

Issues: Misapplication of policy; Hearing Date: 02/16/06; Decision Issued: 02/17/06; Agency: DSS; AHO: David J. Latham, Esq.; Case No. 8257,8258; Outcome: Agency upheld in full (grievant's request for relief denied);
Administrative Review: DHRM Ruling Request received 03/03/06; DHRM Ruling issued 05/08/06; Outcome: HO's decision affirmed; EDR Compliance Ruling Request received 04/21/06; EDR Ruling No. 2006-1338 issued 07/14/06; Outcome: HO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 8257 & 8258

Hearing Date: February 16, 2006
Decision Issued: February 17, 2006

PROCEDURAL ISSUE

Grievant filed two grievances within 15 days of each other, both citing the same date of occurrence (July 29, 2005). Both grievances challenge the same management action and raise similar, if not identical objections to the agency's action. The agency rejected the second grievance, asserting that grievant lacked access to the grievance procedure and, declined to qualify either grievance for hearing. Grievant appealed to the Department of Employment Dispute Resolution (EDR). The EDR Director first ruled that grievant had access to the grievance procedure.¹ In a second ruling, the EDR Director qualified both grievances for hearing, and consolidated the grievances to be heard at a single hearing.²

It should be noted also that the first EDR ruling on access made clear that "... once an employee separates from state employment, the only claim for which

¹ *Access Ruling of Director* Number 2006-1151, issued November 2, 2005.

² *Qualification and Consolidation Ruling of Director* Number 2006-1112, issued January 6, 2006.

he or she may have access to the grievance procedure is a challenge to a termination or involuntary separation.”³

APPEARANCES

Grievant
Attorney for Grievant
Three witnesses for Grievant
Director of Audit Services
Advocate for Agency

ISSUES

Did the agency unfairly apply or misapply Department of Human Resource Management (DHRM) Policy 1.70? Did the agency retaliate against, discriminate against, harass, or demean grievant? Did the agency act arbitrarily or capriciously?

FINDINGS OF FACT

The grievant timely filed two grievances, both asserting that the agency unfairly applied or misapplied DHRM Policy 1.70.⁴ The Department of Social Services (DSS) (Hereinafter referred to as agency) has employed grievant for four years. She was a human services program manager at the time of separation from employment.⁵

Policy 1.70 provides, in pertinent part: “An agency may choose to accept an employee’s request to rescind his or her resignation within 30 calendar days of separation.”⁶

On June 28, 2005, grievant submitted to her supervisor a memorandum of resignation and a job offer letter from a private sector company.⁷ The resignation was somewhat unusual in that a large portion of the memorandum was devoted to a recitation of grievant’s accomplishments. The job offer specified that grievant would have to notify the company of her acceptance by July 15, 2005. Grievant notified her supervisor that her resignation would be effective August 1, 2005, and asked him if he would be interested in making a counter offer to induce her to remain with the agency. She complained that her salary was

³ *Access Ruling of Director* Number 2006-1151, issued November 2, 2005.

⁴ Grievant Exhibits 9 & 10. Grievance Forms A, filed July 29, 2005, and August 12, 2005, respectively.

⁵ Grievant Exhibit 2. Grievant’s Employee Work Profile work description, December 1, 2003.

⁶ Grievant Exhibit 9. Section II.A.3, Department of Human Resource Management (DHRM) Policy 1.70, *Termination/Separation from State Service*, revised May 2004.

⁷ Agency Exhibit 1, pp. 5 & 6.

significantly lower than two other similarly situated employees in the same pay band.

On June 29, 2005, grievant's supervisor prepared and approved paperwork necessary to request a salary Retention counter offer that would increase grievant's salary by 15 percent.⁸ The Budget Unit approved the paperwork on June 30, 2005. The supervisor then submitted the paperwork to Human Resources for consideration. On July 5, 2005, the supervisor discussed the request with the Human Resources compensation manager. Both felt that grievant's job offer letter was odd because it did not include any information as to whom or how grievant should contact the company to notify it of her acceptance. The compensation manager noted that the letterhead did not have a telephone number for the company. She checked on the Internet and found that the company exists and is headquartered in New York City. The compensation manager discussed the situation with the acting Human Resources Director who agreed that the offer letter appeared questionable. As a result, Human Resources decided that it would not approve the request for a salary increase and returned the paperwork to the supervisor "without action"⁹ on July 6, 2005.

