

Issue: Retaliation; Hearing Date: 09/19/06; Decision Issued: 09/21/06;  
Agency: DBA; AHO: David J. Latham, Esq.; Case No. 8417; Outcome:  
Agency upheld in full.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8417

Hearing Date: September 19, 2006  
Decision Issued: September 21, 2006

**APPEARANCES**

Grievant  
One witness for Grievant  
Human Resource Manager  
One witness for Agency

**ISSUES**

Did the agency retaliate against grievant?

**FINDINGS OF FACT**

Grievant filed a timely grievance alleging that the agency retaliated against him by not paying him a \$250 bonus in June 2006. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>1</sup> The Virginia Department of Business

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<sup>1</sup> Agency Exhibit B. Grievance Form A, filed July 24, 2006.

Assistance (VDBA) (Hereinafter referred to as “agency”) has employed grievant for ten years. He is a business services manager and currently works on special projects.

On May 9, 2006, the agency disciplined grievant with a Group II Written Notice and 10 days suspension. On May 15, 2006, the governor appointed a new Director to head the agency. On May 25, 2006, when grievant returned to work following his suspension, he filed a grievance of the disciplinary action.<sup>2</sup> The activities that precipitated grievant’s discipline also resulted in some negative publicity for the agency. Although grievant promptly issued a public, written apology and, although the number of people complaining was relatively small, news media gave the incident a significant amount of publicity. This necessitated that the agency director and others spend a fair amount of time responding to the media and mending fences with community leaders.<sup>3</sup>

During the first part of 2006, the morale of agency employees had been suffering because there was confusion about what employees were to be doing, and because of anxiety about the transition to a new director. Partly because of this and partly because of the negative publicity discussed *supra*, it was suggested that employees should be given some positive news to boost morale. The director decided to have a party to celebrate the agency’s tenth anniversary. She also decided that to improve morale, a \$250 bonus would be given to agency employees who had made an “outstanding contribution to the success of the organization,” since May 15, 2006.<sup>4</sup> The director states that managers were requested to submit accomplishments of their staff for consideration.<sup>5</sup> However, both grievant’s manager and the division administrator denied having any input into deciding who would receive bonuses. The director formally invited all employees to attend a “surprise birthday party.”<sup>6</sup>

The party held on June 26, 2006, was in a large conference room, and included a party atmosphere (balloons, poster marking the 10<sup>th</sup> anniversary) as well as refreshments such as cake and ice cream. Agency employees at two locations other than Richmond participated by speakerphone. After refreshments were served, the director made a speech in which she talked about receiving positive comments from the public about the agency’s services, with one exception. Then division directors were given gift bags containing bonus checks and thank you notes for their employees. The gift bags were distributed to individual employees after the party concluded.

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<sup>2</sup> Grievant Exhibit 1. Grievance Form A, filed May 25, 2006. The grievance proceeded through the resolution steps and ultimately was taken to a hearing. The hearing decision reduced the discipline to a Group I Written Notice and rescinded the suspension.

<sup>3</sup> For more detail, see *Decision of Hearing Officer* Case # 8392, August 10, 2006.

<sup>4</sup> Agency Exhibit C. E-mail from deputy director to human resources, June 19, 2006. See also Agency Exhibit B. Director’s third-step response to grievant, August 7, 2006.

<sup>5</sup> Agency Exhibit B. Director’s third-step response to grievant, August 7, 2006.

<sup>6</sup> Grievant Exhibit 3. E-mail from director to all employees, June 20, 2006.

Grievant did not receive a gift bag or bonus check. The director, deputy director, and previous director are at-will employees appointed by the governor; these three were considered to be non-covered employees and therefore were not given a bonus award. Of the 41 full-time, classified employees, all but grievant received a bonus check of \$250.<sup>7</sup> In addition, four part-time, wage employees were also given a bonus check.<sup>8</sup>

The Commonwealth provides that agencies shall develop and implement recognition programs to acknowledge employees' contributions to the overall objectives of the agency and state government.<sup>9</sup> The Commonwealth's policy requires that agencies shall retain records related to employee recognition programs. Pursuant to this policy, the agency promulgated an agency salary administration plan which includes a section for recognition awards.<sup>10</sup> The policy provides, *inter alia*, that only permanent employees in full-time, classified positions are eligible to receive recognition awards. The policy also requires that documentation must be given to Human Resources to include: the reason for the bonus, a one- to two-paragraph, detailed explanation of the outstanding achievement and/or accomplishment, results of the accomplishment, and how the individual's efforts directly affected the end results.

