Issue: Compliance - Separation from State (Layoff/Recall); Ruling Date: May 27, 2010; Ruling #2010-2635; 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 Number 2010-2635
May 27, 2010

The grievant has requested a ruling on whether his February 1, 2010 grievance with the Department of Transportation (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant was previously a maintenance operations supervisor. During a recent stage of the agency's reorganization, the grievant received an initial notice of layoff. He was later offered and accepted placement in a new position as a maintenance program manager in a different office at the same salary.

The grievant challenged the initial notice of layoff based on the agency's definition of "work unit" under the Department of Human Resource Management (DHRM) Layoff Policy. The agency defined each residency within the district in which the grievant formerly worked a work unit for those in his position in maintenance. However, the grievant states that the work unit for an administrative position with other duties was defined as the entire district. He also challenges the agency's alleged narrow definition of work unit because of its use of a statewide seniority system in determining available placement opportunities.

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

[1] *See Grievance Procedure Manual* § 4.1.
[2] Va. Code § 2.2-3004(B).

discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[3] In this case, the grievant alleges misapplication and/or unfair application of policy. For such an allegation 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.

Further, 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 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] Although it is not clear that the grievant experienced an adverse employment action, his grievance still does not qualify for a hearing.

In this case, the grievant claims that the agency misapplied and/or unfairly applied policy in its definition of "work unit." 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 request to be considered for layoff if no placement options are available for employee(s) initially identified for layoff.[9]

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

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. Indeed, the Layoff Policy's definition of "work unit" is broad, allowing designations based on "geographic area(s) or business unit(s) to be impacted."[10] Thus, qualification is warranted only 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.[11]

This Department can find no policy provision that was violated by the agency's definition of "work unit" as the residency for maintenance positions such as the grievant's. Further, there is no evidence showing that the agency's definition was arbitrary or capricious. Indeed, defining the "work unit" as the agency did would appear to allow it to focus its reorganization efforts based on the individualized requirements and needs of each residency, which can differ across a district. In addition, even if the agency used a different definition of "work unit" for the administrative position identified by the grievant, those positions would appear to have materially different duties than the grievant's and arguably less particularized needs for each residency than those in maintenance.[12] The agency's business justification for defining the "work unit" for maintenance positions in the grievant's district as the residency is reasonable. 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.

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.

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Claudia T. Farr
Director

[10] *Id.*
[11] *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.
[12] Similarly, the broader approach used for placement is a different process under the Layoff Policy and, therefore, has no bearing on the agency's definition of "work unit." *See* DHRM Policy 1.30, *Layoff*.