Issues: Qualification – Benefits/Leave (Annual Leave, Separation from State (Layoff/Recall); Discipline (other); Ruling Date: October 5, 2010; Ruling #2010-2579, 2011-2711, 2011-2712, 2011-2713; Agency: Old Dominion University; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Old Dominion University
Ruling Numbers 2010-2579, 2011-2711, 2011-2712 and 2011-2713
October 5, 2010

The grievant has requested that this Department qualify for hearing his four grievances with Old Dominion University (ODU or the University). For the reasons discussed below, these grievances do not qualify for hearing.

FACTS

The grievant is employed as an Information Technology (IT) Specialist II with ODU. In a September 25, 2009 meeting with one of his supervisors, the grievant was informed that 50% of the funding for his position was being abolished, but that options were being explored in an effort to continue to employ the grievant at the University. Also during this meeting, the grievant was questioned regarding the omission from his most recent employment application of his past employment with ODU. The grievant's supervisor then asked that the grievant to provide an explanation in writing regarding this omission. The grievant asserts that after this meeting, he was "given essentially no tasking and received essentially no communications from his supervisors."[1]

Thereafter, in a letter dated November 9, 2009, the grievant was officially notified that his position was being abolished and he would be laid off effective December 11, 2009. The University subsequently informed the grievant that a potential placement option had been identified and an interview for the position was scheduled for December 2, 2009. Because the grievant disagreed with the University's requirement of an interview, the grievant canceled the December 2nd interview. The grievant ultimately did interview for the position on December 9, 2009, but was determined not "minimally qualified."

Thereafter, on December 11, 2009 the grievant was formally placed in leave without pay (LWOP) layoff status. The grievant, however, successfully interviewed for another placement position within the University on December 16th and was recalled to this position on December

[1] The agency admits that communication with the grievant after the September 25th meeting regarding his impending separation from the University was "lacking."

18, 2009. Also, on December 16th while still in a LWOP- layoff status, the grievant requested a payout of his accrued annual leave, which the University later refused to pay him.

As a result of the forgoing events, the grievant filed four grievances. The grievances all proceeded through the management resolution steps without resolution and the University President denied the grievant's request for qualification of the grievances for hearing. The grievant now seeks qualification of all four grievances from this Department.

DISCUSSION

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 layoff or to the transfer and assignment of employees "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 his four grievances, the grievant claims the agency misapplied or unfairly applied the layoff policy and that his layoff was orchestrated as a means of informal discipline. The grievant's claims are discussed below.

Misapplication/Unfair Application of Layoff Policy

For a grievance claiming a misapplication of policy or an 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."[5] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[6] 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8] Because the grievant raises issues surrounding the abolishment of his position, the grievant has sufficiently alleged an adverse employment action.

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[2] Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004(C).
[4] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.
[5] *See Grievance Procedure Manual* § 4.1(b).
[6] 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.
[7] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

Placement Process – December 2 and December 10, 2009 Grievances

In his December 2, 2009 and December 10, 2009 grievances, the grievant challenges the layoff placement process. More specifically, in his December 2, 2009 grievance, the grievant asserts that the University wrongly required him to interview for a potential placement option. In his December 10, 2009 grievance, the grievant asserts that the University Human Resources office failed to notify him of potential placement options.

The intent of Department of Human Resource Management (DHRM) Policy 1.30 ("Layoff Policy") is to allow "agencies to implement reductions in the work force according to uniform criteria when it becomes necessary to reduce the number of employees or to reconfigure the work force."[9] 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.[10] During the time between Initial Notice and Final Notice of Layoff, the agency shall attempt to identify internal placement options for its employees.[11] 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.[12] 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."[13]

Accordingly, when placing an employee that has been identified for layoff, the employee must be minimally qualified for the placement position. Agency management is responsible for determining whether the employee is minimally qualified for the position being considered as a placement option.[14] DHRM Policy states that "[t]he Employee Work Profile and the employee's work experience should be used as guides in making this determination."[15] An interview could certainly be one way to assess the employee's work experience and there is nothing in Policy 1.30 that specifically prohibits an interview in order to assess whether the employee is minimally qualified for the position. As such, the grievant has failed to raise a sufficient question that policy was misapplied when the University required him to interview for a potential placement opportunity.

