

Issue: Qualification – Separation from State (Layoff/Recall); Ruling Date: May 13, 2010; Ruling #2010-2634; 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. 2010-2634
May 13, 2010

The grievant has requested qualification of his February 22, 2010 grievance with the Department of Transportation (the agency). For the reasons set forth below, the grievance does not qualify for hearing.

FACTS

On or about January 5, 2010, the grievant was given an initial notice of layoff. In lieu of layoff, the grievant decided to retire and to accept the enhanced retirement benefits available. Prior to the effective date of the grievant's layoff, the agency notified the grievant and others in the program in which the grievant worked that they were no longer subject to layoff. The grievant filed this grievance on or about February 22, 2010 to challenge this revocation of the layoff and the severance benefits. The grievant is currently working for the agency in the same position he had. Reportedly, the agency told him that because of the revocation of the layoff the agency was treating the situation as if the initial notice of layoff had never been issued.

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, management reserves the exclusive right to manage the affairs and operations of state government.² Further, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as layoff, 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

¹ See *Grievance Procedure Manual* § 4.1.

² Va. Code § 2.2-3004(B).

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

Additionally, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁴ Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.⁵ An adverse employment action is defined as a “tangible employment act 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 Although it appears unlikely that the actions grieved in this case amount to an adverse employment action, even assuming that there is an adverse employment action at issue, this grievance still would not qualify for a hearing.

In this case, the grievant essentially claims that the agency misapplied and/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. 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 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

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 Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁷ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁸ DHRM Policy 1.30, *Layoff*.

request to be considered for layoff if no placement options are available for employee(s) initially identified for layoff.⁹

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 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.¹⁰

The grievant appears to challenge the agency's revocation of his notice of layoff because he has lost the severance benefit of an enhanced retirement. This Department can find no policy provision that is violated by an agency changing its mind and choosing not to lay off an employee. The grievant has raised no other argument as to why maintaining his position was arbitrary or improper. Though the grievant may disagree with the agency's decisions, his arguments do not raise a sufficient question that the agency has violated any mandatory provision of policy or that its actions were arbitrary or capricious. There is no basis to qualify this grievance for a hearing.¹¹

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

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 If the grievant has questions about his retirement options at this point, or his ability to revoke his retirement application, he should contact VRS at 1-888-VARETIR (888-827-3847).