### 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

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<sup>7</sup> Grievant Exhibit 2. Memorandum from human resource manager to grievant, August 30, 2006.  
<sup>8</sup> One other wage employee was not given a bonus check because she had been employed for only six days.  
<sup>9</sup> Agency Exhibit A. Department of Human Resource Management (DHRM) Policy 1.20, *Employee Recognition Programs*, revised July 1, 2003.  
<sup>10</sup> Agency Exhibit B. Section VIII.J, *Agency Salary Administration Plan*, September 25, 2000.

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, such as a claim of retaliation, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.<sup>11</sup>

Grievant asserts that the agency retaliated against him because he grieved the disciplinary action taken in May 2006. However, grievant admits that he has no direct evidence to demonstrate retaliation, and instead relies on circumstantial evidence to make his case. The agency denies that it did not award grievant a bonus because of his grievance. Rather, the agency's position is that it did not give grievant a bonus because of the negative publicity that grievant's actions had generated, and because of his active disciplinary action.

The agency's position is that it denied a bonus to grievant because, of all eligible employees, only grievant's actions resulted in negative consequences for the agency, and only grievant had a recent, active disciplinary action. Grievant has not rebutted either of these facts. Grievant argues that his negative actions (the offensive blogging) occurred prior to May 15<sup>th</sup> – the date that the director had specified as the starting point for achievement consideration. However, grievant made an unauthorized trip to the offended locality subsequent to May 15<sup>th</sup> and the agency felt that this prolonged the negative publicity generated by the blogging. Grievant's argument that he made the trip on his own time and at his own expense is not persuasive because the trip was clearly job-related. The fact is that grievant would not have made such a trip but for the fact that his blogging had offended some people in the community. While grievant intended his trip to have an ameliorative effect, agency management had not authorized the trip. Since grievant's on-the-job actions had precipitated the brouhaha, he should have consulted with agency management before making such a trip. Agency management could then have decided whether it was in the *agency's* best interest for grievant to make the trip. Thus, grievant's actions after May 15<sup>th</sup> contributed, at least in part, to negative publicity for the agency.

Grievant correctly observes that the agency failed to comply with its own policy in two significant respects. First, agency policy provides that only permanent, full-time, classified employees are eligible for recognition awards. In this case, the agency also gave bonuses to wage employees. Wage employees are neither permanent nor classified employees, and they work only part-time.<sup>12</sup> Thus, the agency made financial awards to employees who are not eligible for such awards according to the agency's own written policy. The agency offered no plausible explanation for its noncompliance. However, while the agency was

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<sup>11</sup> § 5.8, Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, Effective August 30, 2004.

<sup>12</sup> Wage employees are limited to working 1500 hours per year.

out of compliance with its own policy, its noncompliance does not prove retaliation. If the agency had not given bonuses to wage employees, there would not have been any change in grievant's situation.

Second, the agency did not obtain the detailed documentation that the policy requires managers give to the Human Resources Office. The agency contends that because the bonuses were to be given to all eligible employees including managers and division administrators (except grievant), it did not want to spoil the surprise by involving management people in the process. While this explanation is somewhat persuasive, it does negate the argument that the recognition awards were based on individual accomplishments. Instead, it is rather transparent that the bonus checks were distributed *en masse* as a morale booster for all employees (except grievant). The agency policy's language in the recognition awards section envisions awards for individual employee achievements recognized by a manager. The language does not envision a blanket recognition award to virtually everyone in the agency. However, in reading both the state and agency policies, one cannot conclude that such a blanket award is outside the director's authority. Accordingly, the agency has a logical explanation for why documentation was not obtained given the unique circumstances of this case. Moreover, the lack of documentation does not prove that the decision to exclude grievant was retaliatory.

### DECISION

Grievant failed to prove, by a preponderance of evidence, that the agency decision to exclude him from the bonus award was retaliatory.

Grievant's request for relief is hereby DENIED.

### APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this 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 14<sup>th</sup> St, 12<sup>th</sup> 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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.<sup>13</sup> 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.<sup>14</sup> You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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]

*S/David J. Latham*

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David J. Latham, Esq.  
Hearing Officer

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<sup>13</sup> 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).

<sup>14</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.