The grievant also asserts that requiring him to interview for a placement position is inconsistent with past University practice. According to the University however it has been utilizing the same placement process since the 1980's which "involves an initial review of position descriptions and applications by Human Resources, then an assessment interview with the manager of the vacant position being considered for placement." The grievant has not

[9] *Id*.
[10] DHRM Policy 1.30, *Layoff*.
[11] *Id.*
[12] *Id.*
[13] *Id.* (emphasis in original).
[14] *Id.*
[15] *Id.*

provided, nor has this Department found, evidence to refute the University's contention that it routinely interviews the employee for the potential placement position before a placement determination is made. Accordingly, the grievant's claim that the University has been inconsistent in its application of the layoff policy likewise does not qualify for a hearing.

With regard to the grievant's assertion that the University deliberately failed to notify him of potential placement opportunities, this Department likewise finds no misapplication or unfair application of the layoff policy. The layoff policy states that the agency "shall attempt to identify internal placement options for its employees" and once identified, the agency shall make an attempt to place the employee to any valid vacancies.[16] In support of his claim that the University wrongly failed to notify him of all possible placement options during his pre-layoff meeting on November 11, 2009, the grievant points to an October 30, 2009 e-mail from the University Employee Relations Manager identifying three potential placement opportunities. The grievant claims that he was not notified of these potential placement opportunities as required during the pre-layoff meeting on November 11, 2009 and the University's failure to notify the grievant of these possible placement positions demonstrates the University's desire for the grievant to find employment elsewhere.

In this case, the University identified potential placement opportunities for the grievant within the University in accordance with policy. Moreover, the University placed a "hold" on the positions identified in order to assess whether they were viable placement options for the grievant. In addition, the grievant was interviewed for two of the three positions he claims to have not been timely notified of and was ultimately placed in one of those positions. According to the grievant, he was never notified by the University of the third possible placement option. It appears, however, that the grievant was not notified of this possible placement option because he was placed into the second position the University identified for potential placement. (The grievant was determined not minimally qualified for the first identified placement option). Accordingly, even if it were assumed that the third possible option was viable, there was no need to notify the grievant of this option because he had already been placed. Accordingly, this Department finds that the grievant has failed to raise a sufficient question that the University misapplied and/or unfairly applied the layoff policy in allegedly failing to notify the grievant of all possible placement options when they met with him on November 11, 2009.

Annual Leave Payout – December 21, 2009 Grievance

In his December 21, 2009 grievance, the grievant challenges the University's refusal to pay him for his accumulated annual leave upon layoff. The grievant was placed in a LWOP-layoff status on December 11, 2009. He subsequently requested a payout of his accrued annual leave on December 16, 2009. However, on December 18, 2009 and prior to receiving the leave payout, the grievant was placed in a position within the University. Despite his placement and return to active employment status with the Commonwealth, the grievant apparently still desired to receive the payout of his annual leave and asked the University about the payout of his leave on December 18th. The University told the grievant that they would have to look into the issue in

[16] *See* DHRM Policy 1.30.

light of the grievant's return to active employment. Unsure of whether policy permitted it to pay the grievant his accrued annual leave, the University contacted DHRM, the agency responsible for the promulgation and interpretation of the applicable state policies. In response to the University's inquiry regarding this issue, a DHRM Policy Analyst stated the following:

> Policy does not permit leave to be paid out to employees in an active status. Payroll needs a pay cycle to verify and process a leave payout for an employee who is placed on LWOP-layoff.
>
> Because this employee was only in LWOP-layoff for 4 days, and was back in an active status prior to the completion of the pay cycle, he may not have his leave paid out.

