Issue: Qualification – Separation from State (layoff); Ruling Date: August 18, 2011; Ruling No. 2011-2925; Agency: Department of Social Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Social Services
Ruling Number 2011-2925
August 18, 2011

The grievant has requested a ruling on whether his October 8, 2009 grievance with the Department of Social Services (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant was previously the director of the internal audit division of the agency. As part of a budget reduction proposal in 2009, the agency eliminated the grievant's position through a restructuring of its internal audit function. The positions of the alleged top two managers in the internal audit division, including the grievant, were eliminated. The remaining auditors were distributed within and under the other programs in the agency that they audited. The agency states it was eliminating a layer of management it felt it no longer needed as a cost savings effort. As a result, the grievant was subject to layoff. The grievant has challenged his layoff and the layoff process on numerous grounds, including that the agency has retaliated against him.

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 numerous theories, including misapplication and/or unfair application of policy, discrimination, and retaliation.

[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).

Adverse Employment Action

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 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]

An eventual separation by layoff is clearly an adverse employment action. However, the agency states that this grievance could not be challenging the grievant's eventual separation because the grievance was initiated before his separation. In this case, the grievant submitted his grievance after being given Initial Notice of Layoff. In prior rulings, this Department has stated that a grievant may wait and grieve the entirety of a layoff process once the separation-layoff is final.[8] However, an employee is not prevented from initiating a grievance prior to that separation. Consequently, as long as a grievant separated by a layoff process has initiated a grievance within 30 calendar days of his/her final date of employment, e.g., the effective date of separation-layoff, the grievance will be considered timely to challenge the layoff and all issues contained therein leading to the separation, including offers of placement or lack thereof.[9]

Indeed, submitting a grievance prior to the separation-layoff enables the parties to address the grievance through the management steps while the grievant is still employed, rather than forcing a grievant to wait until the Final Notice of Layoff to begin a grievance to challenge his/her eventual loss of a job. While we understand the agency's argument, EDR views layoff as a special type of case. A grievant will not be penalized for filing a grievance early to challenge his/her identification for layoff. Consequently, the grievant's October 8, 2009 grievance is deemed to be challenging the entirety of the layoff process, including his eventual separation. Therefore, the grievant has experienced and has challenged an adverse employment action.

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 unfair as to

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[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 substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2011-2740; 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] *E.g.*, EDR Ruling No. 2010-2623.
[9] *Id.*

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 work force according to uniform criteria when it becomes necessary to reduce the number of employees or to reconfigure the work force."[10] 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.[11]

The grievant has asserted numerous policy violations by the agency.[12] However, even if the agency had failed to follow policy, but in a way that would have had no impact on the grievant's layoff, policy violations would have no materiality to this case and thus no import in qualifying this grievance for hearing, as they would not have implicated an adverse employment action with respect to the grievant. Some of the grievant's allegations also concern the agency's treatment of other employees, not the grievant, and therefore would not qualify for a hearing. As such, in this ruling, this Department will only address those issues that could potentially have caused the grievant's layoff, if successfully proven.

Selection of Grievant for Layoff

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. Thus, a grievance like this that challenges an agency's determination 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] The agency states that it eliminated a layer of management it believed was no longer necessary in reorganizing the agency's internal audit function. This Department must defer to the agency's assessment in this regard, as it does not appear arbitrary or capricious, but rather based upon the agency's intended reorganization and budget reduction. However, the grievant argues that the agency's decision is unlawful.

[10] DHRM Policy 1.30, *Layoff.*
[11] *Id.*
[12] The grievant's allegations of agency errors include, for example, problems with the initial notices of layoff and the failure to include human resources in the layoff decisions until the last minute.
[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."

The grievant has cited to provisions of the Virginia Administrative Code adopted by the Division of the State Internal Auditor. In part, those provisions establish certain rules for agencies' internal audit functions by purportedly requiring agencies to follow the International Standards for the Professional Practice of Internal Auditing (Standards) promulgated by the Institute of Internal Auditors (IIA).[14] The IIA Standards appear to require organizational independence in the structural make-up of internal audit departments by, for instance, permitting the chief audit executive to report to a high enough level within the organization so as to allow the internal audit activity to fulfill its responsibilities.[15] From this section, among others, the grievant argues that the agency is not able to reorganize the internal audit function in the manner it did in permitting auditors to report directly to management within the programs they audit.

