Issue: Qualification – Separation from State (Layoff); Ruling Date: June 11, 2008; Ruling #2008-2004; Agency: Virginia Commonwealth University; Outcome: Qualified for Hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Commonwealth University
EDR Ruling No. 2008-2004
June 11, 2008

The grievant has requested a ruling on whether her January 30, 2008 grievance with Virginia Commonwealth University (the University) qualifies for a hearing. For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

The grievant was formerly a Human Resources Manager (HR Manager), a Pay Band 5 position, with a particular School at the University, earning approximately $50,455. In July 2007, the grievant was notified that her position was being eliminated pursuant to a restructuring of the School. The change was to be effective January 1, 2008. As part of the restructuring, the School abolished the grievant's HR Manager position and created a new Assistant Dean position, which took over a number of the grievant's former "staff services" duties, to include recruitment, development, recognition, and accountability. In addition, a new Human Resources Assistant (HR Assistant) position, Pay Band 3, was created to support the new Assistant Dean.[1] The salary range for a Pay Band 3 position is $23,999 to $49,255. The grievant was offered this HR Assistant position at a salary of $35,000, approximately $15,000 less than she was making in her HR Manager position. The grievant declined the HR Assistant position and, as a result, was laid off.

The grievant initiated her January 30, 2008 grievance to challenge the elimination of her position and the reduced salary she was offered for the HR Assistant position. She has raised numerous issues regarding the position abolishment, including misapplication of the Layoff Policy, retaliation, harassment, and inconsistency with past practice. For instance, she stated that her position was eliminated because of disagreements she had with a senior member of School management. She has also asserted that the University's justification for offering the lower salary for the HR Assistant position was flawed in certain ways, alleging that: 1) other employees had their duties decreased in the past year and did not receive a decrease in pay; 2) other employees at the School were provided

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[1] A portion of the grievant's former salary was also reallocated to make another part time administrative support position at the School full time.

with pay increases; 3) the School granted exceptions to policy in providing higher starting salaries to certain positions; and 4) a "surplus" occurred at the end of the prior fiscal year.[2] The University has largely disputed the grievant's arguments on these issues.

DISCUSSION

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 layoff or to the transfer and assignment of employees "shall not proceed to a hearing."[4] Accordingly, challenges to such decisions do not qualify for a hearing unless the grievant presents evidence raising a sufficient question as to whether the agency misapplied or unfairly applied policy, or discrimination, retaliation or discipline improperly influenced the decision.[5] In this case, the grievant claims in part that the University misapplied or unfairly applied the Layoff 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."[6] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[7] 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."[8] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9] Because the grievance raises issues regarding the abolishment of the grievant's job and the decrease in salary she was offered prior to layoff, the grievant has sufficiently alleged an adverse employment action.

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[2] The grievant has presented no support for her assertion as to a "surplus."
[3] Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(C).
[5] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.
[6] *See Grievance Procedure Manual* § 4.1(b).
[7] 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.
[8] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[9] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001) (citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997).

The intent of Department of Human Resource Management (DHRM) Policy 1.30 ("Layoff Policy") is to allow "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."[10] The Layoff Policy mandates that each agency identify employees for layoff in a manner consistent with business needs and the Policy's provisions, including provisions governing placement opportunities within an agency prior to layoff.[11] During the time between Initial Notice and Final Notice of Layoff, the agency shall attempt to identify internal placement options for its employees.[12] After an agency identifies all employees eligible for placement, the agency must attempt to place them by seniority in any valid vacancies agency-wide in the current or a lower Pay Band.[13] Additionally, the placement must "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."[14]

Further, "[i]t is the intent of [the Layoff Policy] to maintain employees' salaries *where possible*; however, when that is *not feasible* due to budget constraints, agencies may offer lower salaries to employees who are placed in lieu of layoff."[15] Because the School sought to place the grievant in the HR Assistant position, which is in a lower Pay Band, the provisions relating to "demotion in lieu of layoff" are relevant. That portion of the Layoff Policy provides:

> Employees who are placed in positions that are in lower Pay Bands normally will retain their salaries if the salaries are within the employee's new Pay Band. If an employee's salary is above the Pay Band's maximum, the agency may freeze the employee's current salary for a maximum of six months from the placement date, before reducing it to the maximum of the Pay Band. However, *if funding constraints exist*, the agency may reduce the salary to the maximum immediately or offer a lower salary upon placement.[16]

This language is further clarified by the "Frequently Asked Questions" document produced by DHRM about the Layoff Policy. That document states: "Placement in lieu of layoff is intended to allow the employee to continue at the same salary. However, *if*