Relying upon this interpretation, the University advised the grievant that it was not permitted under policy to pay him his accrued annual leave. The grievant argues that because DHRM Policy 4.10, *Annual Leave* allows for a payout of accrued annual leave when placed on LWOP-layoff if requested, he should have been paid, regardless of his status at the time payment was to be made.

DHRM Policy 1.30 states that an employee may request payment of his accrued annual leave when placed on leave without pay (LWOP) layoff.[17] Likewise, DHRM Policy 4.10 allows for a lump sum payment of an employee's annual leave when placed on LWOP-layoff. This Department recognizes that these policies however are silent as to whether an employee may be paid for his annual leave under the circumstances present in this case. That is, the policy does not address whether an employee may be paid his accrued annual leave if the payout was requested while in a LWOP-layoff status, but the employee returned to active status before the payout could be processed. Under such circumstances, qualification is warranted only where evidence presented by the grievant raises a sufficient question as to whether the University's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[18] Arbitrary or capricious is defined as a decision made "[i]n disregard of the facts or without a reasoned basis."[19]

Here, there is no indication that the agency's denial of the grievant's request for a payout of his annual leave under the circumstances present in this case was plainly inconsistent or otherwise arbitrary or capricious. Rather, as noted above, the policies at issue here are silent regarding how to process an annual leave payout request under the circumstances presented in this case. Accordingly, it appears that the University sought input from DHRM, which indicated that the University could not pay the grievant his accrued annual leave and to do so would violate policy. Accordingly, the agency's refusal to pay the grievant his accrued annual leave appears to be based on an appropriate reasoned basis, rather than being arbitrary or capricious. As such, the grievant's December 21, 2009 grievance does not qualify for a hearing.

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[17] *Id.*
[18] *See, e.g.*, EDR Ruling 2008-1879; EDR Ruling No. 2007-1651.
[19] *See Grievance Procedure Manual* § 9.

Informal Discipline – December 9, 2009 Grievance

In his December 9, 2009 grievance, the grievant asserts that his layoff was a means of informal discipline as a result of his failure to reveal his past employment with ODU on his state application and resume. For state employees subject to the Virginia Personnel Act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the policies and procedures promulgated by DHRM.[20] For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.[21] These safeguards are in place to ensure that disciplinary actions are appropriate and warranted.

Where an agency has taken informal disciplinary action against an employee, a hearing cannot be avoided for the sole reason that a Written Notice did not accompany the disciplinary action. Rather, even in the absence of a Written Notice, a hearing is required where the grieved management action resulted in an adverse employment action[22] against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance or conduct).[23]

As noted above, because the grievant raises issues surrounding the abolishment of his position, the grievant has raised a sufficient question as to whether he suffered an adverse employment action. However, this Department concludes that the grievant has failed to raise a sufficient question that the abolishment of his position was orchestrated in an attempt to punish the grievant for his failure to include his prior employment with ODU on his state application and resume. Of particular note, as more fully outlined above, is the fact that the University took appropriate measures to place the grievant in the same role title with the same salary as his previous position. Such actions appear inconsistent with a theory that the University orchestrated his layoff as a means of punishment. Moreover, the grievant was not the only one in his position that was ultimately identified for layoff. Such evidence lends support to the agency's contention that the abolishment of the grievant's position was related to budgetary needs and not as a means of disciplinary action for the grievant's conduct. Accordingly, the grievant's December 9, 2009 grievance does not qualify 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 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 pursuant to the provisions of Va. Code § 2.2-3004(E). If the court should qualify the grievances, within five workdays of receipt

[20] Va. Code § 2.2-2900 *et seq.*
[21] *See* DHRM Policy No. 1.60, *Standards of Conduct*.
[22] *See Grievance Procedure Manual* § 4.1(b).
[23] *See, e.g.*, EDR Ruling No. 2007-1516, 2007-1517; EDR Ruling Nos. 2002-227 & 230; *see also* Va. Code § 2.2-3004(A) (indicating that grievances involving "transfers and assignments … resulting from formal discipline or unsatisfactory job performance" can qualify for hearing).

of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that he does not wish to proceed.

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Claudia T. Farr
Director