

Issue: Qualification – Management Actions (Recruitment/Selection) and Discrimination (Gender); Ruling Date: March 18, 2011; Ruling No. 2011-2856; Agency: George Mason University; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
QUALIFICATION RULING OF DIRECTOR

In the matter of George Mason University
Ruling Number 2011-2856
March 18, 2011

The grievant has requested a ruling on whether his October 19, 2007, grievance with George Mason University (the University or agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

Prior to the grievant's resignation in November 2007, the grievant was employed as a Compliance Safety Officer within the Safety Office at the George Mason University.¹

In September 2007, George Mason University reorganized and consolidated the Occupational Health Department, the Safety Office, and the Laboratory Safety Department into one office called the Environmental Health and Safety Office. As part of the reorganization, the former Director of Laboratory Safety position was expanded and the title was changed to the Director of Environmental Health and Safety to reflect the expansion of the position duties and the reorganizational name of the newly created department. According to the University, management did not establish a new position nor use competitive recruitment for the Director of Environmental Health and Safety position since that position was merely an expansion of job duties for the former Director of Laboratory Safety.

Under the reorganized University structure, the grievant reported directly to the Director of Infrastructure and the Director of Infrastructure reported to the Director of Environmental Health and Safety. The grievant alleges that the only reason he was not positioned to report directly to the new Director of Environmental Health and Safety was the Director's allegedly acknowledged bias toward the grievant and the grievant's purported inability to work well with women.

The grievant initiated his grievance on October 19, 2007, challenging the University's reorganization process and alleging University policy was misapplied during the reorganization of the Safety Office. He specifically claims that the University acted arbitrarily and capriciously

¹ According to the University, the grievant voluntarily resigned from his position as Compliance Safety Officer on November 26, 2007, and he is no longer employed at George Mason University.

by appointing the Director of Laboratory to the Director of Environmental Health and Safety without considering competitive recruitment for that position. Additionally, the grievant alleges that his positioning within the new organizational structure was a result of discriminatory bias.

The October 19th grievance proceeded through the management resolution steps without resolution and was denied qualification by the University president on November 1, 2010. The grievant now seeks a qualification determination from this Department.

DISCUSSION

Although state employees with access to the grievance procedure may grieve anything related to their employment, only certain grievances qualify for a hearing.² By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as 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

Misapplication 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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁴ Thus, typically, a 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 Importantly, the grievance procedure accords much deference to management’s exercise of judgment in actions such as determining whether and how to reorganize and consolidate departments. Thus, a grievance that challenges an agency’s action like the reorganization in this case does not qualify for a hearing unless there is sufficient evidence that the resulting determinations were

² See *Grievance Procedure Manual* § 4.1.

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 somewhat 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).

plainly inconsistent with other similar decisions by the agency or that the reorganization was otherwise arbitrary or capricious.⁸

Here, assuming for the purposes of this ruling only that the actions at issue rose to the level of an adverse employment action, there is no evidence that the University misapplied or unfairly applied policy. The former Director of Laboratory Safety, now the Director of Environmental Health and Safety, was and is, in both positions, a member of the University's administrative/professional faculty staff. The applicable University faculty handbook specifically addresses the reassignment of faculty staff, stating:]

The University retains the right to reassign an administrative/professional faculty member during the term of appointment. Reassignments should take into consideration the individual's skills and experience. In addition, the faculty member's duties may be changed due to the changing needs of the department, school, or university.⁹

In addition, while the University asserts that it has no formal reorganization policy, it states that its reorganization practice is straightforward. When reorganization occurs, the appropriate leadership agrees on a strategic direction for the unit considering several factors such as the needs of a growing research university, the nature of the work involved, a reasonable timetable, costs and benefits, avoidance of duplicate work, and the creation of best practices. Reorganizations are approached with the planned intention of shifting responsibilities among faculty and staff in order to avoid layoffs. Individual job duties and descriptions are considered, as are the faculty or staff holding positions in the areas to be reorganized. If the experiences and skills already exist in the personnel of the involved areas, their position(s) are not opened for recruitment, but may be redefined as needed. If a position requiring new experiences or skills is required, the University follows the standards for creating the position and recruiting for it.¹⁰

In reassigning duties to the former Director of Laboratory Safety, and in renaming the position as Director of Environmental Health and Safety, the University appears to have acted consistently with its faculty handbook provision on reassignment. For example, the responsibilities, skills, and experience required of the Director of Environmental Health and Safety are very similar to the responsibilities, skills, and experience required of the Director of

⁸ 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 EDR Ruling No. 2008-1760 (applying arbitrary or capricious standard to agency's assessment of applicants during a selection process); EDR Ruling No. 2008-1736 (same); EDR Ruling No. 2007-1721 (same); EDR Ruling No. 2007-1541 (applying arbitrary or capricious standard to classification of grievant's job duties and salary determination); EDR Ruling No. 2005-947 and 2005-1007 (applying arbitrary or capricious standard to agency's assessment of a position's job duties); EDR Ruling No. 2003-007 (applying arbitrary or capricious standard to agency's denial of upward role change).

⁹ See George Mason University Administrative/Professional Faculty Handbook, Section III(B)(2), January 1, 2007 update.

¹⁰ This general practice appears to be consistent with DHRM Policy No. 1.30 (Layoff), which applies to classified employees and provides that an agency should identify employees affected by the decision to reduce or reconfigure the work force and determine if placement options exist within the agency, such as making an offer to an affected employee which may result in placement within the same pay band, demotion in lieu of layoff, or separated-layoff.

