Issues: Layoff and Retaliation; Hearing Date: 09/24/07; Decision Issued: 11/12/07; Agency: Va. Community College System; AHO: Sondra K. Alan, Esq.; Case No. 8666; Outcome: Full Relief; **Administrative Review: HO Reconsideration Request received 12/11/07; Reconsideration Decision issued 01/02/08; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received requesting permission to appeal to Circuit Court; EDR Ruling #2008-1891 issued 01/04/08; Outcome: Request Denied (premature); Administrative Review: EDR Admin Review request received 12/07/07 & 01/08/08; EDR Ruling #2008-1910, 1915, 1916 issued 02/12/08; Outcome: Remanded to AHO; Remanded decision issued 05/29/08; Outcome: Original decision affirmed; Judicial Review: Appealed to Pulaski County Circuit Court; Outcome pending .**

DECISION OF HEARING OFFICER

In re:

Case No: 8666

Hearing Date: September 26, 2007 and October 9, 2007
Decision Issued: November 12, 2007

PROCEDURAL ISSUES

The Grievant filed a timely grievance after notice of January 11, 2007 eliminating her position as of January 31, 2007. Grievant had proceeded through resolution steps and upon Grievant's request for hearing, the Agency qualified the grievance for a hearing. The matter was scheduled for hearing during a pre-hearing telephone conference on August 27, 2007 for hearing date of September 26, 2007 at 10:30 am at the agency's facility. Representatives for both Grievant and Agency were present. The matter was not concluded at said hearing and was continued until October 9, 2007 at 11:00 am at the agency's facility at which time testimony was completed.

APPEARANCES

Grievant
Nine witnesses for Grievant
Agency representative
Six witnesses for Agency

ISSUES

Does an eight month lapse between a protected activity and the elimination of Grievant's position satisfy the necessary temporal proximity to establish a causal relationship? Was it necessary for the ultimate decision maker to be fully aware of Grievant's protected activity for the elimination of Grievant's position to constitute a retaliatory, adverse employment action? Did the Agency have a legitimate business reason for eliminating Grievant's position which would eliminate suspicion of retaliation? Was a materially adverse action taken upon Grievant? Can a link between the materially adverse action and the protected activity be established?

FACTS

Prior to the elimination of her position and layoff in January, 2007, the Grievant was employed as a horticulture specialist with the Virginia Community College System.[1] It is un-controverted that from at least the mid 1990's Grievant and her immediate supervisor had difficulties with their working relationship.[2] The immediate supervisor did, however, give Grievant adequate performance ratings[3].

On May 23, 2006, the Grievant filed a workplace violence incident report with the college stemming from a May 12, 2006 confrontation with her immediate supervisor in which the Grievant claims her supervisor engaged in "verbal abuse," "profane/vulgar language," "verbal intimidation at the workplace," and blocked her movement[4]. The incident in question was investigated and it was determined that although the supervisor "could have handled the situation in a less confrontational manner," it did not rise to a level of workplace violence[5].

On January 8, 2007, the Grievant's immediate supervisor proposed a reorganization of the facility services department[6]. The proposed reorganization would eliminate the Grievant's position and replace her landscaping and other "grounds" functions with contract labor[7]. The reorganization was approved by the college president and the vice president for finance and technology on January 11, 2007[8]. The Grievant's position was subsequently eliminated effective January 31, 2007, and she was given a severance package at that time.

On January 31, 2007, Grievant filed a grievance form requesting the matter of the termination of her position and her layoff be addressed by the hearing procedure. [9] Grievant

[1] Agency Exhibit 15 - An Employee Work Plan, p. 2 describes responsibilities and percentage of time that should be spent at each responsibility.
[2] Grievant Exhibits 1 - 9
[3] Agency exhibits 3, 8 and 15
[4] Agency Exhibit 4 – Initial Workplace Violence Incident Report
[5] Agency Exhibit 4, p. 6 "Recommendations to the President's Staff and Comments"
[6] Grievant Exhibit 11
[7] Grievant Exhibit 12
[8] Grievant Exhibit 12
[9] Agency Exhibit 6

alleged retaliation as a motive for her position being eliminated. She based her claim on her report of workplace violence in May of 2006 and her previous Grievant's activity.

By letter ruling dated July 9, 2007, a qualification ruling by the director of the Department of Employment Dispute Resolution certified the matter for hearing. The evidence was heard on September 26 and October 9.

APPLICABLE LAW

In order to establish a successful claim of retaliation, the plaintiff must concretely establish a prima facie case of discrimination. The plaintiff must show that she engaged in a protected activity; the employer took an adverse action against her; and a causal connection existed between the protected activity and the claimed adverse action. *Von Gunten v. Maryland,* 243 F.3d 858, 863 (4th Cir.2001).[10] Should the plaintiff succeed in proving a prima facie case, the *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-03 (1973), analysis applies, and the burden of proof then shifts to the employer to articulate a legitimate, non-retaliatory reason for the action.[11] Finally, the burden of proof shifts once more to the employee, who must prove, if he can, that the legitimate and non-retaliatory reason proffered by the employer is not the true reason, but merely a pretext for the discrimination[12].

