Issue: Misapplication of state and agency layoff policies; Hearing Date: 03/24/03; Decision Issued: 03/27/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5652

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5652

Hearing Date: March 25, 2003
Decision Issued: March 27, 2003

PROCEDURAL ISSUES

Because of unavailability of the agency representative, the hearing could not be docketed until the 49th day following appointment of the hearing officer.[1]

Grievant has requested three forms of relief, none of which are available through the grievance process. First, he requested to retain the rank of major and have his current position reallocated to major. In grievances involving the allegation of policy misapplication, a hearing officer may only direct the agency to correctly apply policy (if a misapplication is found). A hearing officer has no authority to promote or revise classification of an employee.[2] Grievant also sought to have the agency revise the definition of "demotion." Doing so would

[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)2 & 3. EDR *Grievance Procedure Manual*.

constitute a revision of DHRM policy – a form of relief not available to a hearing officer.[3] Second, grievant requested that he be offered the first major's position to become available at his current facility. This form of relief is not available to a hearing officer.[4] Finally, grievant requested that he be offered a retirement/severance package. This too, is not an available form of relief.[5] Moreover, the purpose of providing relief is to restore an aggrieved employee to the *status quo* before any adverse action occurred. Only the first item of relief sought by grievant would accomplish that purpose. However, as noted, the hearing officer can only direct the agency to correctly apply policy if it is determined that policy has been misapplied.

APPEARANCES

Grievant
Five witnesses for Grievant
Human Resource Director of Agency
One witness for Agency

ISSUES

Did the agency correctly apply both the state's layoff policy and the agency's layoff policy?

FINDINGS OF FACT

The grievant filed a timely grievance alleging that the agency misapplied state and agency layoff policies.[6] Following failure to resolve the grievance at the third resolution step, the agency head disqualified the grievance for a hearing. Grievant requested a qualification ruling from EDR. The Director of EDR ruled that the grievance qualified for hearing.[7] The Department of Corrections (DOC) (hereinafter referred to as "agency") has employed grievant for 29 years. He was a major when he filed the grievance and is currently a captain.[8]

Due to decreased tax revenues beginning in 2001, state government was forced to reduce expenditures. In January 2002, the Director of DOC announced an immediate hiring freeze.[9] Shortly thereafter, the agency announced that a

[3] § 5.9(b)4. *Ibid.* (See discussion of this issue in the Opinion section of this Decision.)
[4] § 5.9(b)6. *Ibid.* (See last paragraph in Findings of Fact section of this Decision.)
[5] § 5.9(b)3, 6 & 7. *Ibid.*
[6] Exhibit 20. Grievance Form A, filed May 17, 2002.
[7] Exhibit 21. *Qualification Ruling of Director* Number 2002-167, January 27, 2003.
[8] The DOC ranks of major and captain are both in pay band 5.
[9] Exhibit 1. Memorandum from Director to Executive Staff, January 15, 2002.

budget reduction plan would likely include the closing of some correctional institutions.[10] By March 2002, the agency had tentatively determined that the facility at which grievant was employed was targeted for closing.[11] The agency announced that efforts would be made to reassign employees affected by the closing to other facilities. When a facility is closed, positions assigned to that facility are abolished. Classified employees in positions identified for abolishment are then considered for placement according to the provisions of the Layoff policy of the Department of Human Resource Management (DHRM). The agency has a similar policy that is essentially similar to the DHRM policy.[12] The DHRM policy provides, in pertinent part:

> Seniority must be used by agencies when determining (1) who will be affected by layoff and (2) who is eligible for placement options within the agency before layoff or for recall opportunities.
>
> After an agency has identified all affected full-time classified employees, an attempt must be made to place them by seniority to any valid vacancies agency-wide in the current or a lower Pay Band. Such placement shall be in the highest position 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]

In April 2002, representatives of the Central Office Human Resources Department went to all facilities slated for closing and met with 274 affected employees. On April 10, 2002, two Human Resources representatives conducted a group meeting with all employees at grievant's facility. Then the representatives met individually with each employee to answer questions, and to provide information and forms.[14] Each employee was given the opportunity to complete a preference form indicating what facilities they would prefer to be assigned to. The preference form did not guarantee that a person would get one of their preferences, or even that there would be any position available for them. Its purpose was to help reduce the amount of human resource work by narrowing the possible locations to which an employee would agree to be assigned.

