Issues: Qualification: Benefits/Leave – Leave Without Pay; Discrimination – Age, Disability and Race; Retaliation – Complying With Any Law and Other Protected Right; Ruling Date: April 16, 2007; Ruling #2007-1504, 2007-1532; Agency: Longwood University; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Longwood University
Ruling No. 2007-1504 and 2007-1532
April 16, 2007

The grievant has requested a ruling on whether his October 5, 2006 (Grievance #1) and December 6, 2006 (Grievance #2) grievances with Longwood University (Longwood or the agency) qualify for a hearing. In Grievance #1 the grievant claims that he has been the victim of harassment, discrimination and retaliation and that policy has been misapplied or unfairly applied.[1] In Grievance #2, the grievant challenges his termination as retaliatory, discriminatory, a misapplication of policy[2] and in violation of Virginia Code § 65.2-308.[3] For the following reasons, these grievances do not qualify for a hearing.

FACTS

Prior to his termination, the grievant was employed as a Trades Technician III with Longwood University. On January 4, 2006, the grievant injured his shoulder while working. On January 18, 2006, the grievant saw his doctor at which time his doctor said the grievant was to remain out of work for 2 to 3 days, but could return to work thereafter with the following restrictions: "avoid lifting overhead or above [his] shoulders for two weeks."

On February 2, 2006, the grievant was examined again by his doctor. The grievant's doctor again wrote a note stating that the grievant should not return to work for 3 to 4 days and is to "avoid lifting overhead." Additionally, the grievant's doctor referred him to an orthopedic doctor, which the grievant saw on February 22, 2006. After examination, the orthopedic doctor put the grievant out of work until February 27, 2006 and stated that upon his return to work, the grievant was to do no overhead lifting and no

[1] Although not specifically denoted as such, the grievant's challenge to the agency's placement of him in a conditional leave without pay status can be fairly read as a misapplication or unfair application of policy claim.
[2] Again, although not specifically denoted as such, the grievant's challenge to his termination can be fairly read as a misapplication or unfair application of policy claim.
[3] Va. Code § 65.2-308 states that "[n]o employer or person shall discharge an employee solely because the employee intends to file or has filed a claim under this title [Virginia Workers' Compensation Act] or has testified or is about to testify in any proceeding under this title."

carrying in excess of 30 pounds for 6 weeks. On February 28, 2006, the orthopedist took the grievant out of work completely until March 3, 2006 due to continued shoulder pain. After additional testing on his shoulder, the grievant learned on March 29, 2006 that surgical repair was necessary.

The grievant's shoulder surgery was scheduled for April 25, 2006 and as such, the grievant's orthopedic doctor ordered that the grievant remain out of work while awaiting his surgery and then for approximately three months following his surgery. On June 5, 2006, the grievant was given an order for 6 weeks of physical therapy, which the grievant says he began on June 12, 2006. The grievant saw his orthopedic doctor again on August 9, 2006 where it was determined that the grievant could not return to work for an additional two months.

Thereafter, the agency determined that there was a business need (i.e., shortage of staff for an increased workload)[4] to fill the grievant's position and thus, by letter dated August 31, 2006, the agency informed the grievant that he was being placed on conditional leave without pay effective September 1, 2006.[5] The grievant's position was subsequently advertised to Longwood University personnel only on September 5, 2006. When this internal recruitment failed to secure a suitable candidate, the grievant's position was advertised to the general public on September 21, 2006. According to the agency, an offer was made and accepted by the selected candidate in early October 2006.

On October 11, 2006, the grievant was released by his doctor to return to light duty (i.e., no working overhead and no lifting greater than 20 lbs.) with an expected return to full duty within two months. Because the agency had already filled the grievant's position, he was not brought back to work; however, the agency claims that it attempted to find another position in which to place the grievant, but was unable to do so. As such, the grievant was separated from his employment with Longwood University effective October 9, 2006.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[6] Thus, all claims relating to issues such as the methods, means, and personnel by which work activities are to be carried out generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have

[4] According to the agency, there has been a substantial increase in the number of buildings and that the staff needed to perform the maintenance of these buildings "has not increased at the same rate," thereby creating a "critical state in terms of manpower to perform the work."
[5] The grievant, who participates in the traditional sick leave program, exhausted all of his available leave on April 18, 2006 and had been in a leave without pay status since that time.
[6] Va. Code § 2.2-3004(B).

been misapplied or applied unfairly.[7] In this case, the grievant claims that the agency misapplied and/or unfairly applied policy when it placed him into a conditional leave without pay status and subsequently terminated his employment. Additionally, the grievant claims he has been the victim of discrimination, workplace harassment, and retaliation.