Title VII of the Federal Code §703(a) prohibits specific activities of discrimination due to an individual's race, color, religion, sex or natural origin[13]. Title VII §704(a) makes it unlawful to discriminate against an employee who has complained of a protected activity by an act of retaliation[14]. The Commonwealth of Virginia further describes protected activities, which include

---

[10] *McDonald v. Rumsfeld*, 166 F.Supp. 2d 459, 463 (E.D. Va. 2001). In order to state a prima facie case of retaliation, a plaintiff must show that (1) the plaintiff engaged in a protected activity; (2) the employer acted adversely against the plaintiff; (3) and the protected activity was causally connected to the employer's adverse action. Beall v. Abbott Lab., 130 F.3d 614, 619 (4th Cir.1997) (citing Carter v. Ball, 33 F.3d 450, 460 (4th Cir.1994)). The plaintiff has the burden of providing evidence of a causal connection between the adverse treatment and the protected activity. Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir.1996)..

[11] *Hassman, v. Harvey*, 2005 U.S. Dist. LEXIS 30983 (E.D. Va. 2005).

[12] *McDonald v. Rumsfeld*, 166 F.Supp. 2d 459, 463 (E.D. Va. 2001).

[13] 42 U.S.C. §2000e-2(a) (1).

[14] 42 U.S. C. §2000e-3(a)

"participating in a grievance process".[15] Once the protected activity is identified, the grievant must show that he/she suffered a materially adverse action[16].

It is not necessary for the person authorizing the adverse action to be a part of the retaliation scheme if he/she relied on the recommendation of the persons intending to retaliate.[17]

To determine a causal connection, there must be a temporal proximity between the protected activity and the adverse reaction. It has been established by case law that a thirty (30) month difference between the time of the protected activity and the adverse reaction is insufficient to establish a causal relationship; however a ten (10) week period may be a sufficient temporal connection.[18]

In the instant case, the eight months between the complaint and the adverse reaction has also been held to be a sufficient temporal connection.[19] Grievant did file a complaint of workplace violence, which is a protected activity in Virginia. Eight months later her job was eliminated and she was terminated from employment. This was not a disciplinary action as

---

[15] *See* Va. Code Ann. § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

[16] *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15 (2006). Based on [the Department of Employment Dispute Resolution]'s construction of the grievance statutes, a grievance must involve a non-trivial harm to qualify for a hearing. Frequently, the non-trivial harm constitutes an "adverse employment action," (defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits").

[17] *McDonald v. Rumsfeld*, 166 F.Supp. 2d 459, 463 (E.D. Va. 2001). "If the employee can demonstrate that others had influence or leverage over the official decisionmaker, and thus were not ordinary coworkers, it is proper to impute their discriminatory attitudes to the formal decisionmaker." *Long v. Eastfield College,* 88 F.3d 300, 307 (5th Cir.1996)

[18] *Hassman, v. Harvey*, 2005 U.S. Dist. LEXIS 30983 (E.D. Va. 2005). Plaintiff cannot rely on temporal proximity to establish a causal connection between his protected activities and the adverse personnel actions. The lapse of time between the denial of the opportunity to compete for the Chair positions and any protected activity of Plaintiff far exceeds the general time limit recognized by the Fourth Circuit for establishing a *prima facie* case of retaliation. *See King v. Rumsfeld,* 328 F.3d 145, 151 (4th Cir.2003) (holding that a ten-week period between the protected activity and the adverse action gives rise to a sufficient inference of causation to satisfy the prima facie requirement).

[19] *See* Lettieri v. Equant, Inc. 478 F.3d 640, 650 (4th Cir. 2007) (continuing retaliatory conduct and animus directed at the plaintiff in the seven-month period between her report of gender discrimination and termination was enough to establish a causal link between the complaint and termination).

Grievant had not been reprimanded for any negative behavior and no Group 1, 2 or 3 issues of discipline were raised.

There is no contest among the parties that Grievant did file a complaint in May 2006 and there is no contest that the elimination of her job obviously amounted to a materially adverse action in Grievant being abruptly unemployed. The issue for this case then is whether or not there exists a causal link between the protected activity and the adverse action.

OPINION

Retaliation

It is clear that Grievant and her immediate employer had less than an amicable working relationship. The animosity of the parties had existed since at least the mid 1990's. While trivial disagreements, such as those described in testimony, (e.g. "He tried to micromanage me." and "She turned away from me when I was talking.") do not amount to evidence sufficient to prove retaliation, the long term open disagreement between the parties is certainly a fertile bed when considering the intent of the immediate supervisor. It will forever be impossible to ascertain what was truly in the employer's mind unless the employer states, "I did this for the purpose of retaliation." which, of course, is never going to be said. By reviewing the evidence, listening to testimony of the parties and witnesses and observing the appearance of the parties and witnesses when testifying, this Hearing Officer concludes retaliation after he was reported in May 2006 was a motive for the immediate supervisor's action.

