

Issue: Misapplication of layoff policy; Hearing Date: 01/16/03; Decision
Issued: 02/05/03; Agency: Museum of Natural History; AHO: David J.
Latham, Esq.; Case No. 5626



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5626

Hearing Date: January 16, 2003
Decision Issued: February 5, 2003

PROCEDURAL ISSUE

In her grievance, the grievant alleged that her position had been eliminated in retaliation for speaking to a member of the Board of Trustees regarding allegations about the Executive Director.¹ However, during the hearing grievant withdrew her allegation of retaliation from this grievance.

APPEARANCES

Grievant
Three witnesses for Grievant
Human Resource Analyst
Advocate for Agency
Three witnesses for Agency

¹ Agency Exhibit 1. Grievance Form A, filed June 17, 2002.

ISSUE

Did the agency retaliate against grievant? Was the layoff selection process misapplied? Did the agency discriminate on the basis of age or gender?

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.² Subsequently, the grievant requested the Director of the Department of Employment Dispute Resolution (EDR) to qualify the grievance for a hearing. In a qualification ruling, the EDR Director concluded that a sufficient question of possible retaliation and other issues remained such that the grievance should be qualified for a hearing.³

The Virginia Museum of Natural History (Hereinafter referred to as "agency") has employed the grievant for five years. At the time of her layoff, grievant was a Media Specialist III (Exhibits Manager).

In December 2001, a member of the Board of Trustees began investigating allegations of mismanagement by the Executive Director. The Board member contacted several employees, including grievant. The Executive Director later learned that discussions had occurred between grievant and the Board member. During the fall of 2001, it became apparent that budget cuts were on the horizon for all state agencies due to a revenue shortfall.⁴ 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.⁵ 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.

² Agency Exhibit 1. Grievance Form A, filed June 17, 2002.

³ Agency Exhibit 2. Ruling Number 2002-153, *Qualification Ruling of Director*, December 19, 2002. For reasons stated in the Ruling, the Director concluded that grievant's allegation of a "hostile work environment" does not qualify for a hearing.

⁴ Agency Exhibit 3. Memorandum from Executive Director to Trustees, October 23, 2001.

⁵ Agency Exhibit 4. Organization chart, January 11, 2002. See also Grievant Exhibit 6. Email from Chairman of the Board of Trustees to committee member and Executive Director, February 19, 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.⁶ 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.⁷ To achieve the required budget cuts, the committee proposed the elimination of five classified and two wage positions, including the grievant's position.⁸ The committee prepared a revised reorganization chart that, again, identified only functions – not who would be assigned to those functions.⁹

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.¹⁰ 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. Exhibits were identified early in the process as a function that could be supervised by the manager of other functions and thereby eliminate the exhibit manager's position. In addition, traveling exhibits were expensive and there had been little public interest in them. 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.

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.¹¹ 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 22, 2002, the Director added five additional members to the structure committee, bringing the total to ten people.¹² By mid-April, five more members including grievant were added to the structure committee.¹³ Other employees submitted ideas to the Director, including one of the three employees who were subsequently laid off.¹⁴

⁶ Agency Exhibit 4. Proposed reorganization chart, February 19, 2002.

⁷ Agency Exhibits 5 & 6. Structure Committee report, and email from committee member to members of committee, February 21, 2002.

⁸ Agency Exhibit 7. Proposed reorganization chart revised February 26, 2002.

⁹ Agency Exhibit 7. *Ibid.*

¹⁰ Agency Exhibit 8. Memorandum to Structure Committee from Executive Director, March 5, 2002.

¹¹ Agency Exhibit 11. Memorandum to Structure Committee from Executive Director, March 22, 2002.

¹² Grievant Exhibit 7. Memorandum to committee member from Executive Director, March 22, 2002.

¹³ Agency Exhibit 11. Memorandum to committee members from Executive Director, April 17, 2002.

¹⁴ Agency Exhibit 10. Memorandum to Executive Director from another laid-off employee, April 16, 2002.

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.¹⁵ 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.¹⁶ DHRM approved the plan. Grievant's Role title was Media Specialist III. 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. One of the employees had more seniority than grievant because she had been hired three years before grievant. The second employee was not performing substantially the same work as grievant; she is a graphics designer who draws illustrations for text and has significant website experience. Initial notice of layoff was given to grievant on May 22, 2002, and her last day of official employment was June 6, 2002. There were no valid vacancies available to which grievant could be placed during this time period.

Grievant identified one position she believes she could have been placed in. The person in that position was a part-time wage PR & Marketing Specialist II position. However, that position was filled at the time.¹⁷

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 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).