After this, during the second week of July, the supervisor began necessary steps in anticipation of grievant's impending separation. He forwarded paperwork to human resources to begin the recruitment process to hire a replacement. He also met with grievant's staff and formulated an orderly process to handle grievant's duties until a replacement could be hired. This included the development of a document assigning various responsibilities to certain employees during the transition period.¹⁰ The supervisor asked grievant to review a checklist for close out items and meet with him to reconcile her leave hours.¹¹

Grievant was on vacation out of state from July 11 through 22, 2005. During her vacation, her fiancé had proposed to her and they discussed future plans. She and her fiancé determined that they wanted to build a house and, for various personal reasons, he did not want her to take a job that involved extensive travel. Because the job offer involved extensive travel, they determined that grievant should not accept the offer. Although grievant returned from vacation on July 22, 2005, she waited until late on July 27, 2005 to e-mail to her supervisor her request to rescind her resignation.¹² She also spoke with her supervisor that day stating that she would agree to request rescission of her resignation if he would make certain changes in the division, attend mediation,

⁸ Agency Exhibit 1, pp. 7-12.

⁹ Testimony established that when human resources returns such requests without action, it means that the request has been disapproved.

¹⁰ Agency Exhibit 1, pp. 28-34. Fraud Management Carryover.

¹¹ Agency Exhibit 1, pp. 21 & 22. E-mail from supervisor to grievant, July 8, 2005, and return e-mail confirming that the first message had been read. See also Agency Exhibit 1, p.2. Timeline of supervisor's actions between July 8-14, 2005.

¹² Agency Exhibit 1, pp. 35 & 36. E-mails from grievant to supervisor, July 27, 2005.

treat her and her staff with more respect, and promise to make an attempt to give her a salary increase.

The supervisor received the e-mail the following morning. He spoke with the Special Advisor to the Commissioner who advised him that the Commissioner had no problem with the supervisor not granting the request to rescind. The Special Advisor also told the supervisor that grievant had told her on July 27, 2005 that she was expecting a job offer for more money than her current salary from a county DSS agency. The Special Advisor concluded from her conversation with grievant that she would probably be leaving soon to take that position. The supervisor then consulted with a human resources manager who advised him not to grant the request to rescind. On that same day, the supervisor responded to grievant by e-mail and by overnight letter to her residence that he would not grant grievant's request to rescind her resignation.¹³

Grievant's subordinates believed that grievant never intended to leave her employment.¹⁴

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

¹³ Agency Exhibit 1, pp. 37 & 38. E-mail and letter from supervisor to grievant, July 28, 2005.

¹⁴ Testimony of grievant's witness.

circumstances. In all other actions, such as a claim of unfair application or misapplication of policy, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹⁵

The applicable policy, Policy 1.70, addresses an employee's request to rescind resignation by stating that the "agency may *choose* to accept an employee's request to rescind resignation within 30 calendar days of separation." The balance of the section in which this language is found provides guidance on what actions should be taken if the request to rescind occurs *after* separation. The policy does not provide any specific guidance on what actions, if any, should be taken if the request to rescind occurs *prior* to separation. That may well be because no additional action other than choosing to accept or deny the request is required. Accordingly, since the policy is silent on this issue, it must be presumed that the policy intent is that agencies have the authority to choose to accept a request to rescind regardless of whether the request is made before or after separation. Further support for this position is contained in a policy interpretation by a representative of the Virginia Department of Human Resource Management.¹⁶ Grievant has advanced no theory to suggest that the agency was not within its authority to make such an election before separation. Moreover, grievant knew that her supervisor would have to approve her request even before she submitted it.¹⁷

Rather, grievant challenges the agency's action on the basis that it was done without explanation, retaliatory, arbitrary and capricious, discriminatory, harassing, and demeaning.¹⁸ Each of these assertions is addressed below.

Explanation not provided

Grievant correctly notes that the agency did not offer an explanation when it denied her request to rescind resignation. However, she has not shown that the agency is required to provide an explanation. There is no policy or procedure requiring that an explanation be provided. As a general rule, when an employer elects not to allow rescission, it does so because it has determined that it would rather not continue the employment relationship. Under these circumstances, virtually any explanation the agency might give would, even if sugar-coated, likely be negative and unsatisfactory to the employee. The explanation would probably only provoke an argumentative response from the employee that would not change the employer's decision. Thus, in these cases, it is logical to not offer an explanation and thereby allow the separation to be as amicable as possible.

Retaliation

¹⁵ § 5.8, Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, Effective August 30, 2004.

¹⁶ Agency Exhibit 1, p. 39. E-mail from DHRM representative to DSS employment relations manager, August 1, 2005.

¹⁷ Grievant Exhibit 9. Grievance Form A, filed July 29, 2005 .

¹⁸ Grievant Exhibit 10. Grievance Form A, filed August 12, 2005.

