Issue: Misapplication of layoff policy; Hearing Date: September 24, 2003; Decision Date: October 9, 2003; Revision Date: February 10, 2004; Agency: Virginia Polytechnic Institute and State University; Hearing Officer: Thomas J. McCarthy, Jr., Esquire; Case Number: 5812

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 5812

Hearing Date: September 24, 2003
Decision Issued: October 9, 2003

Revision Dated: February 2, 2004

APPEARANCES

Grievant
Grievant's Counsel
Agency Counsel
1 Witness for Grievant
2 Witnesses for Agency

ISSUES

1. "Was the denial of severance benefits to the Grievant a misapplication or unfair application of the state severance benefits policy?"

2. "If the answer to Issue No. 1 is "yes", based on the type and source of funding, what is the appropriate amount of total severance benefits due the Grievant?"

FINDINGS OF FACTS

The Grievant filed a timely appeal following the termination of Grievant's employment due to a termination of funding. Following failure to resolve the grievance at the third resolution step, the agency head declined to qualify the grievance for a hearing. 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 this grievance qualifies for a hearing based on the Grievant's position being funded in part by non-grant funds, leaving the determination of whether the remaining funding source for Grievant's position were grant funds as defined in the CFDA. That decision and the consequential appropriate amount of total severance benefits conferred upon the Grievant has been left to the Hearings Officer.

Prior to Grievant's employment with Virginia Polytechnic Institute and State University (hereinafter referred to as "Agency") in 2001, Grievant was employed by the Virginia Department of Social Services (hereinafter referred to as "Agency II"). In 2001, Grievant was employed by Agency as a member of the project support team, a project carried out by the Agency under an Interagency Agreement funded by Agency II, using 50% federal funding and 50% state funding. Funding for the Grievant's position ended June 15, 2003, and Grievants' position ended on that date.

When Grievant accepted the Agency position, Grievant knew that the duration of Grievants' employment depended on the project being funded by Agency II.

Grievant was a "restricted" employee. "Restricted" employees are defined in the Department of Human Resource Management (DHRM) Policy No. 2.20 II(A)(2) as "[e]mployees whose positions receive 10 percent or more of required funding from non-continuous or non-recurring funding sources, such as grants, donations, contracts, capital outlay projects, or higher education auxiliary enterprise revenues."

Grievant maintains she is eligible for transitional service benefits due to her termination when funding for the project ended. The Agency maintains that the Grievant is ineligible for severance benefits relying on the Workforce Transition Act (WTA), specifically Virginia Code Section 2.2-3202(B) which states "[a]n otherwise eligible employee whose position is contingent upon project grants as defined in the Catalogue of Federal Domestic Assistance, shall not be eligible for the transitional severance benefit

conferred by this chapter unless the funding source had agreed to assume all financial responsibility therefore in its written contract with the Commonwealth."

Grievant counters that even if the 50% funding for the project from the federal government is determined to be a grant as defined in the Catalogue of Federal Domestic Assistance, fifty percent of the funding for the project came from state funds.

The policy in question in the present case is the Department of Human Resource Management (DHRM) Policy No. 1.57; *Severance Benefits*. Policy 1.57 states that restricted full-time employees are eligible to receive severance benefits. However, as similarly stated in the WTA, "restricted employees in *grant-funded* positions as defined in the Catalog of Federal Domestic Assistance are eligible to receive severance benefits only if the funding source has agreed to assume all financial responsibility in its written contract with the Commonwealth. Policy 1.57 further states that in regard to severance payments, "[r]estricted employees who are *partially funded* by grant funds may be eligible to receive severance based on the percentage of non-grant funded salary." In sum, Policy 1.57 confers severance payment benefits upon eligible restricted full-time employees partially funded by non-grant funds commensurate with the percentage of salary that is provided by non-grant funds. In contrast, the WTA is silent as to severance payment for employees whose positions are partially funded by non-grant sources.

Agency II did not agree to fund service benefits under its interagency agreement with the Agency.

A specific grant for the program from the federal government was not applied for by Agency II (Grievant Exhibit G-5).

Except for being a restricted employee, Grievant was otherwise eligible for state severance benefits.