¹⁵ Grievant Exhibit 11. Letter to DHRM from Executive Director, May 8, 2002.

¹⁶ Agency Exhibit 17. DHRM Policy No. 1.30, *Layoff*, effective September 25, 2000.

¹⁷ The wage employee was 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.

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.¹⁸

Grievant contends that the Executive Director laid her off in retaliation because grievant had discussions with a member of the Board of Trustees. 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.¹⁹ 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. Grievant easily meets the first criterion because speaking with a Board member about possible inappropriate actions of the Executive Director is a protected activity. Her layoff is an adverse employment action and thus fulfills the second criterion. However, grievant has not provided any evidence to show that the Director said or did anything that *directly links* her layoff to his displeasure. 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 grievant's position. Therefore, even though grievant has withdrawn her allegation of retaliation, there is no evidence of a direct nexus between the protected action and grievant's layoff.

Grievant claims that the layoff policy was misapplied. However, the preponderance of evidence reflects that the agency applied the layoff policy correctly. There was an issue as to grievant's actual Role title at the time of her layoff. The agency contends that the grievant's position had been changed to Media Specialist III sometime during the last eight months of her employment. If that was her correct Role, there were no available positions for which she was eligible because one person had more seniority, and the other person performed substantially different work.

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

¹⁹ EDR *Grievance Procedure Manual*, p.24

However, the grievant's most recent Employee Work Plan reflects a Role title of PR & Marketing Specialist III.²⁰ The agency submitted no evidence to show that grievant had signed a more recent Work Profile. At the time of grievant's layoff, there was one other PR & Marketing Specialist III. However, that person was more senior having been employed ten years prior to grievant and therefore grievant was not eligible for that position. There were three people with the lower-level Role title of PR & Marketing Specialist II. One was laid off on the same date as grievant; the other two were laid off on August 30, 2002. Grievant asserted that she felt qualified for one of the latter two positions. The agency had considered this possibility but concluded that because it was a different Role, it was not accessible. Even if the hearing officer could conclude that grievant should have been placed in that position, the issue is now moot because the position was subsequently eliminated. Thus, there is now no available position into which grievant can be placed. 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 layoff. DHRM reviewed and approved the layoff plan. Accordingly, grievant has not borne the burden of proof to show misapplication of the layoff policy.

Grievant alleges that the committee's early decision to eliminate her position resulted in other employees becoming aware that grievant might be laid off, and that this created a hostile work environment. Whenever layoff plans are developed over a period of time, it is not unusual that other employees will learn through office gossip which employees will be likely candidates for layoff. This is an unfortunate side effect of the process but there has been no evidence that this was done intentionally to create a hostile work environment for grievant, or any of the other 16 people laid off during 2002.

Finally, grievant has alleged that her layoff was the result of age and gender discrimination. The courts have established a four-part test to determine whether discrimination has occurred. To sustain a claim of age discrimination, grievant must show that: (i) she is a member of a protected age group (over 40 years old); (ii) she suffered an adverse job action; (iii) she was performing at a level that met his employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's age.²¹ Grievant is over 40 years of age and female, both of which are protected classes. She was laid off, and was performing satisfactorily. However, there is no evidence that the layoff was the result of either grievant's age or gender. Most (67 percent) of the agency's employees are female. Based on the available evidence it appears only coincidental that the first three of 17 people laid off were female and over 40 years of age. Accordingly, grievant has not borne the burden of proof to show that she was discriminated against on the basis of age or gender.

²⁰ Grievant Exhibit 3. Grievant's Employee Work Profile (Description), September 24, 2001.

²¹ Cramer v. Intelidata Technologies Corp., 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).

Grievant submitted an undated memorandum of unknown authorship that labels her a trouble maker and recommends her position be eliminated.²² The Executive Director testified under oath that he did not write the memorandum and does not know who did. He had solicited ideas from all employees and did receive suggestions from several employees, some of which were anonymous.

In summary, it is possible that grievant's discussions with a Board member were not welcomed by the Director because it put a spotlight on him. However, the 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. The exhibit function was determined by the Structure Committee to be a function that had to be reduced in order to achieve the necessary spending reductions. It was entirely logical to target this function for elimination; grievant happened to be the manager. However, 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, that the layoff policy was misapplied, or that the agency discriminated against her on the basis of age or gender. Grievant's request for relief is 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.

²² Grievant Exhibit 2. "Strictly Confidential" memorandum.

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.²³ 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.²⁴

[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

²³ 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).

²⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.