Misapplication/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. The applicable policy in this case is Department of Human Resource Management (DHRM) Policy 4.45, *Leave Without Pay Conditional and Unconditional*.

According to DHRM Policy 4.45, "[a]n agency may grant conditional leave without pay for reasons where a guarantee of reinstatement is not practical due to the agency's need to fill the employee's position."[8] Accordingly, conditional leave without pay guarantees reinstatement only if the employee's position is still available when the employee returns from an extended absence.[9] Policy further states that "[i]f an employee is not reinstated at the end of the conditional leave, the agency *should* assist the employee in determining whether vacancies for which the employee might be qualified exist in other state agencies."[10]

Based on the foregoing, an agency *may* grant an employee conditional leave without pay and a request for leave without pay may be denied.[11] Therefore, under policy, management is granted discretion in making determinations whether or not to grant leave without pay. In this case, the grievant had been on leave without pay since April 18, 2006 as a result of his work-related shoulder injury. Upon learning in August 2006 that the grievant required an additional two months off from work, the agency determined that as a result of a staff shortage for its increased workload it could no longer afford to support the grievant's need for unconditional leave without pay and placed him in a conditional leave without pay status as of September 1, 2006. This determination was wholly within management's discretion and does not appear to be a misapplication or unfair application of policy.

Additionally, the grievant claims that the agency violated policy when it made no attempt to place him in another position once he was able to return to work on October 12, 2006 with restrictions. However, as stated above, policy does not *require* that an agency assist the employee in determining whether vacancies exist in other state

[7] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b)-(c).
[8] DHRM Policy 4.45(III)(B).
[9] *Id.* at (II)(B).
[10] *Id.* at (V)(C)(emphasis added).
[11] *Id.* at (III)(B).

agencies; rather, state policy says that an agency *should* assist the employee in this regard. Accordingly, even if this Department were to assume that the agency failed to assist the grievant in locating vacancies in other state agencies,[12] this Department concludes that there has been no violation of policy.

In light of the above, it does not appear that the agency unfairly applied or misapplied policy when it placed the grievant in a conditional leave without pay status and later terminated the grievant's employment. Therefore, the issue of misapplication and/or unfair application of policy does not qualify for a hearing.

Disability Discrimination

DHRM Policy 2.05 "[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability."[13] Under Policy 2.05, "'disability' is defined in accordance with the Americans with Disabilities Act," the relevant law governing disability accommodations.[14] Like DHRM Policy 2.05, the Americans with Disabilities Act (ADA) prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability. A qualified individual is defined as a person with a disability, who, with or without "reasonable accommodation," can perform the essential functions of the job.[15] An individual is "disabled" if she "(A) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment."[16]

Was the Grievant "a Qualified Individual with a Disability?"

In this case, the grievant claims that the agency regarded him as having a disability when it placed him on conditional leave without pay and later terminated his

[12] According to the agency, it searched for vacancies within Longwood for the grievant, but it is unclear whether it searched for vacancies within other state agencies when assisting the grievant. The grievant claims that he directly contacted a supervisor in another department and that supervisor said the grievant could come work for him until he could return to work with no restrictions. Even if this Department were to assume that the grievant's assertion is true, policy did not require the agency to temporarily place the grievant in that other department. Further, to the extent the grievant is using the agency's refusal to place him in another department until he could return to work as a basis to support his claims of discrimination, this Department concludes, as outlined below, that the grievant has failed to provide sufficient evidence to support his claims that he was treated differently than other similarly-situated employees and that the agency's stated reason for his placement on conditional leave without pay and resultant termination was pretextual.

[13] DHRM Policy 2.05, page 1 of 4 (emphasis added).

[14] 42 U.S.C. §§12101 *et seq.*

[15] In defining whom the ADA covers and the duties of the employer, the Act does not distinguish between those persons whose disability came about due to a work-related injury versus other disabled individuals.