APPLICABLE LAW AND OPINION

The Virginia Workforce Transition Act (WTA), specifically in Virginia Code Section 2.2-3203(B) sets forth that, "An otherwise eligible employee whose position is contingent upon project grants as defined in the Catalogue of Federal Domestic Assistance, shall not be eligible for the transitional severance benefit conferred by this chapter unless the funding source had agreed to assume all financial responsibility therefore in its written contract with the Commonwealth."

DHRM Policy No. 1.57: *Severance Benefits* speaks to the eligibility of restricted employees in grant-funded and partially grant funded positions for severance benefits. The WTA does not address severance benefit eligibility for restricted position employees whose positions are partially grant funded.

In the WTA, the General Assembly specifically referred to "project grants as defined in the Catalogue of Federal Domestic Assistance." "Project Grants" is one category of federally funded assistance under "Types of Assistance" listed in the CFDA. The CFDA defines "Project Grants" as: "The funding for fixed or known periods of specific projects."

In the Grievant's case, all of the funding for Grievants' position came from the Agency II. The evidence is that Agency II received 50% of the funds for the project from the federal government and 50% of the funds for the project from the Commonwealth. Agency II then paid Agency under the interagency agreement.

The Agency, through its witnesses and counsel ably contended that the project was funded by a "project grant" because the Agency treats all programs not funded under the Agency budget as project grant funded.

It is uncontroverted that 50% of the funding from the project came to Agency II from state funds. Since there are no state funded programs defined in the CFDA, and since DHRM Policy No. 1.57 says that "restricted employees who are partially funded by grant funds may be eligible to receive severance based on the percentage of non-grant funded salary." (DHRM Policy No. 1.57, page 2 of 3) Grievant under Policy 1.57, is entitled at least to severance benefits payments based on the 50% of the project funded through Agency II by state funds.

Agency II received federal funds which it used to fund 50% of the project. These funds were paid to the Agency to operate the project. The WTA limits severance benefits for "an otherwise eligible employee whose position is contingent upon project grants as defined in the Catalogue of Federal Domestic Assistance …" Virginia Code section 2.2-3202(B). The construction of this statute is governed by the maxim *expressio unius est exclusio alterius,* which dictates that the mention of a specific item in a statute implies that other omitted items were not intended to be included within the scope of the statute. *Commonwealth v. Brown, 259 Va. 697, 704-05, 529 S.E.2d 96, 100 (2000); Board of Supervisors v. Wilson, 250 Va. 482, 485, 463 S.E.2d 650, 652 (1995); Turner v. Wexler, 244 Va. 124, 127, 481 S.E.2d 885, 887 (1992); Smith Mountain v. Ramaker, et al, 261 Va. 240; 542 S.E.2d 392 (2001).* The General Assembly is presumed to mean what it says. If it had wanted to limit severance benefits to all otherwise eligible employees funded with interagency agreements, it could have said so. The statute language is clear "… contingent upon project grants as defined in the Catalogue of Federal Domestic Assistance, …" The evidence did not show that the funding from the federal government to Agency II was for "fixed or known periods of specific projects." While the project may be a specific project, there was no evidence of a fixed or known period for the federal funding to Agency II. There is evidence that no specific grant for the project from the Federal Government was applied for by Agency II. There is nothing in the CFDA which says the funding for State interagency funded projects are "Project Grants".

The evidence was that Agency II did not apply to the federal government for a specific grant for the interagency project in question. By the time the project got to the Agency, it was funded by comingled state and federal funds which certainly do not meet the CFDA definition of "Project Grants".

The Agency cannot make funding for an agreement with Agency II a "Project Grant" by so calling it. To be limited by the WTA in Virginia Code Section 2.2-3202(B), it must meet the statutory definition. It does not.

By Policy Ruling dated January 14, 2004, the Department of Human Resources Management has found that Department of Human Resource Management's Policies 1.30 and 1.57, and the Virginia Workforce Transition Act must be considered together, and that collectively, these three documents define what benefits are due employees who are terminated involuntarily.

DECISION

Accordingly, on Issue 1, as directed, the previous decision is revised and the Agency is found not to have misapplied the state service benefit policy and statute.

Further, on Issue 2, and as directed, the previous decision is revised, and the Grievant is found not to be eligible to receive any severance benefits.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the *Grievance Procedure Manual* set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review

This hearing decision is subject to four types of administrative review, depending upon the nature of the alleged defect with the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and **received** by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

_____

Thomas J. McCarthy, Jr., Esquire
Hearing Officer