While we understand the grievant's underlying point, the grievant's argument does not raise a sufficient question that the agency's action is unlawful. The Virginia Administrative Code provisions cited only apply to agencies with an internal audit function.[16] The agency, however, has redistributed the responsibilities of its internal audit function. Consequently, we are not persuaded by the grievant's argument that the IIA Standards, to the extent they even require the result argued by the grievant, would apply to this agency that has effectively dismantled its internal audit function.

The agency reorganized its internal audit department such that the manager of that department was no longer needed. This resulted in the grievant's layoff. This Department can find no indication that such a decision was arbitrary or capricious or violated some other mandatory policy provision.

Pre-Layoff Placement

The grievant argues that the agency failed to provide him offers of pre-layoff placement and did not enact a hiring freeze. However, there were no positions that were recruited or filled during the layoff notice period for which the grievant was minimally qualified, and the grievant has presented no evidence to the contrary. The agency presented two potential options for possible placement to the grievant before he was separated. The grievant did not accept either option as appropriate. The grievant has identified no other valid vacant positions that should have been offered.

The grievant does focus on the determination of the agency (with the assistance of DHRM)[17] that he was not minimally qualified for the Human Resources Director position. 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

[14] 1 Va. Admin. Code § 42-10-20.
[15] IIA Standards § 1110, *available at* http://www.theiia.org/guidance/standards-and-guidance/ippf/standards/full-standards/.
[16] 1 Va. Admin. Code § 42-10-10.
[17] There is absolutely no problem with the agency having consulted with DHRM on such a decision. Indeed, the agency notes that DHRM was consulted primarily because DHRM was handling the selection and recruitment for the position.

minimum qualifications of a position. It appears that the grievant did not have prior experience in human resources. Based on this alone, we cannot find that a sufficient question has been raised as to whether the grievant was minimally qualified for the Human Resources Director position; indeed, it appears he was not. As such, the grievance does not qualify for a hearing based on any misapplication or unfair application of 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;[18] (2) the employee suffered a materially adverse action;[19] 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.[20] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[21] Here, the grievant's layoff is a materially adverse action. The remaining factors are discussed below.

Protected Activity

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."[22] In this case, the grievant points to at least one incident over the course of his work as head of the agency's internal audit department in which he engaged in protected activity. Specifically, he asserts that during a pilot fraud investigation project, he reported to the former agency head overpayments to a number of service providers, which could certainly be viewed as a report of fraud, abuse, or gross mismanagement that would be protected under the grievance procedure.

Causal Link

The grievant asserts that by e-mail in April 2008, after learning of the overpayments to service providers, the former agency head ordered the pilot fraud investigation project terminated, citing the lack of a mechanism with which to collect the overpayments. The grievant

[18] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).
[19] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.
[20] *See, e.g.*, EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).
[21] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).
[22] *Grievance Procedure Manual* § 4.1(b).

asserts that he nevertheless continued to bring the need for the pilot fraud project to the attention of management, and included it in his final Internal Audit Plan.

In 2008, an organizational review of the agency occurred, leading to the publication of the report regarding the review in January 2009. A portion of that review, based at least in part on interviews with agency managers, indicated that agency management did not have confidence in its internal audit function. In May 2009, the former agency head considered a possible merger of the agency's internal audit function with another agency's internal audit division. As part of that possible merger, the grievant would have been removed as head of the internal audit department. That proposed merger was abandoned.

In July 2009, the agency began to consider eliminating the grievant's position as a budget cutting measure, which was initially a recommendation of another member of agency management, not the former agency head. To support his claim that retaliation for a protected act was the reason for his eventual layoff, the grievant cites to conflict he had with the former agency head, for example, conflict over sharing information about hotline complaints and not investigating potential overpayments found in a review of a specific program. The grievant asserts that this conflict and the sequence of events following the grievant's initial reports of the overpayments and the former agency head's closure of the pilot program indicate the former agency head's desire to silence the discovery of fraud or waste and indicates retaliation.

The agency disputes this suggestion, arguing that the former agency head did not authorize additional investigations because the agency had no mechanism to recoup overpayments and would be responsible for paying the funds back to the federal government regardless. It is also notable that the pilot fraud discovery program was only scheduled to last until June 30, 2008. The former agency head did not close the pilot program early, but simply allowed the program to expire as originally scheduled. The grant funds that had been used for the pilot program were then diverted to address a mandatory quality control initiative.