[16] 42 U.S.C. § 12102(2).

employment.[17] In support of his claim, the grievant asserts that agency management made the following comments: "don't drag [your shoulder injury] out like you did your foot [injury]" and "you're just trying to get disability."[18] Additionally, the grievant claims that representatives of the agency's human resources department told the grievant that he was eligible to apply for disability retirement.[19]

To be regarded as having a disability, the grievant must show that the agency either (1) mistakenly believes that he has a physical or mental impairment that substantially limits one or more major life activities; or (2) mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.[20] Presumably, the grievant's shoulder injury constitutes a physical impairment. However, to be regarded as having an ADA disability, the agency must believe that the grievant's shoulder injury substantially limits one or more of his major life activities.[21] Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[22] To be "substantially limited" in a major life activity, the plaintiff must be significantly restricted in performing the activity.[23]

While the grievant has presented evidence that the agency may have considered his shoulder injury to be potentially long-term, he has not presented any evidence to suggest that the agency believed him to be substantially limited in one or more of his major life activities. As stated above, the agency appears to have invoked its right to place the grievant on conditional leave without pay in order to accommodate its business functions, not because it believed he was substantially limited in any major life activity. As the grievant has failed to make this showing, his claim of disability discrimination does not qualify for hearing.

Race Discrimination

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[17] More specifically, the grievant claims that he is not disabled but that "[t]he University assumed I was or would be disabled due to my injury and separated me…"

[18] The agency admits that management made the former comment, but denies the latter.

[19] The agency admits that the human resource director had a conversation with the grievant where disability retirement was discussed and that upon his separation from employment, the grievant was informed of his eligibility to apply for work-related disability retirement. According to the agency, the human resource director was only informing the grievant of his option under the traditional sick leave program to apply for disability retirement and was not making a determination as to his qualification for such benefits.

[20] *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999).

[21] In McKey v. Occidental Petroleum Corp., 956 F. Supp. 1313, 1317-18 (S.D. Tex. 1997) the court notes that "In fact, the ADA does not designate any impairment as a disability *per se*. Instead, the Interpretive Guidelines to the ADA emphasize the impact an alleged impairment has on the individual. 'The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.''' 29 C.F.R. 1630.2(j), App. (1996). 42 U.S.C. § 12102(2)(A).

[22] 29 C.F.R. § 1630.2(i).

[23] Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 196-97, 122 S. Ct. 681, 691 (2002).

The grievant also asserts that his placement in a conditional leave without pay status and resultant termination were discriminatory on the basis of race.[24] Grievances that may be qualified for a hearing include actions related to discrimination on the basis of race.[25] To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status, in other words, that because of the grievant's race, he was treated differently than other "similarly-situated" employees. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, unless there is sufficient evidence that the agency's professed business reason was merely a pretext for discrimination.[26]

In this case, the grievant has not provided evidence that his placement in a conditional leave without pay status and termination occurred under circumstances raising an inference of unlawful race discrimination. In particular, the only person that the grievant identifies as similarly situated, was in fact, not so. The other employee, an African American, was allegedly out on worker's compensation for a knee injury. He was subsequently released to return to work with restrictions and the agency accommodated those restrictions by placing him in another department until he could return to work full time with no restrictions. This employee, unlike the grievant, was never placed in a leave without pay status because he had sufficient accrued leave to cover any absences from work. Moreover, at the time the grievant was placed in a conditional leave without pay status and at the time he was terminated, he, unlike the African American employee, was unable to return to work, with or without restrictions. Accordingly, the grievant and the African American employee were not similarly situated so as to implicate a claim for unlawful discrimination on the basis of race. Moreover, the grievant has not presented any evidence which would suggest the agency's stated reason for the grievant's placement in a conditional leave without pay status (i.e., increased workload and staff shortage) and resultant termination is in fact a pretext for race discrimination. Accordingly, his claim of race discrimination does not qualify for hearing.

Age Discrimination

The grievant also asserts that his placement in a conditional leave without pay status and resultant termination were discriminatory on the basis of age. Grievances that may be qualified for a hearing include actions related to discrimination on the basis of age.[27] It is unlawful for an employer to discriminate against an employee on the basis of age (i.e., forty years of age or older).[28] In particular, the Age Discrimination in Employment Act (ADEA) provides that "it shall be unlawful for an employer . . . to

[24] The grievant is a Caucasian male.
[25] *See Grievance Procedure Manual* § 4.1(b).
[26] Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. 1998)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).
[27] *See Grievance Procedure Manual* § 4.1(b).
[28] *See* 29 U.S.C. 621 et seq. (Age Discrimination in Employment Act (ADEA)).

discharge any individual . . . because of such individual's age."[29] Such discrimination is also a violation of state policy.[30] However, like race discrimination claims, to qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status.

