Issue: Qualification – Separation from State (Layoff); Ruling Date: April 2, 2009; Ruling #2009-2198; Agency: Department of Education; Outcome: Qualified for Hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Education
Ruling No. 2009-2198
April 2, 2009

The grievant has requested a ruling on whether his November 7, 2008 grievance with the Department of Education ("the agency") qualifies for a hearing. For the reasons discussed below, this grievance is qualified for a hearing.

FACTS

The grievant initiated his November 7th grievance to challenge the elimination of his position and subsequent layoff. The agency states that as a budget reduction measure, the grievant's position was identified for elimination. The agency maintains that the Superintendent of Public Instruction was notified that the agency would experience a 15% cut in general funds for Fiscal Year 2009. The agency asserts that Assistant Superintendents were asked to identify functions within their units that could be eliminated as well as situations where the number of staff members assigned to a function could be reduced. According to the agency, among those functions identified for potential reduction within the Division of Student Assessment and School Improvement were the assessment specialists assigned to the development of the English reading tests, which included the grievant and another full-time employee. Because the grievant had less seniority (5 years) than the other full-time reading assessment specialist (9 years), the grievant was laid off.

The agency asserts that a part-time employee, (whom the agency describes as primarily involved with English writing tests but who nevertheless provided assistance to the reading assessment specialist) was initially "not targeted for layoff because of the differences in duties assigned to this position." The agency states that "upon further consideration by the agency, the employee in the part-time position was [subsequently] laid off because the duties of the position were in the broader area of English." The agency asserts that "[b]ecause this position was still necessary for the unit to carry out the duties in the development of the writing of tests, it was not eliminated." The agency then offered the part-time position to the grievant, which he declined.

The grievant states that the true reason for his layoff was retaliation for voicing concerns about alleged deficiencies in Standards of Learning (SOL) test development,

construction and production for the Commonwealth, performed by agency testing contractors. He claims that his layoff is essentially the last act in a series of retaliatory actions carried out against him and that allegations leveled against him by agency contractor employees regarding his purported behavior are "slanderous," and "purposeful[] distort[ions]" that are part of a "smear campaign."

In addition, the grievant has provided this Department documents showing that in the latter part of the summer of 2008, an employee from a company who had been awarded a testing contract ("Contractor A") accused the grievant of speaking to her on July 30, 2008, in an accusatory and intimidating fashion about the testing materials being developed for the agency. An employee from a non-profit test developer ("Contractor B") purportedly overheard the conversation and seems to have largely agreed with Contractor A's employee's version of events. While the grievant agrees that a conversation occurred, he has a very different view of how that conversation transpired and contends that Contractor A's inability to satisfactorily respond to the grievant's questions regarding issues such as lack of control over test versions, prompted embarrassment. The grievant asserts that this embarrassment served as the true impetus for Contractor A's complaint against him.

Subsequent to Contractor A's complaint, the agency apparently approached Contractor B to gather information about any other allegedly inappropriate behavior by the grievant with any of Contractor B's staff. As a result, it appears as though the agency was presented with an approximately year-old memorandum, dated August 13, 2007, that outlined several incidents including but not limited to the grievant (1) purportedly making disparaging comments about his supervisor to Contractor B, (2) giving coupons to a Contractor B employee but also referring to that same employee as a "bastard," and (3) replying to a question of how he was doing by saying "same old shit."

On or about September 12, 2008, the grievant was presented with documents that outlined Contractor A's and Contractor B's employees' versions of the July 30, 2008 incident. The grievant was also provided a copy of Contractor B's August 13, 2007 memorandum. He was invited to respond to the documents and was told that his response would be "review[ed] . . . with [his] management team to determine what, if any, additional actions may by necessary." He claims that he was initially told to provide an immediate response to the documents but was later allowed to provide a written response, which he did on October 10, 2008. He was notified that he was being laid off a week after he provided his October 10th response, in which (1) he asserted that the charges of misconduct leveled against him by contractor employees were part of a "smear campaign," and (2) questioned whether the agency intended to retaliate against him "for voicing my concerns about the quality of test development and production cycles."[1]

[1] The grievant asserts that he has frequently voiced concerns to agency management about a number of purported deficiencies in Contractor A's work product and processes. For example, the grievant asserts that he voiced concerns to management in the presence of Contractors A and B about the veracity of tests produced, particularly noting concerns about the statistical integrity of linking sets between tests, which the grievant believed appeared to be "askew." The grievant also complained about Contractor A's purported

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Further, complaints relating solely to layoff "shall not proceed to a hearing."[3] 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.[4] In this case, the grievant claims retaliation and, effectively, that the agency misapplied or unfairly applied policy.

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. 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."[5] Policy mandates that each agency identify employees for layoff in a manner consistent with its business needs and the provisions of the Layoff Policy. 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.[6]

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failure to control the various versions of tests during development, which allegedly led to errors in test drafts. The grievant asserts that "[i]t seemed at times that [the agency] was complicit in overlooking the substantive errors committed by [the Contractors]."

[2] Va. Code § 2.2-3004(B).

[3] Va. Code § 2.2-3004(C).

[4] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

[5] DHRM Policy 1.30, *Layoff*.

