Qualification – Separation from State (layoff/recall); Ruling Date: June 28, 2011; Ruling No. 2011-3009; Agency: Department of Taxation; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Taxation
Ruling Number 2011-3009
June 28, 2011

The grievant has requested a ruling on whether her February 11, 2011 grievance with the Department of Taxation (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant previously was employed by the agency as a manager of a group of Business Systems Analysts (BSAs). The grievant's position was eliminated in a recent round of budget reductions. The grievant's February 11, 2011 grievance challenges her resulting layoff from employment. In so doing, the grievant alleges that she was not offered placement into an available BSA position. The agency states that the grievant was not minimally qualified for the BSA position and, as such, it was not a valid vacancy to which the grievant could be placed pre-layoff.

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 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 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

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

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] Because the grievant was laid off, she 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 workforce 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]

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. However, in this case, the grievant does not challenge the fact her position was identified for layoff, but rather the agency's failure to offer her pre-layoff placement into a BSA position.[10]

"During the time between Initial Notice and Final Notice of Layoff, the agency shall attempt to identify internal placement options for its employees."[11] However, "[a]gency management must determine whether an employee is *minimally qualified* for the position being considered as a placement option."[12] As such, if the agency determines that the employee is not

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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.*

[10] The grievant also alleged that the agency should have provided more pre-layoff notice. While DHRM Policy 1.30 encourages as much notice as feasible, it requires only a minimum of two weeks' notice prior to the effective date of layoff, which was provided here. Consequently, there is no basis to find that the agency misapplied policy in its pre-layoff notice.

[11] DHRM Policy 1.30, *Layoff.*

[12] *Id.*

minimally qualified for a position, the position is not a valid vacancy for offering pre-layoff placement. The only position to which the grievant argues she should have received placement was the BSA position for which the agency determined she was not minimally qualified.

The grievance procedure accords much deference to management's exercise of judgment, including management's assessment of an employee's knowledge, skills, and abilities as it relates to the minimum qualifications of a position. Thus, a grievance that challenges an agency's determination like this case does not qualify for a hearing unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.[13]

Reasonable minds could disagree about whether the grievant satisfies the minimum qualifications of the BSA position. Although the grievant includes some relevant considerations as to her ability to perform the tasks of a BSA now and/or in the future, the agency's assessment of her abilities appears reasonable, as well. In addition to her supervisor's detailed assessment, during the second step meeting at least two BSAs who worked with the grievant were not sure the grievant would meet the minimum qualifications of the position.[14] Based on consideration of all of these analyses, this Department cannot find that the agency's determination in this regard was completely arbitrary or disregarded the available facts. While the grievant may reasonably disagree with the agency's assessment, she has not raised a sufficient question as to whether the agency's ultimate decision disregarded the facts or was otherwise arbitrary or capricious. As such, this grievance 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.

Claudia T. Farr
Director

[13] *See Grievance Procedure Manual* § 9. Arbitrary or capricious is defined as a decision made "[i]n disregard of the facts or without a reasoned basis."

[14] One of the BSAs stated that she could not say one way or the other.