To establish a prima facie case of age discrimination under the ADEA, the grievant must prove that "(1) he was in the age group protected by the ADEA; (2) he was discharged or demoted; (3) at the time of his discharge or demotion, he was performing his job at a level that met his employer's legitimate expectations; and (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful age discrimination."[31] If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[32]

The grievant is over the age of forty and was discharged. However, at the time he was separated, the grievant was not performing his job at all. Moreover, he has failed to raise a sufficient question that his discharge occurred under circumstances that raise a reasonable inference of unlawful age discrimination. In support of his age discrimination claim, the grievant alleges that shortly after his shoulder injury, the trades supervisor asked him if he knew what was wrong with his shoulder and the grievant responded by saying that he did not know anything yet. The grievant claims that the trades supervisor then commented that because of his age, the doctor probably would not do anything except physical therapy. The agency asserts that these comments were made by the carpentry supervisor, not the trades supervisor, and that the comments were intended to give the grievant "the benefit of [the carpentry supervisor's] own experience," as he had suffered a should injury very similar to the grievant's, and that the comment was related to the supervisor's understanding that age can be a factor in determining whether surgery is an option. The comment about the grievant's shoulder, regardless of who actually said it, does not appear to be related to the grievant's ultimate separation and thus, not probative of age discrimination.[33]

Additionally, the grievant claims that during the internal recruitment process, the grievant's position was informally offered to a "much younger part-time employee already employed in the Carpenter Shop"[34] and that placing the part-time employee in the

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[29] 29 U.S.C. § 623(a)(1).
[30] *See* Department of Human Resources Management Policy 2.05.
[31] Halperin v. Abacus Tech. Corp., 128 F.3d 191, 201 (4th Cir. 1997).
[32] *Id. See also* Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. 1998)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).
[33] *See* Cramer v. Intelidata Techs. Corp., 1998 U.S. App. LEXIS 32676, *4-5 (4th Cir. 1998) (unpublished opinion) ("In order for the alleged discriminatory statements to be probative of age discrimination**,** there must be a nexus between the statements by [the supervisor] and the decision-making process.")
[34] The grievant asserts that the part-time employee was told he would get the grievant's job if he applied.

grievant's position would do little to help with the alleged shortage of staff since he was already employed in the carpenter shop. The agency, on the other hand, asserts that the grievant's position was never offered to an internal Longwood employee. Even if informally offered the job during the internal recruitment process, it is undisputed the "much younger" part-time employee did not actually fill the grievant's position,[35] and the grievant has offered no evidence to suggest that the agency's alleged informal offer was made in an effort to replace the grievant with a younger employee. Moreover, the grievant has presented insufficient evidence that the agency's stated reason for the grievant's placement in a conditional leave without pay status (i.e., increased workload and staff shortage) and resultant termination is in fact a pretext for age discrimination.

Accordingly, this Department concludes that the grievant has failed to come forward with sufficient evidence to establish that his placement in a conditional leave without pay status and termination occurred under circumstances raising an inference of unlawful age discrimination.

Workplace Harassment/Hostile Work Environment

For a claim of a workplace harassment and/or hostile work environment based on race, age and/or disability to qualify for hearing, an employee must come forward with evidence raising a sufficient question that: (1) he was subjected to unwelcome harassment; (2) the harassment was based on his race, age and/or disability; (3) the harassment was sufficiently severe or pervasive to alter his conditions of employment and create an abusive atmosphere;[36] and (4) there is some basis for imposing liability for the harassment on the employer.[37]

The grievant has presented evidence that the actions taken against him were unwelcome. However, as noted above, the grievant has failed to raise a sufficient question that the agency's actions were based upon his race, age and/or alleged perceived disability. As the grievant has failed to make this showing, his claim of workplace harassment and/or hostile work environment does not qualify for hearing.

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[38] (2)

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[35] The grievant's position was ultimately filled by a person 56 years of age, three years younger than the grievant.

[36] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S.Ct. 367 (1993).

[37] *See* Spriggs v. Diamond Autoglass, 242 F.3d 179 (4th Cir. 2001).

[38] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such

the employee suffered a materially adverse action;[39] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[40] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[41]

In this case, the grievant claims that the agency is retaliating against him because (i) he filed a worker's compensation claim; (ii) his wife, who is also an employee of Longwood University, previously filed a grievance against the agency challenging her termination and was reinstated by the hearing officer;[42] and (iii) he complained to the human resources office when the trade supervisor allegedly commented to him "don't drag this out like you did your foot." Clearly, the grievant engaged in protected activity when (1) he initiated his worker's compensation claim;[43] and (2) when he reported to human resources what he believed to be discrimination based on a perceived disability.[44] Moreover, his wife's grievance activity arguably could be used to support his claim of retaliation.[45] Being separated from his employment with Longwood University constitutes a materially adverse action. Thus, the only question remaining is whether a causal link exists between the grievant's prior protected acts and his separation.