[6] *Id.*

The grievant argues that his position should not have been abolished because there was a part-time employee in the same role doing substantially the same sort of duties as he, but who was not laid off, at least not initially. The Layoff Policy requires that:

> After identifying the work that is no longer needed or that must be reassigned, agencies must select employees for layoff within the same work unit, geographic area, and Role, who are performing substantially the same work, according to the following layoff sequence:
>
> > (1) wage employee(s) performing the same work (wage employees are not covered by the provisions of this policy or Policy 1.57, Severance Benefits);
> > (2) the least senior through the most senior part-time restricted employee; and then
> > (3) the least senior through the most senior part time classified employee; and then
> > (4) the least senior through the most senior full-time restricted employee (if the position is anticipated to be funded for longer than 12 months); and then
> > (5) the least senior through the most senior full time classified employee.[7]

The initial layoff of the grievant rather than the part-time employee who was in the same Role title as the grievant does not appear to comply with the above sequence established by DHRM Policy 1.30. That, along with the subsequent layoff of the part-time employee and the offer of that position to the grievant, instead of bringing the grievant back to the full-time position he held prior to the layoff, raises a sufficient question as to whether the layoff policy may have been misapplied, at least initially.

This Department will typically not qualify a grievance based on a potential misapplication of policy that is subsequently corrected.[8] However, in this case there are questions remaining that are best answered by a hearing officer at an administrative hearing as to the agency's motive regarding the grievant's layoff, which the grievant maintains was retaliatory.[9]

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[7] DHRM Policy 1.30, *Layoff.* An agency's assessment of an employee's performance is not listed in the Layoff Policy as a factor to be considered in determining which employees to lay off. Performance-related or conduct-related separations are to be implemented pursuant to DHRM Policy 1.40 (Performance Planning and Evaluation) and DHRM Policy 1.60 (Standards of Conduct) respectively, not through layoff.

[8] We do not mean to imply a finding that any potential misapplication of policy was fully and properly remedied by the actions taken by the agency. That determination is left to the hearing officer *assuming* that he finds a misapplication.

[9] In claims regarding discrimination or retaliation where intent is critical to the outcome, the hearing officer, as fact finder, is better positioned to determine whether retaliatory intent played a role in management's action. *See* Ross v. Communications Satellite Corp., 759 F.2d 355, 364-365 (4th Cir. 1985), abrogated on other grounds, quoting Morrison v. Nissan Motor Co., Ltd., 601 F.2d 139, 141 (4th Cir. 1979)

Retaliation

The grievant asserts that the agency's motivation for abolishing his position was retaliatory. 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;[10] (2) the employee suffered a materially adverse action;[11] 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.[12] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[13]

The grievant appears to have engaged in protected activities by voicing concerns to his management about perceived problems associated with the SOL tests developed for the agency by Contractor A.[14] The grievant has also presented evidence that he suffered a materially adverse action in that he was laid off. This grievance also presents sufficient evidence of a possible causal link between the grievant's protected activities and his layoff to warrant further exploration of the facts at issue in this case at a grievance hearing. First, there is a close proximity in time (one week) between grievant's October 10, 2008 letter, which reiterated those concerns, and the agency's notice of layoff.[15] In addition, in response to the agency's assertion that the grievant was laid off for a legitimate business reason—the agency was forced to cut its budget by 15%—the grievant counters that this reason is pretextual, asserting that the agency targeted him for

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("[r]esolution of questions of intent often depends upon the 'credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and crossexamination.'"). *See also* EDR Ruling 2007-1727 ("A hearing officer, as a fact finder, is in a better position to determine questions of fact, motive and credibility and decide whether retaliatory intent contributed to the grievant's reassignment.")

[10] *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). *See also* VA. Code § 2.2-3000(A) ("employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management").

[11] 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.

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

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

[14] *See* Va. Code § 2.2-3000 (A) ("employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management.")

[15] The First Notice of Layoff was dated October 17, 2008.

layoff rather than the part-time employee, violating the layoff policy in doing so. Moreover, when this Department sought further explanation regarding the rationale for laying-off the grievant instead of the part-time employee, the agency's responses provided minimal clarification.[16] Given that sufficient questions still remain as to the motivation of the agency for initially choosing the grievant over the part-time employee, we deem it appropriate to send this grievance to hearing for further examination of the facts surrounding the layoff process. Accordingly, this grievance is qualified for hearing.

CONCLUSION

The November 7, 2008 grievance is qualified for hearing. This qualification ruling in no way determines that the grievant's layoff was retaliatory, a misapplication of policy, or otherwise improper, but rather only that further exploration of the facts by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to adjudicate the qualified claims, using the Grievance Form B.

Claudia T. Farr
Director

[16] For example, the second step respondent stated in the second step response that "the part time staff position that had the primary function of working with the English writing tests initially was not targeted for layoff because of differences in duties assigned to this position." The second step respondent went on to explain that "upon further consideration by the agency, the employee in the part time position was laid off because the duties of the position were in the in the broader area of English." When this Department asked a member of the agency's human resource department to "Please provide clarification as to (1) why the P-14 was not, as the second-step response puts it, originally 'targeted' for layoff, and (2) what prompted the agency to reconsider its decision," the agency responded: "(1) the hourly position was not assigned primarily to the reading assessment function (2) the hourly position was assigned to same work unit, with the same role title; duties were in the broader area of English." While this explanation may very well be true, it sheds limited light on the reason for the agency's initial decision to target the grievant over the part-time employee and it's subsequent decision to reverse itself. Less illuminating was the agency's response to another question. This Department asked the human resource department representative the following: "[Y]ou explained that the agency 'eliminated the occupancy' of the grievant's former position but maintained the 'functionality.' My question is how was the functionality continued--in other words, who assumed the duties previously performed by the grievant?" The response provided was:

> Among the functions identified for potential reduction were the specialists assigned to the development of the English reading tests. Three full time and one part time staff members were assigned to work on the 10 tests in the area of English. In comparison, three full time and one part time staff members were assigned to the development of 15 mathematics and science tests and one specialist managed 9 history tests with some assistance from the director of assessment development.