



JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2024-5729
July 22, 2024

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether the grievant’s April 3, 2024 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

Due to the closure of some of the agency’s facilities, the agency was required to determine impacts on employees at those facilities pursuant to DHRM Policy 1.30, *Layoff*. One such impacted employee was placed into a vacant senior probation and parole officer (“SPO”) position in the grievant’s district. The grievant filed this grievance to challenge the placement of the employee as being denied an opportunity to compete for a promotional opportunity. The grievance has since gone through the management resolution steps, with the agency head denying the grievant’s request for a hearing. The grievant now appeals that determination to EDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.¹ Additionally, the grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government.² By statute and under the grievance procedure, complaints relating solely to issues such as the hiring, promotion, transfer, assignment, and retention of employees within the agency and layoff “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 While the grievant asserts that the agency’s decision to place the employee in the SPO position violated “Equal Employment Opportunity” by allegedly discriminating against state employees not affiliated with the closed facilities, nothing in this claim asserts a discriminatory basis protected by law or policy. Therefore, this grievance could only

¹ See *Grievance Procedure Manual* §§ 4.1 (a), (b).

² See Va. Code § 2.2-3004(B).

³ *Id.* §§ 2.2-3004(A), (C); see *Grievance Procedure Manual* §§ 4.1(b), (c).

qualify for a hearing based on a 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.⁴

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁵ Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action that could be remedied by a hearing officer. An adverse employment action involves an act or omission by the employer that results in “harm” or “injury” to an “identifiable term or condition of employment.”⁶ For purposes of this ruling only, EDR will assume that the grievant has alleged an adverse employment action, in that the agency’s placement of the employee into the SPO position denied her an opportunity for advancement.

In this case, the employee placed into the SPO position (a Pay Band 4, Grade 11 position) was previously in a Pay Band 4, Grade 9 position. Pursuant to DHRM Policy 1.30, “[a]fter an agency has identified all employees eligible for placement, an attempt must be made to place them by seniority to any valid vacancies agency-wide in the current or a lower Pay Band.”⁷ “Such placement shall be in the highest position available for which the employee is minimally qualified at the same or lower level in the same or lower Pay Band, regardless of work hours or shift.”⁸ Therefore, placing an employee within the Pay Band is consistent with policy.

Due to the limited placement options available given the geographic location of one of the agency’s facilities that was closing, the agency requested and was granted by DHRM an exception to DHRM Policy 1.30. This exception permitted the agency to place employees from that facility into vacant positions that are one Pay Band higher than the placed employee’s current position. That particular circumstance did not apply to the placement at issue in this grievance because it was a placement within the same Pay Band. However, to the extent the difference in “Grade” between the two positions is not considered the same level within the Pay Band, the agency’s placement of the employee into the SPO position is supported by the policy exception granted by DHRM, which would have permitted placement to an even higher position in Pay Band 5.

The grievant argues that the employee placed into the SPO position was not minimally qualified for the position. Under DHRM Policy 1.30,

Minimally qualified employees are those who are determined by agency management to:

⁴ See, e.g., EDR Ruling No. 2020-4956.

⁵ See *Grievance Procedure Manual* § 4.1(b); see Va. Code § 2.2-3004(A).

⁶ See *Muldrow v. City of St. Louis*, 144 S. Ct. 967, 974 (2024) (addressing a required element of a Title VII discrimination claim); see, e.g., *Burlington Ind. v. Ellerth*, 524 U.S. 742, 761 (1998) (defining adverse employment actions under Title VII to include “tangible” acts “such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits”).

⁷ DHRM Policy 1.30, *Layoff*, at 5.

⁸ *Id.*

- possess the necessary knowledge, skills, abilities (KSAs) and other bona fide job requirements as outlined in the Employee Work Profile (or other document used by the agency to describe the nature of the position and the position's qualifications) and
- be able to satisfactorily perform the duties of the position after a six-month period of orientation in the new position.

Agency management and human resources must determine whether an employee is minimally qualified for the position being considered as a placement option. The Employee Work Profile and employee's work experience should be used as guides in making this determination.⁹

EDR has reviewed the Employee Work Profile for the SPO position and reviewed the placed employee's resume. EDR has found no indication to suggest that the employee should not have been considered to possess the necessary KSAs for the job by the agency. The grievant is certainly not wrong to question whether the employee had satisfactory experience to perform the full job at the time of placement. However, policy only requires that the placed employee be able to satisfactorily perform the duties of the position within six months. The agency determined that the employee would have met the definition of "minimally qualified," and EDR has reviewed no information to reasonably call that determination into question.

The grievance procedure accords much deference to management's exercise of judgment, including decisions as to an employee's eligibility for placement under the Layoff Policy. Thus, a grievance that challenges an agency's determination like the one at issue here does not qualify for a hearing unless there is sufficient indication that it was plainly inconsistent with other similar decisions by the agency, or that the decision was otherwise arbitrary or capricious.¹⁰ Although the grievant disagrees with the agency's actions, EDR has not reviewed any evidence sufficient to support an assertion that the agency misapplied and/or unfairly applied any mandatory provision of policy, that the agency's actions were so unfair that they amounted to a disregard of the intent of any applicable policy, or that the placement was conducted in a manner that was otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on this basis.

Finally, qualification may not be appropriate even if a grievance challenges a management action that might ordinarily qualify for a hearing. For example, an issue may have become moot during the management resolution steps, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.¹¹ EDR has been informed that the employee placed into the SPO position will be voluntarily leaving the agency, rendering the position vacant again, and that the position will be posted for open recruitment. Accordingly, it would appear that the grievant will have the

⁹ DHRM Policy 1.30, *Layoff*, at 9.

¹⁰ See *Grievance Procedure Manual* § 4.1(c); *id.* § 9 (defining an arbitrary or capricious decision as one made "[i]n disregard of the facts or without a reasoned basis").

¹¹ See, e.g., EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.

opportunity to compete for the vacant position. As the relief requested by the grievant will effectively be provided due to these events, there is no basis to qualify such a grievance for hearing.

CONCLUSION

For the reasons discussed above, EDR finds that the facts presented in the grievance record do not constitute a claim that qualifies for a hearing under the grievance procedure.¹² EDR's qualification rulings are final and non-appealable.¹³

Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹² *Grievance Procedure Manual* § 4.1.

¹³ See Va. Code § 2.2-1202.1(5).