Issue: Qualification – Separation from State (layoff); Ruling Date: April 22, 2010; Ruling #2010-2583; Agency: College of William & Mary; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the College of William and Mary
Ruling No. 2010-2583
April 22, 2010

The grievant has requested qualification of his December 21, 2009 grievance with the College of William and Mary (the College). For the reasons set forth below, the grievance does not qualify for hearing.

FACTS

In late 2009, the College was faced with significant budget reductions. The School at the College in which the grievant worked similarly had to determine how to accomplish substantial budget savings. Part of the School's budget reduction decisions involved eliminating positions and laying off employees. The grievant's position was eliminated in this process. The grievant has submitted his December 21, 2009 grievance to challenge the elimination of his position. He raises three main issues: unfair and misapplications of state and agency policy, including retaliation; breach of contract;[1] and a systematic pattern of bias, creating a hostile workplace. The grievant describes the "systematic" unfair and hostile treatment by his Department Head in alleging various past actions, including 1) in 2002, removing general funding for and changing the grievant's position and when the General Assembly restored that funding, not allocating the funds to and restoring the grievant's position; 2) upon being selected for a general fund position in 2004, preventing the grievant from receiving the full salary sought by his supervisors, which forced the grievant into a restricted position partially funded by grants; 3) seeking to eliminate his position during fiscal year 2009 budget cuts; 4) putting the grievant in a part-time position when grant funding lapsed in 2009; 5) criticisms of work performance; and 6) rewriting the grievant's position to remove supervision of a subordinate employee.

DISCUSSION

The grievant has described various issues in how the Department Head has treated him in the past with regard to his employment. In so doing, the grievant describes allegations of a hostile work environment or harassment. The grievant's factual allegations about the past

[1] A breach of contract claim is not among the issues identified by the General Assembly as qualifying for a grievance hearing. *See* Va. Code § 2.2-3004(A). As such, this claim cannot qualify for hearing and will not be addressed further.

conduct are also relevant to his claims regarding the elimination of his position and will, therefore, be considered as to that claim as well.

Hostile Work Environment

For a claim of hostile work environment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[2] "[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."[3]

Further, the grievant must raise more than a mere allegation of harassment or hostile work environment – 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. The grievant has not presented any indication that the alleged hostile work environment was based on a protected status.[4] Consequently, this claim does not qualify for a hearing.[5]

Layoff

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[6] Further, complaints relating solely to layoff "shall not proceed to a hearing."[7] Accordingly, challenges to layoff 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.[8] In this case, the grievant appears to assert claims of retaliation and misapplication and/or unfair application of policy.

Misapplication and/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

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[2] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[3] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).
[4] *See, e.g.*, DHRM Policy 2.30, *Workplace Harassment*.
[5] This ruling does not mean that EDR deems the alleged workplace behavior, if true, to be appropriate, only that the claim of hostile work environment on the basis of a protected status does not qualify for a hearing.
[6] Va. Code § 2.2-3004(B).
[7] Va. Code § 2.2-3004(C).
[8] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.

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."[9] Policy requires 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, agency management 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.[10]

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, even though agencies are afforded great flexibility in making such decisions, agency discretion is not without limitation. Rather, this Department has repeatedly held that even where an agency has significant discretion to make decisions (for example, an agency's assessment of a position's job duties), qualification is warranted where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[11]

Regardless of whether the grievant should have been or was properly in a full-time classified position, the elimination of his position assisted with the agency's need to reduce its budget. Further, his position was selected as one of at least fifteen positions at the School to be eliminated by a 10-member advisory committee of senior faculty and administrators who were charged by the Dean/Director with investigating and exploring the School's general fund budget and making reduction recommendations. The grievant largely disputes the elimination of his position by stating that it was the last act in a long history of actions taken against him by the Department Head. Even if the grievant's allegations are true, they do not change the fact that the agency appears to have handled the budget reduction situation in a reasonable

[9] DHRM Policy 1.30, *Layoff*.
[10] *Id.*
[11] *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); *see also, e.g.,* EDR Ruling 2008-1879.

manner and based on legitimate business-related concerns. The grievant has raised no other argument why eliminating his position was arbitrary or improper. Though the grievant may disagree with the agency's determinations, his arguments do not raise a sufficient question as to whether the agency misapplied the Layoff Policy. Rather, the agency's decision appears to be based on business-related budget reduction decisions, and consistent with the applicable policy.

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;[12] (2) the employee suffered a materially adverse action;[13] 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.[14] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[15]

The grievant initiated a grievance on or about May 5, 2009. The grievant claims that this protected activity[16] influenced the selection of his position for elimination. Although the loss of a job is clearly a materially adverse action,[17] the grievant has presented insufficient evidence of a causal link between his grievance filing and the elimination of his position. Indeed, it appears that the grievant's position had previously been identified for layoff during fiscal year 2009 budget cut proposals, prior to the May 5, 2009 grievance. Consequently, there is no basis to infer retaliation in this case, much less to raise a sufficient question as to whether the agency's stated rationale was merely pretext for retaliation. Because the grievant has not raised a sufficient question as to the elements of a claim of retaliation, the grievance does not qualify for hearing.

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[12] *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 law to a governmental authority, seeking to change any law before 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).

[13] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); *see, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

[14] *See, e.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

[15] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

[16] *See, e.g.*, Va. Code §§ 2.2-3000, 2.2-3004(A).

[17] *See, e.g.*, Rupert v. Geren, 605 F. Supp. 2d 705, 714 (D. Md. 2009).

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