grievant's protected activities and layoff could imply retaliation,²⁰ any such evidence in this case does not raise a sufficient question of retaliation in light of the agency's un rebutted business reason: the need to eliminate the grievant's full-time position to attain required budget savings.

In sum, regardless of prior management statements of intent not to effectuate a layoff, the agency's ultimate decision to proceed with the elimination of the grievant's position, in order to achieve the level of cost savings required, appears not to have been motivated by retaliation. Accordingly, this claim does not qualify for hearing.

¹³ For example, the grievance procedure identifies "discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin or sex." Va. Code § 2.2-3004(A); *see also* DHRM Policy 2.05, *Equal Employment Opportunity*; DHRM Policy 2.30, *Workplace Harassment*.

¹⁴ *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).

¹⁵ *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.

¹⁶ *See, e.g.*, *EEOC v. Navy Fed Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005).

¹⁷ *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

¹⁸ *See* Va. Code § 2.2-3000 ("[E]mployees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management.").

¹⁹ *See, e.g.*, *Rupert v. Geren*, 605 F. Supp. 2d 704, 714 (D. Md. 2009).

²⁰ The grievant states she raised some of these issues with management in late 2008 to early 2009. Management apparently first started informing the grievant in March 2009 that her office and position may be eliminated.

Second Issue

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.²¹ The grievant's claims regarding the agency's alleged failure to notify field offices and the BVA of the elimination of her position, and regarding the agency's alleged failure to comply with federal regulations, do not appear to fall into any of the types of cases that qualify for hearing under the grievance procedure.²²

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 he does not wish to proceed.

Claudia T. Farr
Director

²¹ See *Grievance Procedure Manual* § 4.1 (describing that only grievances that challenge certain actions, including, but not limited to, formal discipline, misapplication or unfair application of policy, discrimination, or retaliation, qualify for hearing).

²² *Id.* Further, it does not appear that these claims pertain directly and personally to the employee's own employment, as required by the grievance procedure. *Grievance Procedure Manual* § 2.4. Claims about the agency's alleged failures to notify offices after her layoff or to comply with the regulations had no impact on her employment status.