Grievant listed three facilities on his preference form, all of which are located adjacent to his facility.[15] During his conversation with the Human Resources representative, he did not indicate a willingness to move or relocate outside the immediate geographic area (defined as within 45 miles of current place of employment).[16] Information in the packet given to grievant on April 10, 2002 advises that employees must accept placements offered them if the

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[10] Exhibit 3. Memorandum from Director to Regional Directors, February 12, 2002.
[11] Exhibit 4. Memorandum from Director to Regional Directors, March 7, 2002.
[12] Exhibit 8. DOC Procedure 5-39, *Layoffs; Reductions in Work Force*, March 15, 2001.
[13] Exhibit 7. DHRM Policy No. 1.60, *Layoff*, September 25, 2000.
[14] Exhibit 10. Packet of information provided to grievant on April 10, 2002.
[15] Exhibit 9. Grievant's Preference form, April 10, 2002.
[16] Exhibit 9. *Reassignment & Layoff Procedures*, Questions & Answers.

placement is in the same pay band or does not require a salary reduction and does not require relocation. If the employee does not accept such a placement, he will be separated from State service.[17]

On April 17, 2002, the agency offered grievant placement as a captain at an adjacent facility; grievant had named this facility as second choice on his preference form. The placement was within the same pay band, did not require a salary reduction, and did not require relocation. Grievant accepted the placement, which was to be effective on June 9, 2002.[18] When central office made this offer, it was unaware that, just a few days earlier, the Regional Director had moved a captain from another facility to fill this vacancy. The right hand learned what the left had done several days later. Human Resources notified grievant that the placement offer had been made in error but that it would offer another placement that did not require either relocation or salary reduction.[19]

Subsequently, grievant learned from the same human resources representative of a major's vacancy at a correctional facility located about 400 miles away. Grievant rejected this possibility because he did not want to relocate. In another conversation, there was discussion of a major's vacancy at a facility located about 120 miles away. Grievant rejected this possibility for the same reason. At some point, the human resources representative suggested that the only position left was a sergeant's position at a facility located about 25 miles away. A major's position was vacant at this same facility but it was filled by another major who had about 18 months more seniority than grievant.

Grievant then learned that a captain's position was vacant at a facility located about 35 miles away. He knew of a captain at his current facility who lived in that area. Grievant spoke with the other captain and the Human Resources Director. The other captain volunteered for reassignment at the facility near his residence, so that grievant could then fill his vacancy at the current facility. The placement was offered on May 15, 2002 and grievant accepted the position of captain at his current facility the following day.[20] The grievant's current facility was his first choice location on his preference form.

Partially as a result of grievant's complaints to Human Resources about the reduction in his level of authority, the agency promulgated a new policy to provide for the possibility of a return to a higher level position in the same Pay Band. Employees placed in lower-level positions within a Pay Band are eligible for placement in a higher-level position within the Pay Band if that vacancy occurs within 12 months.[21]

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[17] Exhibit 9. *Ibid.*
[18] Exhibit 18. *Notice of Placement*, signed by grievant on April 18, 2002.
[19] Exhibit 18. Memorandum from human resources representative to grievant, May 1, 2002.
[20] Exhibit 12. Notice of Placement, signed by grievant May 16, 2002.
[21] Exhibit 11. Agency Memorandum HR-2002-05*, Return to Higher Level Position in a Pay Band*, July 1, 2002.

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).