In support of his claim of retaliation, the grievant states that (1) he is the only employee ever to have been treated in this manner when faced with similar circumstances;[46] (2) the trades supervisor was "clearly unhappy" and refused to speak to the grievant after he complained to the human resources office; and (3) he has been told that the Human Resources Director, who supervised and terminated the grievant's wife

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law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* §4.1(b)(4).

[39] Burlington N. & Santa Fe Ry. Co. v. White, 126 S.Ct. 2405, 2414-15 (2006).

[40] *See* EEOC v. Navy Fed. Credit Union, 424 F.3d. 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).

[41] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (Title VII discrimination case).

[42] *See* Decision of Hearing Officer, Case No. 7908, issued December 1, 2004.

[43] *See* Va. Code §65.2-308.

[44] *See* Peters v. Jenney, 327 F.3d 307, 320 (4th Cir. 2003) (a plaintiff need not demonstrate that the employer has actually violated Title VII; rather, the plaintiff must show that "he opposed an unlawful employment practice which he reasonably believed had occurred or was occurring")(internal quotation marks omitted).

[45] *See* United States EEOC v. Bojangles Rests., Inc., 284 F. Supp.2d 320, 330 (M.D.N.C. 2003)(employee could bring a retaliation claim against her employer because the employer perceived the employee as someone who was or who would be assisting someone engage in protected activity, in this case, the employee's fiancé, who was also employed by the employer).

[46] The grievant cited to two examples in support of this assertion.

and was also closely involved in the instant case, was furious when she learned that the grievant's wife had won her grievance.[47]

The agency denies that the grievant is the only employee to have been placed on conditional leave without pay and to have his position filled, and advised this Department during its investigation that at least one other employee has been placed on conditional leave without pay while on worker's compensation. This employee's position, like the grievant's, was later filled. Additionally, the agency asserts that the two employees that the grievant cites to as examples to support his claim that he is the only employee to be treated in this manner were not in fact similarly-situated to the grievant as neither of these employees was ever in a leave without pay status.

Further, assuming that the trades supervisor had been upset and had refused to talk to the grievant after the grievant complained, this alone is insufficient to raise a question that the grievant's placement on conditional leave without pay and resultant termination was the result of the grievant's complaints to human resources. Likewise, the Human Resources Director's anger over the grievant's wife's reinstatement, even if true, alone does not raise a question of retaliatory intent especially in light of the fact that the grievant's wife's reinstatement occurred in 2004 and the grievant admits to having no problems with the Human Resources Director prior to the events being grieved in this case. Finally, the University has articulated a legitimate, non-retaliatory reason for the materially adverse action (i.e., increased workload and staff shortage) which the grievant's evidence is insufficient to rebut.

In light of the above, this Department concludes that the issue of retaliation does not qualify for hearing because the grievant's evidence is insufficient to demonstrate a causal link, that is to say, demonstrate that the agency placed him in a leave without pay status and terminated him *because* he filed a worker's compensation claim, *because* he complained to human resources about the trades supervisor's comment and/or *because* his wife filed a grievance against Longwood and was reinstated through that process. Accordingly, the issue of retaliation does not qualify for hearing.

Violation of Virginia Code § 65.2-308

In Grievance #2, the grievant claims that his termination was in violation of Virginia Code § 65.2-308. This Department has no authority to assess the applicability of Virginia Code § 65.2-308 to this case, nor enforce those provisions. Rather, this is a matter for the Circuit Court to decide. Thus, while this issue appropriately proceeded through the management resolution steps for a possible resolution,[48] it does not qualify for a hearing.

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[47] During this Department's investigation, the grievant's wife stated that a co-worker told her that the Human Resources Director "screamed," and "was shaking and couldn't speak" when she found out that the grievant's wife had won her grievance and been reinstated to employment at Longwood.
[48] Va. Code § 2.2-3004 (A).

CONCLUSION AND APPEAL RIGHTS

Based on the foregoing, this Department concludes that neither Grievance #1 nor Grievance #2 qualifies for a hearing. 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 these grievances, 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 grievances and notifies the agency of that desire.

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Claudia T. Farr
Director