In her written grievance, grievant alleged retaliation because in March 2005, she had threatened [grievant's term] to utilize the grievance procedure. 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. Generally, protected activities include use of or participation in the grievance procedure, complying with or reporting a violation of law to authorities, seeking to change a law before the General Assembly or Congress, reporting a violation of fraud, waste or abuse to the state hotline, or exercising any other right protected by law.

Merely threatening to use the grievance procedure is not the same as actually filing a grievance. Although grievant had told her supervisor that she thought about filing a grievance in March 2005, she did not do so.²⁰ Accordingly, it may be concluded that grievant did not participate in a protected activity prior to the filing of the instant grievances. Grievant has therefore failed to satisfy the first prong of the test to show retaliation. Therefore, it is not necessary to consider whether the refusal to grant a request to rescind a resignation constitutes an adverse employment action.

Moreover, even if grievant could demonstrate participation in a protected activity, and even if one could find that refusal to allow rescission of a resignation is an adverse employment action, grievant has not demonstrated any nexus between the two events. Mere speculation that the two are linked is insufficient to carry the burden of proof.

Arbitrary and capricious

The term "arbitrary and capricious" is defined for grievance purposes as "In disregard of the facts or without a reasoned basis."²¹ The supervisor denied grievant's request for multiple reasons. First, little more than one year earlier grievant had requested a salary increase. The supervisor was able to obtain an increase for her in the amount of ten percent. He had attempted to obtain a second increase in the latter half of 2004 but it was not approved by the agency. Then, when grievant submitted her resignation, she requested yet another substantial salary increase. Because grievant combined her salary request with the resignation, it appeared that she was attempting to use a threatened resignation as leverage to increase her salary. The supervisor was tired of grievant's requests for large salary increases.

¹⁹ EDR *Grievance Procedure Manual*, p.24.

²⁰ Grievant Exhibit 9. Attachment D to first grievance: Memorandum from grievant to supervisor, March 18, 2005.

²¹ § 9, EDR *Grievance Procedure Manual*, effective August 30, 2004.

Second, grievant had let it be known for some time that she was seeking other employment. On many occasions she had threatened to leave her position. Although grievant asserts that she was joking on many of these occasions, her supervisor knew that she had been filing job applications outside the agency for some time. In fact, the supervisor had attempted on occasion to discourage grievant from taking some jobs she had applied for. Third, because the offer letter from an outside company appeared unusual, both grievant's supervisor and a human resources manager had real concerns as to whether the offer was legitimate or whether it was being used to leverage another large salary increase.

Fourth, after grievant's request to rescind, the supervisor learned from the Commissioner's office that grievant was expecting yet another job offer from a county DSS agency. Since that agency had contacted grievant about the job offer, and it was for more money than her current salary, it appeared that grievant would soon be leaving anyway. At that point, it made no sense to allow grievant to rescind her resignation only to have her again resign a month or two later.²² If grievant were allowed to rescind, the entire hiring process for her replacement would have to be halted and then begun anew when she later resigned. Accordingly, the evidence supports a conclusion that the agency did not make its decision arbitrarily or capriciously. Rather, there was a multifaceted, reasoned basis to support the decision to allow resignation to proceed to its normal conclusion.

Discrimination

Grievant asserts that the decision to disallow rescission was discriminatory. To sustain a claim of discrimination, grievant must show that: (i) she is a member of a protected group; (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 protected classification.²³ Grievant did not assert specifically that she was discriminated on the basis of gender. However, she alluded to such a basis by noting that two male employees in her pay band were paid more she was. On this basis, it may be argued that grievant is a member of a protected group. Thus, grievant satisfies the first prong of the test. She also satisfies the third prong of this test because she was performing at a satisfactory level.

However, grievant has not met the second prong of the test. Grievant has not demonstrated that the employer initiated an adverse employment action. An adverse employment action includes any employer action resulting in an adverse

²² In fact, grievant accepted the position with the county DSS agency and became employed there effective September 15, 2005.

²³ *Cramer v. Intelidata Technologies Corp.*, 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).

effect on the terms, conditions, or benefits of employment, such as a cut in pay.²⁴ A transfer may constitute an adverse employment action if a grievant can show that the transfer had some significant detrimental effect on the terms, conditions, or benefits of her employment.²⁵ A transfer with dramatic shift in working hours, appreciably different responsibilities, or one providing reduced opportunities for promotion can constitute an adverse employment action, depending on all the facts and circumstances.²⁶ In the instant case, it was grievant who initiated her resignation – not the agency. The agency simply allowed grievant’s resignation to proceed to its normal conclusion.

