Issue: Qualification – Separation from State (layoff/recall); Ruling Date: August 27, 2010; Ruling #2011-2730; 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 2011-2730
August 27, 2010

The grievant has requested a ruling on whether her November 23, 2009 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

This case involves the elimination of the grievant's position by the agency and her eventual separation. Once notified that her position would be eliminated, the grievant was given a choice by the agency either to accept layoff with severance benefits or to ask that the agency consider placing her in a different position. The grievant completed the agency's Affected Employee Placement Interest Form, choosing the latter option. Language included on this form indicated that if the grievant declined an offer of placement into a position that does not require relocation or a reduction in salary, the grievant would be separated and treated as if she had voluntarily resigned.

As required by the Affected Employee Placement Interest Form, the grievant also submitted a completed application for employment, which required her to indicate the shift she would accept (day, evening, night, rotating, or weekends). Of those choices, the grievant checked only "day." On or about October 14, 2009, the grievant was offered a position that required her to work evening hours (although it did not involve a relocation or a salary reduction). Because she was offered a position with evening hours, which she had previously indicated to the agency on the required application form that she would not accept, the grievant declined the offer of placement on or about October 15, 2009. The grievant states she was required to inform the agency of her decision within twenty-four hours.

Because the grievant declined placement, she was separated from employment on or about October 24, 2009. The grievant initiated her grievance on November 23, 2009. The agency administratively closed the grievance, asserting that the grievant did not have access to the grievance procedure because her separation was treated as a voluntary resignation. In EDR Ruling No. 2010-2503, this Department granted the grievant access to the grievance procedure to pursue her grievance at least through the management steps. Now that the grievance has done so, the grievant requests that her grievance be qualified for a hearing.

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] 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.[2]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] Thus, typically, the threshold question is whether the grievant has 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] For purposes of this ruling only, it will be assumed that the grievant has experienced an adverse employment action in that her grievance alleging a misapplication or unfair application of policy challenges the loss of her job.

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."[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;

---

[1] *See Grievance Procedure Manual* § 4.1.
[2] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[3] *See Grievance Procedure Manual* § 4.1(b).
[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*.

- 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]

Further, if an employee declines a pre-layoff offer of placement into a position that does not require relocation or a reduction in salary, the employee will be separated from employment with the Commonwealth and not entitled to other benefits under the policy or severance benefits.[9] This is exactly what happened to the grievant. Therefore, it cannot be said that policy was misapplied or unfairly applied such as to amount to a disregard of the policy's intent.

The crux of the grievant's argument is that in documentation she was required to submit to the agency if she wanted placement in lieu of layoff, she had indicated that she would accept only a day shift job due to family obligations. The placement offered to the grievant allegedly could require work outside the hours the grievant stated she would accept. While we understand the grievant's position, this Department can find no mandatory policy language violated by the agency's placement option in this case. Although the agency would certainly have discretion to honor an employee's requests in crafting placement opportunities, there appears to be no requirement in policy to do so.[10] Though the grievant may disagree with the offer of placement, her arguments do not raise a sufficient question as to whether the agency's decisions violated any mandatory provision of policy, disregarded the intent 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

[8] *Id.*
[9] *Id.*
[10] It is also notable that the Layoff Policy indicates that placement is made to the highest position available for which the employee is minimally qualified "regardless of work hours or shift." *Id.*