Pretext

Next, it must be determined if a legitimate reason for the elimination of Grievant's position can be established. If so, the Grievant must then show the proffered legitimate business decision to be pretext. In the instant case, the agency stated that Grievant's position was being eliminated due to budget factors.

The Supervisor, Vice President and President of the college all discussed that the college had three financial budgets: 1) The operating budget, 2) the strategic planning budget

and 3) the capital expense, long-term investment budget. They testified that the operational budget included fixed expenses such as employee salaries, utilities and other fixed expenses. Grievant's salary was a portion of the operational budget. The department heads had no input in altering the operational budget. The strategic budget had funds available for which each department could submit requests. Proposals were submitted and grants were given to the various departments based on their needs. A long term or construction budget may or may not involve department head input. It was also stated that the budget year for the college was July 1st through June 30th of the following year. The President also testified that there was no actual decrease in the college budget from previous years but rather a lack of the hoped for increase.

This Hearing Officer reviewed the carefully written letter of the immediate supervisor ("department head") to the college Vice President[20] with its one page attachment as exhibit, as well as the Vice President's memorandum to the President of the college[21]. This Hearing Officer finds it suspect that such a letter was gratuitously written by the immediate supervisor to his superior regarding a line item (salary) in the operational budget over which he had no say. There was no evidence that the president had ever put out a request to department heads asking for comments regarding ways to reduce the operational budget. The recommendation was made in January, which was mid-year for the fiscal budget, which had already been decided. Thus, the money for Grievant's salary was already committed until at least June 30, 2007. While nothing prohibits an Agency from making hasty or poor business judgments, the facts in this case are again suspicious. After the supervisor submitted his letter with a one page attachment, the Vice President of the college made a recommendation to the President of the college regarding a contract that he had not seen and on the same day the President of the college approved the recommendation. The vice president also stated he hadn't considered alternatives such as re-evaluating grievant's duties and hiring someone else to do shipping and

[20] Grievant Exhibit 11
[21] Grievant Exhibit 12

secretarial work. The sum of this evidence leads this Hearing Officer to conclude that the stated business decision, i.e. to increase manpower and effect a sufficient financial savings to the college, were only pretext reasons for eliminating Grievant's position.

DECISION

The Hearing Officer concludes that Grievant's position was eliminated due to retaliation for her engaging in a protected activity. The Hearing Officer recommends that Grievant be reinstated in her position or a position similar to that which she had last occupied. There has been no evidence of any activity of the Grievant from January 31, 2007 to the date of hearing, therefore the Hearing Officer is unable to make any recommendation as to the specific dollar amount of back pay. The evidence shows that Grievant received a severance package at the time her position was eliminated. The Hearing Officer believes the act of being reemployed should affect the status of the severance package.

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 was 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 Street, 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.[22] 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.[23]

[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.

Judicial Review of Final Hearing Decision

Within thirty (30) 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.

Sondra K. Alan, Hearing Officer

[22] 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).
[23] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

DECISION OF HEARING OFFICER

In re:

Case No: 8666

Hearing Date: September 26, 2007 and October 9, 2007
Decision Signed: November 12, 2007
Decision Issued: November 20, 2007
Reconsideration Decision Issued: January 2, 2008

APPEARANCE BY PETITION

Agency letter stating intent to ask for reconsideration dated 11/27/07.

Grievant's Petition for Attorney Fees dated 11/29/07.

Agency's email requesting clarification of issuance date of decision and acknowledgment of fifteen (15) day appeal period dated 12/04/07.

Agency response to Petition for Attorney Fees dated 12/06/07.

Agency Request for Reconsideration dated 12/11/07.

Grievant's Motion to Deny Reconsideration dated 12/21/07.

Agency response to grievant's Motion for Denial dated 12/26/07.

DECISION

Grievant's counsel filed a request for attorney fees in the above styled case. However, this Hearing Officer has no authority to award attorney fees in cases which are not disciplinary dismissals.

The agency has requested reconsideration of the November hearing but did not file its request until December 11, 2007. This was twenty-one (21) days after the December 20th date of the issuance of the decision and therefore, not timely filed.

Because of these facts, the Motion for Attorney Fees is denied and Request for Reconsideration is denied. The earlier hearing decision is upheld.

APPEAL RIGHTS

A hearing officer's original decision becomes a final hearing decision, with no

further possibility of an administrative review, when:

1. The fifteen (15) 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 DHRM, the hearing office has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty (30) 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.

Sondra K. Alan, Hearing Officer