Moreover, even if one could conclude that allowing a resignation to proceed to its normal conclusion is an adverse employment action, grievant has failed to present any evidence to show that this decision was based on grievant’s gender. Accordingly, grievant has not met either the second or fourth prongs of the four-part test to establish a claim of discrimination. Therefore, grievant has failed to prove that the agency discriminated against her.

Harassing and Demeaning

Grievant failed to offer any evidence to show that the agency’s decision either harassed or demeaned her. Further, she has not shown that anyone at the agency intended to “harass or demean her by not granting her request to rescind her resignation.”²⁷

Grievant had alleged in her memorandum of March 18, 2005 to her supervisor that he was moody, and belittled and humiliated her and her staff. The supervisor met with grievant in March and discussed these issues with her. Since then, grievant had not raised these concerns again until she resigned. Grievant contends that conditions improved for a period of time but that the supervisor eventually reverted to his previous behavior. However, she did not file a grievance or seek the intervention of management above the supervisor to resolve her concerns. Her mention of these concerns in the July 29th grievance does not directly relate to the agency’s decision to deny rescission of resignation.

It is apparent that, although the supervisor thought that his working relationship with grievant was reasonably satisfactory, she had a different view. These are issues for which it is now impossible to provide any relief because grievant is no longer employed. More importantly, even if grievant’s perception of the working relationship is more accurate than her supervisor’s view, this would only serve to provide one more reason that the agency chose not to permit rescission of the resignation. In plainer language, if the working relationship was

²⁴ *Von Gunten v. Maryland Department of Employment*, 2001 U.S. App. LEXIS 4149 (4th Cir. 2001) (citing *Munday v. Waste Mgmt. of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997).

²⁵ *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999)

²⁶ *See Boone v. Goldin*, *Ibid.*; *Webster v. Henderson*, 2000 U.S. Dist LEXIS 5777 (D. Md 2000) *aff’d* 2002 U.S. App. LEXIS 287 (unpublished opinion). *See also Garrison v. R.H. Barringer Distributing Co.*, 152 F. Supp. 2d 856 (MD N.C. 2001).

²⁷ Grievant Exhibit 10. Grievance Form A, filed August 12, 2005.

as poor as grievant indicates, there would be no incentive for the agency to prolong the situation once grievant had resigned.

Other issues

Grievant provided evidence of another employee who had resigned, requested rescission of his resignation, and was allowed to stay with the agency.²⁸ Although this occurred months after grievant's separation and is therefore not relevant to the instant case, the evidence was considered nonetheless. The employee relations manager testified that he was aware of one other situation about ten years ago in which an employee who resigned was allowed to return within two weeks of the resignation date. The fact that the agency chose in two cases to permit rescission does not create a precedent. The policy on separation from state employment service gives the agency the authority to choose whether to accept a rescission request.

It is also worth noting that grievant was required to notify the company from which she had received the job offer by July 15, 2005 if she was going to accept the job. Since grievant knew of this deadline, she knew when she failed to accept the offer by that date that she should immediately request rescission of her resignation. However, she failed to make her request until nearly two weeks later and only two days before her last day of work. Grievant has not provided a satisfactory explanation for waiting so long to request rescission.

Summary

The undisputed evidence establishes that grievant's supervisor had obtained one large salary increase for her in 2004, and had attempted to obtain another salary increase later in 2004. On some occasions, he had encouraged her to stay when she applied for other employment. He had always given her satisfactory performance evaluations. He never counseled or disciplined grievant. Finally, even after grievant resigned, the supervisor attempted to obtain a 15 percent salary increase in an attempt to retain grievant. These are not the actions of one who would act arbitrarily and capriciously, or retaliate against grievant, rather these are the actions of a supportive supervisor. However, subsequently, the supervisor had concerns about why grievant's resignation letter was primarily describing her accomplishments, the legitimacy of grievant's job offer, the relationship between grievant's fiancé and the president of the company making the job offer, the fact that grievant was about to receive a different job offer from a county agency, grievant's frequent attempts to find other employment, and her repeated requests for salary increases. Given all these factors, and with advice and input from both Human Resources and the Commissioner's office, the supervisor determined that it would be best to allow the resignation to proceed. This type of reasoned decision making is within the agency's authority.

²⁸ Grievant Exhibit 3. Memoranda documenting the resignation and rescission, November 29, 2005 and December 5, 2005, respectively.

DECISION

Grievant's request for relief is hereby DENIED.

APPEAL RIGHTS

You may file an administrative review request within **15 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 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 15-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.²⁹ You must file a notice of appeal with the clerk of the circuit court in the

²⁹ 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

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.³⁰

[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

that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

³⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.