

Issue: Misapplication of Layoff Policy and Retaliation; Hearing Date: 01/15/03;
Decision Date: 02/18/03; Agency: Va. Museum of Natural History; AHO:
David J. Latham, Esquire; Case No. 5612



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5612

Hearing Date: January 15, 2003
Decision Issued: February 18, 2003

PROCEDURAL ISSUES

Due to the holiday season, and the availability of participants, it was not possible to docket this case for hearing until the 36th day following appointment of the hearing officer.¹

Grievant has requested as relief payment of salary and benefits for a period of one year. Such a monetary payment amounts to a claim for damages – a form of relief not available through the grievance process.² At the hearing, grievant stated that she had intended to request reinstatement of her position and, back pay and benefits.

¹ § 5.1 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001, requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

² § 5.9(b)1. EDR *Grievance Procedure Manual*.

In addition to the issues qualified for a hearing, the grievance raised two other issues – hostile work environment and harassment – that did not qualify for a hearing.³

APPEARANCES

Grievant
Five witnesses for Grievant
Human Resource Manager
Advocate for Agency
Two witnesses for Agency

ISSUES

Did the agency retaliate against grievant? Was the layoff selection process misapplied?

FINDINGS OF FACT

The grievant filed a timely appeal following the termination of her employment due to a layoff. Following failure to resolve the grievance at the third resolution step, the agency head declined to qualify the grievance for a hearing.⁴ Subsequently, grievant requested the EDR Director to qualify the grievance for a hearing. In a qualification ruling, the EDR Director concluded that a sufficient question of possible retaliation and misapplication of policy remained such that the grievance should be qualified for a hearing.⁵

The Virginia Museum of Natural History (Hereinafter referred to as “agency”) has employed the grievant for four years. At the time of her layoff, grievant was a public relations and marketing specialist II.

During 2001, another employee contacted the agency’s Board of Trustees and reported that the Executive Director was misspending or misappropriating agency funds. An outside auditor was hired to investigate the allegation; the auditor concluded that there had been no malfeasance of agency funds. A complaint was made to the Board that the Executive Director had ignored complaints about two carpenters who had made inappropriate remarks to female staff. The Director had already looked into the complaint and took what he considered to be appropriate corrective action. Following the complaint to the Board, the Board chairperson asked him to reinvestigate the matter.⁶ He

³ Agency Exhibit 2. *Qualification Ruling of Director*, No. 2002-078, December 4, 2002.

⁴ Agency Exhibit 1. Grievance Form A, filed June 18, 2002.

⁵ Agency Exhibit 2. *Qualification Ruling of Director*, Ibid.

⁶ See Agency Exhibit 18. Written comments of the Chairman of the Board of Trustees, January 6, 2003.

reinvestigated but the females who had been offended refused to pursue the matter or press charges.

During the fall of 2001, it became apparent that budget cuts were on the horizon for all state agencies due to a revenue shortfall.⁷ State government directed agencies to find methods to reduce expenditures. The agency's Executive Director and the Board of Directors concluded that a reorganization of the staff was necessary to achieve budget reductions. The Board told the Executive Director that he should form a committee of employees to develop a plan for reorganization. The Board felt that this would be a good opportunity to address what they felt was an ineffective reporting structure.⁸ The committee was to be given two prime objectives: to reduce the number of direct reports to the Executive Director from nine to three people, and to achieve the budget reduction percentage mandated by the Governor. The Executive Director named five employees to a Structure Committee on February 14, 2002.

The committee formulated a broad restructure of the organization that achieved the primary goal of reducing the number of direct reports to the Executive Director. A proposed reorganization chart was prepared which reflected that 11 different functional areas would report through two primary division heads who in turn, reported to the Executive Director.⁹ The chart included only functions, not the names of people who would fill each position. The Structure Committee memorialized its initial discussions in two memoranda.¹⁰ To achieve the required budget cuts, the committee proposed the elimination of five classified and two wage positions, including the grievant's position.¹¹ The committee prepared a revised reorganization chart that, again, identified only functions – not who would be assigned to those functions.¹²

The Executive Director reviewed the plan and responded to the committee indicating that it might not be possible to maintain publications at the existing level due to financial considerations.¹³ The Committee concluded early in its deliberations that publishing had largely become a luxury that the agency could not afford in a restricted budget situation. The agency published a magazine that continually lost money, even though it was intended to be self-supporting. Thus, elimination of this money loser and some of the staff who produced it were logical targets to reduce the agency's budget. The consensus was that the agency would have to concentrate the available reduced revenue on its core functions – the acquisition of, and display of collections.

⁷ Agency Exhibit 3. Memorandum from Executive Director to Trustees, October 23, 2001.

⁸ Agency Exhibit 4. Organization chart, January 11, 2002.

