

Issue: Qualification – Separation from State (Layoff/Recall); Ruling Date: August 4, 2010; Ruling #2011-2703; 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 2011-2703
August 4, 2010

The grievant has requested a ruling on whether his April 12, 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

During a phase of the agency's restructuring, the grievant was in an Administrative and Office Specialist III (AOS III) position identified for layoff. In requesting placement, the grievant submitted paperwork including a letter, dated January 22, 2010, which indicated the grievant's desire to remain within his current area headquarters. The grievant also indicated in this letter that he was willing to accept placement into a Transportation Operator III or Transportation Operator II position, the latter of which would be in a lower pay band than his pre-layoff position. The agency placed the grievant into a Transportation Operator II position in his current area headquarters. However, the grievant asserts that the agency should have placed him in a different position.

The grievant indicates that two other AOS III employees, who were also in impacted positions, received more advantageous offers of placement and he had seniority over both of these employees. One AOS III received placement in another office in an AOS III position. The other AOS III was offered placement in a Transportation Operator III position, which was vacated by a substitute, in the same residency, but a separate area headquarters from the grievant's. It appears both of these other AOS III employees were not in the grievant's area headquarters prior to or after layoff. The grievant submitted this grievance to challenge the agency's action as inconsistent with policy and considerations of seniority.

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

¹ See *Grievance Procedure Manual* § 4.1.

² Va. Code § 2.2-3004(B).

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 a 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 alleges misapplication and/or unfair application of policy.

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 For purposes of this ruling only, it will be assumed that the grievant has experienced an adverse employment action. However, this grievance still does not qualify for a hearing.

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 work force 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

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. In this case, the grievant does not challenge the fact his position was identified for layoff, but he disputes the agency's offer of pre-layoff placement.

Seniority appears to be a factor in the agency's placement process, with impacted employees who have more years of service receiving priority in placement. The agency further states that, in this stage of the reorganization specifically, when determining placement options for employees who received initial notice of layoff, if a vacant position was available, the employee would be offered placement to such a vacant position (without relocation or decrease in pay) rather than seeking a match to a substitute, even if there was a substitute for a better position available. Such an approach would appear to support an agency's legitimate business interests in reducing its expenditures and limiting payouts of severance and/or enhanced retirement benefits while filling needed vacant positions.

Because the grievant states he had seniority over the other two AOS III employees, and those employees received better placement options, it is understandable why the grievant would argue there had been inconsistent approaches taken. However, it appears that the agency was honoring the grievant's request to stay in his current area headquarters. There is no indication that there were better vacant positions in that area headquarters. Therefore, while it could appear -- absent the grievant's January 22, 2010 letter -- that a more senior employee received less favorable priority in placement than these two other AOS III employees, the grievant's desire to remain in his current area headquarters, as expressed in his letter, explains the result in this case. Though the grievant may disagree with the placement, his arguments do not raise a sufficient question that the agency's decisions violated any mandatory provision of policy or 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