The grievant has presented and this Department has reviewed information that might suggest there existed personal dislike and/or disagreement between the grievant and upper agency management. However, the evidence fails to raise a sufficient question that either the reorganization or the grievant's layoff were motivated by any reports of fraud, waste, and abuse by the grievant. For instance, as stated above, there is no evidence linking the dispute over the discovery of overpayments in the pilot program to the grievant's layoff. Rather, the disagreement appears to have arisen over issues of recoupment and return of federal funding.

While it appears that the agency's attempts to reorganize its internal audit department through different methods and to eliminate the grievant's position by layoff were clear goals, there is insufficient evidence that these agency goals were motivated by any report of fraud, waste, or abuse by the grievant. Indeed, based on the grievant's allegations, it was not the former agency head that first suggested eliminating the grievant's department/position, but rather another member of management. In short, the grievance does not raise a sufficient question that the agency was motivated by a retaliatory intent due to the grievant's alleged reports of fraud, waste, and abuse. As such, this claim does not qualify for a hearing.

Discrimination

To qualify a grievance alleging discrimination 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 this case, age[23] and/or veteran status[24]). 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.[25]

In support of his age discrimination claim, the grievant argues only that statistically most employees being laid off by the agency during this round of budget cuts were over the age of 40, including the grievant. In order to state such a disparate-impact discrimination claim under the ADEA, "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is 'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.'"[26] The agency can avoid liability if it can show that the employment practice was based on reasonable factors other than age.[27] As discussed above, the agency sought to eliminate a layer of management it felt was no longer needed. As such, it appears that the grievant's layoff was based on such a reasonable fact unrelated to age. Further, the evidence is insufficient to show that the grievant's age was the reason for his layoff. Consequently, the grievant's age discrimination claim in this case does not qualify for a hearing.

The grievant also asserts that his veteran status was not taken into account and he was somehow the victim of discrimination as a result. Unlike in selection decisions, the Layoff Policy does not require an employee's veteran status to be taken into account as some kind of preference.[28] The grievant's mere allegation does not raise a sufficient question of discrimination on the basis of veteran status. Moreover, the agency has presented a reasonable non-discriminatory explanation for the layoff, as already stated. There is no indication that this explanation was pretext for discrimination on the basis of veteran status. As such, the grievant's discrimination claim does not qualify for a hearing.

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[23] Indeed, to establish a case of age discrimination, the grievant must raise a sufficient question as to whether age was the reason for the agency's action. *See* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2350-51 (2009). To prevail on a claim of age discrimination, an employee must also be a member of the protected class. The Age Discrimination in Employment Act's (ADEA's) protections extend only to those who are at least forty years old. *See* 29 U.S.C. § 631. Age discrimination is also a violation of state policy. *See* DHRM Policy 2.05.

[24] *See* DHRM Policy 2.05, *Equal Employment Opportunity*.

[25] *See* Hutchinson v. INOVA Health System, Inc., No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. April 8, 1998)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

[26] Smith v. City of Jackson, 544 U.S. 228, 241 (2005) (quoting *Wards Cove Packing Co*. v. Atonio, 490 U.S. 642, 656 (1989)).

[27] *Id*. at 241-43.

[28] *Compare* DHRM Policy 1.30, *Layoff*, *with* DHRM Policy 2.10, *Hiring*.

Abuse of Power

The grievant has asserted various claims of wrongdoing by the agency under the general category of "abuse of power." However, absent sufficient evidence to support his claims of misapplication or unfair application of policy, retaliation, or discrimination, there is no relief that a hearing officer could provide for a general "abuse of power" claim. As such, these claims do not qualify for a hearing.[29]

Defamation

The grievant further alleges defamation. Although all complaints may proceed through the three resolution steps, thereby allowing employees to bring legitimate concerns to management's attention, only certain issues qualify for a hearing. Claims such as false accusations, defamation and slander are not among the issues identified by the General Assembly as qualifying for a grievance hearing.[30] Accordingly, this issue cannot be qualified 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 this Department's 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

[29] Some of the claims raised in this section include facts that are relevant to the grievant's other issues and have been duly considered and/or addressed as to those issues.
[30] Va. Code § 2.2-3004 (A); *Grievance Procedure Manual §* 4.1.