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 his evidence first and must prove her claim by a preponderance of the evidence.[22]

In reviewing this case, one is reminded of Murphy's Law.[23] The undisputed facts establish that grievant had been offered and accepted a position at one of his preferred facilities. Then, apparently because of an absence of coordination between the Regional Director's office and the Central Office Human Resources department, it was discovered that another employee had already filled the position. Thus, because of a bureaucratic snafu, grievant found himself again in need of placement. It is understandable that grievant would be upset by this turn of events. However, the retraction of this first placement offer was caused by an unfortunate error, not by a policy misapplication. In the aftermath, there were discussions about vacancies at facilities that would have required grievant to relocate his residence. In one such discussion, it appears that a human resources representative may have been expressing frustration and brusquely told grievant that only a sergeant's position was available for him. This sufficiently annoyed the grievant that he filed a grievance.

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[22] § 5.8 EDR *Grievance Procedure Manual,* effective July 1, 2001.
[23] "If anything can go wrong, it will."

Facing the possibility of losing one's job after 29 years is a very traumatic experience. Similarly, facing the possibility of being demoted three ranks can be equally traumatic. In grievant's case, he was able to avoid these possibilities largely through his own initiative. He was finally placed in a position that retained his same rate of pay, the same pay band, and did not require relocation. Grievant's discomfort in going through a four-month process in which he faced the real possibility of losing his job is understandable. By the same token, however, grievant must recognize that most, if not all, of the other 273 employees subject to layoff probably underwent similar increased stress.

Nonetheless, grievant has not demonstrated that the agency misapplied policy. Of the three available major's positions, grievant rejected two because they would have required relocation of his residence. An employee with more seniority filled the third major's position. Thus, the agency correctly applied the seniority requirement of the layoff policy. Grievant contends that rather than discuss these possibilities verbally, the agency should have made a formal written offer of placement to the first two positions. This contention is not persuasive. Grievant readily admits he would have rejected both positions if they had been formally offered.[24]

The human resources department was under a time constraint to arrange placements for 274 employees between April 10, 2002 and June 9, 2002. Because of the need to work quickly, the agency made a decision to streamline the process as much as possible. It is correct that the agency could have sent grievant an offer for one position, waited for his formal rejection, sent another written offer for another position, waited for that rejection, and hope that eventually he would accept a position. That would have required more time than the agency could afford, especially considering that there were 273 other employees who also required placement. Thus, the agency reasonably decided to utilize preference forms and to verbally explore placement possibilities rather than sending out formal offers that it knew grievant would not accept. The agency made a bona fide effort to place grievant in a location of his choosing and ultimately he was placed at his first choice location. Grievant has failed to demonstrate either that the lack of formal written offers adversely affected him, or that his placement would have been any different.

Grievant points out that the reduction in rank from major to captain reduced his level of authority and limited his area of responsibility. While this is true, it is an unfortunate byproduct of the layoff process. However, by comparison with employees who were actually laid off, or who had to relocate their residences, grievant came through the process relatively unscathed. Not

[24] On March 4, 2003, in order to settle this grievance, the agency extended an offer of placement to grievant for a major's position at the facility located 125 miles away (Exhibit 13). Grievant did not accept the offer.

only did grievant remain in the same pay band, but he also retained the same rate of pay, and is at the facility that was his first choice.

Grievant also argues that his reduction in rank was a “demotion.” While it is true that the change in rank reduced his level of authority, it was not a demotion as that term is defined by DHRM. The Commonwealth’s policy on compensation defines a demotion either as a voluntary employee-initiated change of position to a lower Pay Band, or as a management-initiated assignment for performance or disciplinary reasons.[25] Grievant’s reassignment was neither voluntary nor for performance or disciplinary reasons. Rather, it was an action of agency management to move the employee from one position to a different position in the same Role or Pay Band, which is termed Reassignment Within the Pay Band.[26] Grievant believes that these definitions were created by the agency at the “eleventh hour.”[27] In fact, the Department of Human Resource Management formulated these definitions in 1999-2000 as part of the Commonwealth’s comprehensive Compensation Reform Program.

DECISION

The grievant has failed to show, by a preponderance of evidence, that the agency misapplied either the state layoff policy or the agency layoff policy. Therefore, the 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.

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

[25] DHRM Policy 3.05, *Compensation*, September 25, 2000.
[26] *Ibid.*
[27] Exhibit 20. Attachment to Grievance Form A.

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.[28] 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.[29]

[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

[28] 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, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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