Laboratory Safety.¹¹ The University basically redefined the duties of the Director of Laboratory Safety and renamed the position as Director of Environmental Health and Safety to accurately reflect the reorganized department name, consistent with the handbook.

Further, the grievant's evidence fails to raise a sufficient question as to whether the agency's reorganization was arbitrary or capricious. Rather, the University has provided a reasoned basis for the reorganization. Specifically, the University indicated that prior to the reorganization, there was ambiguity with regard to responsibilities and authority within the three safety-related groups, duplication of efforts, and the potential for contradictory policies and procedures. In the University's judgment, consolidation of the three departments was needed to streamline and improve upon the University's safety programs. Moreover, it does not appear that the agency's selection of the head of the reorganized division was arbitrary or capricious; rather, the selection appears to have been based on that individual's skills and experience. While the grievant may disagree with the university's rationale for the reorganization and their selection determinations, such disagreement does not mean that these actions were plainly inconsistent or otherwise arbitrary or capricious.

Discriminatory Bias

The grievant also alleges that management purposely positioned him within the reorganization to avoid his being a direct report to the Director of Environmental Health and Safety, and/or to other female supervisors, because of the Director of Environmental Health and Safety's purported discriminatory bias towards him.

For a claim of discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. The grievant must present facts that raise a sufficient question as to whether: (1) he was a member of a protected class;¹² (2) he applied for an open position; (3) he was qualified for the position, and (4) he was denied the position under circumstances that create an inference of unlawful discrimination.¹³ Where the agency presents a legitimate, non-discriminatory reason for the employment action taken, the grievance should not qualify for a hearing, unless there is sufficient evidence that the agency's stated reason was merely pretext or an excuse for discrimination.

¹¹ Many of the responsibilities for the Director of Laboratory Safety and the Director of Environmental Health and Safety positions listed by the University are very similar and/or overlap. For example, in both positions the employee is required to oversee the implementation of the Laboratory Safety program, investigate and report on infractions of safety regulations, oversee the administrative elements of and serve on committees, perform administrative functions related to oversight of the program to include managing of budget/expenditures and developing strategic plans, and be available to the University police/responders in the event technical guidance is required in response to an emergency situation. In addition, the skills described by the University that are needed for the Director of Environmental Health and Safety position are excellent collaboration, cooperation, and team management skills as well as up-to-date training on various safety techniques. The University asserts the former Director of Laboratory Safety possessed these skills and had the ability to competently handle the job responsibilities of the Director of Environmental Health and Safety position.

¹² See, e.g., Va. Code § 2.2-3004(A)(iii)(listing race, color, religion, political affiliation, age, disability, national origin or sex).

¹³ See *Dugan v Albemarle County School Bd.*, 293 F.3d 716, 720-721 (4th Cir. 2002); *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 851 (4th Cir. 2001).

The grievant does not expressly state the protected class upon which his claim of discrimination rests. We will assume, however, for purposes of this ruling only, that he is a member of a protected class, and unsuccessfully applied for an open position. Nevertheless, the grievant's evidence fails to raise a sufficient question as to whether he was denied a position due to unlawful discrimination. Indeed, the evidence indicates that the University had a legitimate, non-discriminatory reason for its reorganization, and with placing the grievant as it did within the reorganized structure.

Under the reorganization, three individuals directly report to the Director of Environmental Health and Safety - the Director of Laboratory Safety, the Director of Infrastructure, and the Occupational Health Manager. According to the University, two of these positions, the Director of Laboratory Safety and the Director of Infrastructure, were filled by existing personnel who already possessed the skills and experience necessary for the redefined positions. The University asserts that the grievant was not considered for the Director of Environmental Health and Safety, the Director of Infrastructure, or the Director of Laboratory Safety positions because he did not possess the skills, abilities, and expertise required for the redefined supervisory roles. In particular, the University stated the supervisory roles required excellent collaboration, cooperation, and team management skills which the University strongly felt the grievant did not exhibit to the same degree as the employees who were selected for those roles. Therefore, the University decided it was best to keep the grievant in the same position after the reorganization. As to the Occupational Health Manager position, because that position had been vacant prior to the reorganization, the University kept it vacant after the reorganization and continued competitive recruitment to fill it, rather than filling it noncompetitively through the appointment of an existing employee. Accordingly, the University advised the grievant he would not be noncompetitively appointed to the position of Occupational Health Manager, but that he could submit an application.¹⁴

Further, the University denies the grievant's allegation that the Director of Environmental Health and Safety admitted she was biased towards the grievant and purportedly stated he did not work well with women. In fact, the University asserts the Director of Environmental Health and Safety not only stated she held no bias towards the grievant, but actually said she would have the grievant report directly to her if the University found the grievant qualified for any of the positions. The University admits that management received several complaints from University employees that the grievant had a difficult time working with others, especially with female employees, but states that the decision to keep the grievant in the same position after the reorganization was based upon his lack of the needed expertise, skills, and abilities for each of the supervisory roles and, more importantly, the fact that other personnel were more qualified for the positions.

¹⁴ The competitive selection for the Occupational Health Manager position apparently occurred after the grievant filed his October 19, 2007 grievance. The grievant was not selected and did not grieve his competitive nonselection. Because the competitive nonselection was not a management action challenged by the grievant's October 19, 2007 grievance as filed, it is not an issue before us for qualification purposes.

In sum, we find the grievant has failed to raise a sufficient question as to whether unlawful discrimination occurred in this case. The grievant's allegations are insufficient to overcome the agency's stated legitimate, non-discriminatory reasons for its decisions.

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. 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