Issue: Qualification – Separation from State (Layoff/Recall); Ruling Date: February 15, 2011; Ruling No. 2011-2888; 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 2011-2888
February 15, 2011

The grievant has requested a ruling on whether his April 7, 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

In his April 7, 2010 grievance, the grievant challenges the agency's "[i]nconsistent, improper, and negligent application" of the Commonwealth's Layoff Policy and violation of the agency's Equal Employment Opportunity (EEO) Policy.[1] The grievant's claims are essentially twofold. First, the grievant alleges that the agency utilized "newly created" positions as placement options for employees impacted by layoff instead of opening those new positions to competition. The grievant, therefore, alleges that he was denied the opportunity to compete for these positions. Second, the grievant argues that in different ways the agency mishandled its application of the Layoff Policy to other employees. As a result of these alleged acts, the grievant states that the workload of his work unit has been impacted.

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, management reserves the exclusive right to manage the affairs and operations of state government.[3] 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] The grievant's claims regarding the agency's alleged violation of its EEO Policy is coextensive with his argument that he was denied the opportunity to compete for newly created positions discussed below. The grievant does not appear to be alleging discrimination, but rather an equal opportunity to compete for those positions. As such, this claim will be addressed as part of the claim regarding the newly created positions.
[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).

discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[4] In this case, the grievant essentially alleges misapplication and/or unfair application of policy.

"Newly Created" Positions

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 workforce according to uniform criteria when it becomes necessary to reduce the number of employees or to reconfigure the work force."[5] The Layoff Policy further mandates that each agency attempt to identify internal placement options to any "valid vacancies" agency-wide for impacted employees.[6] The Policy's definition of "valid vacancy" is: "A vacant classified position that is fully funded and has been approved by the appointing authority to be filled. These may include part-time or restricted positions depending upon agency needs and position funding."[7]

The grievant argues that the agency violated the Layoff Policy by utilizing "newly created" positions as valid vacancies for purposes of placing employees impacted by layoff. The grievant argues that to be considered "vacant," a position must be one that was vacated by an employee, not just a newly created position that is open. In reviewing the provisions of the Layoff Policy, we find no support for the grievant's assertions. Further, during this Department's investigation for this ruling, DHRM was consulted. Information provided by DHRM indicates that not only are agencies able to utilize such newly created positions as placement options, but consideration of those new positions is required. Consequently, there is no misapplication of the Layoff Policy here. Because the agency acted consistent with the provisions of the Layoff Policy, this Department also finds no violation of the agency's EEO Policy. Thus, the issue of the agency's use of newly created positions and the alleged impact it had on the grievant does not qualify for a hearing.

Application of Layoff Policy to Others

The grievant has provided specific examples of individuals affected by layoff. As noted in EDR Ruling No. 2010-2670, such claims appear to challenge the application of the Layoff Policy to other employees. A grievance must pertain personally and directly to the grievant's own employment to be permitted to proceed.[8] Consequently, in EDR Ruling No. 2010-2670, the grievant was directed to demonstrate that the agency's application of the Layoff Policy to other employees had some nexus to his own employment. The grievant has stated that the personal and direct impact of the agency's actions has been to increase his workload.

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[4] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[5] DHRM Policy 1.30, *Layoff.*
[6] *Id.*
[7] *Id.*
[8] *Grievance Procedure Manual* § 2.4.

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[9] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[10] 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."[11] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[12]

Even if it is assumed for purposes of this ruling only that the agency's actions regarding other employees somehow violated the Layoff Policy, the grievant has not demonstrated that he has experienced an adverse employment action as a result. Nothing that the grievant has submitted indicates that his workload was increased to such a degree that an adverse employment action occurred. In short, there has been no indication of a significant detrimental effect on the grievant as to the facts raised for this claim. Consequently, this claim does not qualify 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.

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Claudia T. Farr
Director

[9] *See Grievance Procedure Manual* § 4.1(b).
[10] 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.
[11] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[12] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).