Issue: Qualification – Separation from State (Layoff); Ruling Date: July 23, 2010; Ruling #2010-2697; Agency: Department of Behavioral Health and Developmental Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2010-2697
July 23, 2010

The grievant has requested a ruling on whether her February 25, 2010 grievance with the Department of Behavioral Health and Developmental Services (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 dental assistant with the agency. Sometime in early 2010, the grievant requested "voluntary layoff" so she could retire with an enhanced benefits package under the Workforce Transition Act (WTA). The grievant asserts that other employees at her facility had requested and received the same benefits. The agency reportedly denied her request on at least two occasions before she filed her grievance on February 25, 2010. The agency stated that it would not be eliminating her position because it was needed to support the two full-time dentists on staff. Although one of these dentists was planning to retire soon, it was apparently stated that the agency would fill that position. On March 1, 2010, the grievant retired.

The grievant states that the agency later decided not to fill the dentist position. The grievant also states that the agency decided not to fill the grievant's former position because the additional dental assistant was not needed to support the now one full-time dentist. The grievant appears to argue that the agency at some point knew it would not fill her position and, therefore, improperly denied her request for "voluntary layoff" because they would have eliminated her position if she had not retired. The grievant seeks the WTA benefits she believes she was entitled to obtain through enhanced retirement if her position was eliminated.

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

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

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 alleges 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. In addition, the grievant must have suffered an adverse employment action.[4] 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6] Here, even if the grievant experienced an adverse employment action, her grievance still does not qualify for a hearing.

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."[7] 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.[8]

Agency decisions regarding the above layoff considerations 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

[3] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[4] 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.
[5] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[7] DHRM Policy 1.30, *Layoff*.
[8] *Id.*

question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[9]

This Department can find no policy provision that was violated by the agency's denial of WTA benefits in this case. Indeed, it does not appear that so-called "voluntary layoff" is an accepted process in the Commonwealth. While an agency could ultimately decide to eliminate the position of an employee who had requested "voluntary layoff," that decision would need to be based on appropriate considerations under the Layoff Policy and not on the employee's request. Therefore, even if the agency had decided, prior to the grievant's retirement, that it would eliminate a dental assistant position at the facility, the agency would have been bound to follow the layoff sequence established in the Layoff Policy. Under that sequence, the least senior employee in the same role performing substantially the same work would be subject to layoff first.[10] Because the grievant was not the least senior dental assistant at the facility, she would not have been the dental assistant subject to layoff in this hypothetical scenario. As such, even assuming the grievant's allegations are true that other employees were granted "voluntary layoff," she would not have been the employee whose position was eliminated and she would not have been entitled to any WTA benefits.[11]

Ultimately, the agency chose not to eliminate a dental assistant position, or the grievant's position specifically, when she requested "voluntary layoff." Shortly thereafter the grievant retired. The grievant has no basis to claim entitlement to layoff or WTA benefits. The grievant's 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.

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] *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.
[10] DHRM Policy 1.30, *Layoff*.
[11] We note as well that the grievant's allegations of other employees being granted "voluntary layoff" are not persuasive. Even if "voluntary layoffs" occurred, they were either supported by appropriate applications of the Layoff Policy or were improper, neither of which would support the grievant's claim here.