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[10] *Id*.
[11] DHRM Policy 1.30, *Layoff*.
[12] *Id*.
[13] *Id*.
[14] *Id.* (emphasis in original). The grievant has not presented any argument in this case that the University had a higher position available that was not offered to her. This Department learned during its investigation for this ruling that the University did offer the grievant a Pay Band 4 position in another area of the University. It is unclear at what salary the position was offered to the grievant. However, documents provided to EDR by the University indicate a salary range for the position between $38,000 and $42,000. The grievant did not accept that position either.
[15] *Id.* (emphasis added).
[16] *Id.* (emphasis added).

an agency can document that budget constraints do not permit them to offer the same salary, the agency may offer placement at a lower salary."[17]

The grievant's salary as an HR Manager was above the Pay Band maximum for the HR Assistant position by about $1,200. Under the Layoff Policy, however, the University could 1) freeze the grievant's current salary for a maximum of six months from the placement date, before reducing it to the maximum of the new Pay Band ($49,255), 2) reduce the grievant's salary to the $49,255 new Pay Band maximum immediately upon placement, "if funding constraints exist," or 3) offer a salary lower than $49,255 (but no lower than $23,999, the Pay Band minimum) upon placement, "if funding constraints exist."[18] An agency will have discretion in determining when such "funding constraints" exist, but the Layoff Policy, with its related Frequently Asked Questions, also appears to place a burden on the agency to "document" the funding constraints.

In its step response, the University states that statewide revenue shortfalls and budget cuts were <u>not</u> the cause of the change in the grievant's position and lower salary offer. Rather, the step response states that due to a restructuring, the grievant's position was abolished and the grievant was offered another position at a lower salary "commensurate with the responsibilities of the new position." The step response provides no information as to any other funding constraints that could have prevented the University from maintaining the grievant's former salary. Furthermore, during its investigation for this ruling, EDR sought information from the University that would demonstrate that "funding constraints" necessitated the lower salary offer. The University responded by stating that the category of funds used by the School to pay salaries is fixed and limited, not varying year to year unless there is a new program to implement. The supporting documentation provided by the University, however, indicates that in both fiscal years 2005-06 and 2006-07, the School spent more of this category of funds than was originally allocated, and, in 2006-07, "borrowed" funds from another school at the University to "cure the large deficit." More to the point, however, it is unclear at this stage how ending balance information alone "documents" the "funding

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[17] DHRM Policy 1.30, *Layoff*, "Frequently Asked Questions," No. 10 (emphasis added); *see also id.* at No. 21 ("Agencies should try to maintain the employee's former salary when recalling an employee. However, if such a salary offer is not feasible due to budget constraints, the agency may offer the employee a position in the same Role at a salary lower than his or her pre-layoff salary. The agency must be able to document the budget-driven need to make a lower offer."). It should also be noted that this Department sought the informal input of DHRM's policy analyst regarding this portion of the Layoff Policy. While DHRM's response was helpful, the information provided essentially stated that the Policy "does not dictate what constitutes 'appropriate' funding constraints." Admittedly, the Policy does not include language providing guidance on when it is "not feasible" for an agency to maintain an employee's salary due to budget constraints. However, express feasibility and "funding constraints" language was included in the Policy and must have some effect given that Frequently Asked Question No. 10 appears to make documentation of the agency's budget constraints a precondition to offering a placement at a lower salary. This Department is not at liberty to ignore express Policy language. Thus, we have attempted to make a fair reading of the plain language of the Policy, the Frequently Asked Questions, and DHRM's input to apply the Policy suitably for this qualification ruling.

[18] *See* DHRM Policy 1.30.

constraints" that prevented the School from offering the grievant a higher salary. While it is the grievant's burden to establish the misapplication or unfair application of policy, in this instance, given the University's limited supportive documentation and the ambiguity in the Layoff Policy regarding what constitutes a "funding constraint," or what is "not feasible" due to budget constraints, the grievance must be qualified for hearing so that an independent hearing officer may review the case, interpret the relevant policy, and apply it to the facts of the case. Among other review and appeal rights, either party will be able to request the DHRM Director to review the hearing officer's decision and rule in writing on the hearing decision's consistency with policy.[19]

Alternative Theories and Claims

The grievant has also asserted additional theories in her grievance, including retaliation and other misapplication or unfair application of policy arguments. However, because the specific misapplication/unfair application of policy theory discussed in this ruling qualifies for hearing, this Department deems it appropriate to send all alternative theories raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons set forth above, the grievant's January 30, 2008 grievance is qualified for hearing. This qualification ruling in no way determines that the agency's actions misapplied or unfairly applied policy or were otherwise improper, only that further exploration of the facts and interpretation of the Layoff Policy by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the University shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

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Claudia T. Farr
Director

[19] *See Grievance Procedure Manual* § 7 ("Review of Hearing Decisions").