⁹ Agency Exhibit 4. Proposed reorganization chart, February 19, 2002.

¹⁰ Agency Exhibits 5 & 6. Structure Committee report, and email from one committee member to other members, February 21, 2002, respectively.

¹¹ Grievant Exhibit 7. Memorandum from Executive Director, March 6, 2002.

¹² Grievant Exhibit 7. Proposed reorganization chart, revised February 26, 2002.

¹³ Agency Exhibit 8. Memorandum to Structure Committee from Executive Director, March 5, 2002.

In mid-March 2002, the committee submitted a draft proposal. The Executive Director reviewed the draft proposal, made suggestions, and directed the committee to further develop its ideas. Among other things, the Director questioned whether the plan reduced too much the functions of sales, marketing, public relations and communications, and who would manage publications and exhibits. On March 27, 2002, the Director added five additional members to the structure committee, bringing the total to ten people. By mid-April, five more members including were added to the structure committee. Other employees submitted ideas to the Director.¹⁴

On May 8, 2002, the Executive Director and the committee finalized the reorganization plan and forwarded it to the Department of Human Resource Management (DHRM) for review. The memorandum includes the names, positions, and employment dates of all classified employees. Three people were identified for layoff including grievant. The agency followed the layoff sequence specified in the Commonwealth's layoff policy and determined that there was no other position to which grievant could be assigned.¹⁵ DHRM approved the plan. Grievant's Role title was PR and Marketing Specialist II. The Layoff Policy specifies that agencies must select employees for layoff within the same work unit, geographic area and Role, who are performing substantially the same work. The agency had two other employees holding the same Role title as the grievant. Both positions were part-time wage employees.¹⁶ The agency considered whether grievant could fill either position and concluded that she did not have the specialized experience necessary to operate certain equipment, and that she did not have sufficient editing experience for the other position. Initial notice of layoff was given to grievant on May 22, 2002, and her last day of official employment was June 10, 2002. There were no valid vacancies available to which grievant could be placed during this time period.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue

¹⁴ Grievant Exhibit 8. Memorandum to Executive Director from coworker, April 16, 2002.

¹⁵ Agency Exhibit 17. DHRM Policy No. 1.30, *Layoff*, effective September 25, 2000.

¹⁶ The two wage employees were laid off in a second round, which resulted in seven layoffs on August 30, 2002. Seven additional employees were laid off in October 2002. Thus, a total of 17 employees (approximately 50 percent of the staff) have been laid off from May through October 2002.

legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹⁷

Grievant contends that the Executive Director laid her off in retaliation because grievant had spoken with a member of the Board of Trustees about harassment charges involving two carpenters. Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.¹⁸ To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Speaking with a Board member is a protected activity and grievant was removed from employment. However, grievant has not provided any evidence to show that the Director said or did anything that *directly links* her layoff to her activity. A preponderance of evidence reflects that the original five members of the Structure Committee formulated the plan that ultimately resulted in the decision to eliminate some of the agency's public relations functions. Since grievant's major role was public relations, it was logical that her position be eliminated.

Grievant claims that the layoff policy was misapplied. However, the preponderance of evidence reflects that the agency applied the layoff policy correctly. Grievant was given consideration for the only two positions to which she had access under the policy. However, the agency concluded that her experience was not sufficient to fill the positions as they existed. Further, the policy requires agencies to offer lower-level positions only if *vacancies* exist. There were no available *vacancies* in lower-level positions at the time of the

¹⁷ § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

¹⁸ EDR *Grievance Procedure Manual*, p.24

layoff. There were three people with the Role title of PR & Marketing Specialist II. The other two were laid off on August 30, 2002. Grievant asserted that she felt qualified for one of the latter two positions. Even if the hearing officer could conclude that grievant should have been placed in one of those positions, the issue is now moot because the positions were subsequently eliminated. Thus, there is no available position into which grievant can be placed. DHRM reviewed and approved the layoff plan. Accordingly, grievant has not borne the burden of proof to show misapplication of the layoff policy.

In summary, grievant has failed to show, by a preponderance of evidence, that the Director orchestrated the layoffs of three people (and 14 more within a few months) in order to discharge the grievant. The agency was forced to dramatically reduce expenses, and since 85 percent of its budget is personnel costs, it was inevitable that many employees would lose their positions. Grievant has not demonstrated that any of her alternative theories were the real reason behind her layoff.

DECISION

The grievant has not demonstrated by a preponderance of evidence that she was retaliated against, or that the layoff policy was misapplied. Grievant's requests for relief are hereby DENIED.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹⁹ You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.²⁰

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

David J. Latham, Esq.
Hearing Officer

¹⁹ An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, Record No. 2853-01-4, Va. App., (December 17, 2002).

²⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.