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September 3, 2016

TO: Faye Gallant, Chair, Staff Alliance

FROM: James R. Johnsen, President 

RE: Staff Alliance Resolution 2016-04 Regarding Layoff Regulations

For the reasons discussed in General Counsel Hostina's September 2, 2016, memo, which is attached, I am declining to make the additional changes to University Regulation 04.07.110 requested in Staff Alliance Resolution 2016-04.

While I fully appreciate the concerns stated, the memo provides a thorough and convincing explanation of why the proposed changes are unnecessary or would be problematic.

Thank you for your work and the work of the Alliance and UAF Staff Council on this important issue. Please don't hesitate to let me know if there are additional concerns.

Enclosure (09-02-16 GC Opinion)

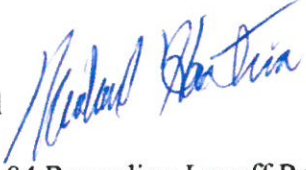
cc: CHRO Keli Hite-McGee

Michael SC 274
General Counsel
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Many Traditions One Alaska

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DATE: September 2, 2016
TO: James R. Johnsen, President
FROM: Mike Hostina, General Counsel 
RE: Staff Alliance Resolution 2016-04 Regarding Layoff Regulations

Because this resolution raises legal issues, I am providing an opinion that you might include with your response to the June 2016 resolution from Staff Alliance regarding changes to the layoff regulation implemented in March 2015.

Background

In early 2015, as part of an effort to prepare the University to deal with ongoing budget reductions, the University proposed revisions to existing layoff regulations. The proposed revisions included reduction of the exempt staff layoff notice period to three months from six and a simpler review process for layoff disputes.

To provide for a transition period and to ensure that the revisions would be in effect in time to address anticipated budget reductions in FY16, President Gamble determined to adopt the revised regulations as emergency regulations.

Nevertheless, the University sought and received feedback from Governance prior to adoption. That feedback resulted in significant changes to the proposed revisions. See February 17, 2015 memo from Staff Alliance (Att. A) and then-CHRO Erik Seastedt's March 2, 2015 response, (Att. B). President Gamble signed the revisions March 2, 2015 (Att. C- signed clean copy; Att. D – version showing changes.) Subsequently in July 2015 tuition waiver layoff benefits were expanded from one to two years and from a maximum of 30 to 60 credits.

Analysis of Resolution

The resolution raises three concerns. I'll address each in turn.

- *The regulations do not specify that the reviewer and the individual who made the layoff decision cannot be the same person.*

A reviewer would not review his/her own decision, since there would be no benefit to the University¹ or the affected employee from such a review. While the regulation could

¹ The University provides internal dispute resolution procedures not only to ensure fair treatment but also to avoid expensive and unnecessary litigation. Self-review is unlikely to accomplish either objective.

President Johnsen
 RE: Staff Alliance Resolution 2016-04 Regarding Layoff Regulations
 September 2, 2016
 Page 2 of 3

specify this legal principle, there are many, less obvious reasons, why a particular person might not be an appropriate reviewer in a given case. The regulation does not address all legal principles (which would be impossible), or even all process issues, since it is a regulation, not a procedure.

In response to previously expressed Staff Alliance concerns, the reviewer was changed to provide for review by the “*Chief Human Resources Officer or designee, or in appropriate cases, a substitute . . .*” (R04.07.110 I (3)). The regulation thus elevates the review to a level of the organization at which few conflicts should occur, and provides the CHRO flexibility to appoint an appropriate reviewer.

- ***The maximum length of time for the review to occur after a review is requested is not stated in the existing regulations. This does not provide protection for the employee. The employee requesting the review has no assurance that the decision would be made within the 30 day notice period.***

A maximum length of time for the review should not be specified for the reasons discussed below. In any event, because pay in lieu of notice may be provided, there is no way to ensure completion of all reviews before an employee leaves employment.

The regulation provides for a sliding scale of process. This enables the CHRO to match the level of process to the issues involved. As explained in some detail on the last page of Mr. Seastedt’s March 2, 2015, response to Staff Alliance, the review may range from a simple review of the documentary record in a straightforward case, to meetings with the employee and the decision-maker, to a hearing before an independent hearing officer in the most complex cases. These latter two processes individually could take considerable time, and even a simple document review may take more than 30 days if it is one of numerous challenges to a particular layoff or group of layoffs.

It is in the University’s interest as well as the interest of the affected employee to complete reviews as soon as practicable. If a review determines that a selection for layoff was inappropriate, reinstatement and back pay is a possible, even likely result, and has significant consequences for both the University and the employee.

- ***There is no specification of reinstatement protections if the grievance findings are in the staff member’s favor and the layoff decision is reversed.***

University Regulations governing dispute resolution do not specify what the remedy must be in a given case² since the remedy in each case may vary with the circumstances. It is likely that reinstatement would result in most cases in which a layoff was improper. However, there are circumstances when reinstatement would not be appropriate, for example, when a layoff of a term employee is overturned after the end of the employee’s contract term.³ In such a case lost wages may be the appropriate remedy.

² For example, University Regulation 04.08.080 provides the procedure for review of a termination for cause. Generally, if cause is not established, the employee may be contractually entitled to reinstatement. However, that is not always the case and it would be an error to specify that in the regulation.

³ It is also possible that a procedural defect in the layoff process may be cured in the interim between the decision and the conclusion of the review process, in which case no remedy may be due.

President Johnsen
RE: Staff Alliance Resolution 2016-04 Regarding Layoff Regulations
September 2, 2016
Page 3 of 3

If an employee with a right to continued employment is terminated through layoff, and the layoff decision actually is reversed, the University would fail to reinstate that employee at its peril absent some other basis for the termination. However, because that legal principle need not be re-stated in regulation, and at the same time, because it is impossible to predict all possible factual scenarios, specifying reinstatement is both unnecessary and legally problematic.