Issues: Retaliation – Whistleblowing and Complying with Any Law; Hearing Date: 02/20/08; Decision Issued: 03/10/08; Agency: DOLI; AHO: John V. Robinson, Esq.; Case No. 8774; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: EDR Ruling Request received 03/19/08; EDR Ruling #2008-1995 issued 05/07/08; Outcome: HO's decision affirmed; Judicial Review: Appealed to Richmond City Circuit Court, May 2008; Outcome pending.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8774

Hearing Officer Appointment: February 4, 2008
Hearing Date: February 20, 2008
Decision Issued: March 10, 2008

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing alleging retaliation by the Commissioner of the Virginia Department of Labor and Industry (the "Department" or the "Agency") concerning certain reports made by the Grievant which allegedly resulted in, amongst other things, the Grievant being removed from all her job duties, as described in the Grievance Form A dated June 8, 2007 ("Grievance 1"). On August 10, 2007, the Grievant initiated a second grievance ("Grievance 2"), in which she also alleged retaliation concerning the Agency's decision to physically move the Consultation Program Manager from the central office to another location along with all consultation files, which the Grievant asserts constitutes the abolition of her job, as described in the Grievance Form A dated August 10, 2007.

Pursuant to its Ruling Nos. 2008-1755 and 2008-1831, the Virginia Department of Employment and Dispute Resolution ("EDR") qualified and consolidated for hearing by a single hearing officer Grievances 1 and 2.

The hearing officer was appointed on February 4, 2008. The hearing officer scheduled a pre-hearing telephone conference call at 11:00 a.m. on February 5, 2008. The Grievant, one of the Grievant's two advocates, the Department's advocate and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant, by her advocate, confirmed that she is challenging the Agency's actions for the reasons provided in her Grievance Form As and is seeking the relief requested in her Grievance Form As, including restoration of her job as Consultation Program Support Tech without restrictions. Following the pre-hearing conference call, the hearing officer entered a Scheduling Order on February 5, 2008, which is incorporated herein by this reference.

The hearing officer issued an Order for Documents to the Agency delineating certain documents specified by the Grievant. The production of these documents is governed by a Protective Order agreed to by the parties and entered by the hearing officer. The Protective Order is incorporated herein by this reference.

The Grievant, by her advocate, conceded that in this proceeding she bears the burden of proof and must prove retaliation by the Agency by a preponderance of the evidence.

At the hearing, the Agency was represented by an experienced advocate and the Grievant was well represented by two (2) advocates. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely all exhibits in the Agency's two (2) binders (1 through 10) and all of the exhibits in the Grievant's two (2) binders (1 through 40).[1]

At the request of the Grievant, the hearing officer issued an order for production of documents. No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

APPEARANCES

Grievant
Representative for Agency
Witnesses

FINDINGS OF FACT

1. The Grievant is employed by the Department as a Program Support Technician. AE 7.

2. On or about February 16, 2007, the Grievant alleged that her immediate supervisor, the Department's Consultation Services Program Manager (the "CPM") acted improperly in, amongst other things, improperly closing a certain case file awaiting hazard abatement in the Department's Division of Cooperative Programs, Consultation Services.

3. During the period relevant to this grievance (the "Period") the CPM was responsible for managing the Consultation Services Program (the "Program"), including supervising at least nine (9) Field Consultants, one (1) OSHA Trainer/Instructor (the "Training Officer") and the Grievant, who provided administrative support to the Program. GE 38.

[1] References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

4. The Department may adopt stricter standards and directives for the Virginia Occupational Safety and Health ("VOSH") programs than those required by the U.S. Department of Labor.

5. Upon learning of the potential problem, the Commissioner asked the Grievant to conduct a more thorough review of the files to ascertain whether there were other issues. The Grievant referenced about eleven (11) consultation case files involving thirteen (13) allegations against the CPM.

6. The Commissioner promptly instructed his Assistant Commissioner to begin a confidential, thorough investigation into the Grievant's allegations concerning the mishandling of case files by the CPM.

7. The Assistant Commissioner conducted a reasonable, extremely thorough investigation and found that of the thirteen (13) allegations, four (4) had merit, eight (8) were without merit, and one (1) had partial validity. AE 6. The Assistant Commissioner accurately described the general nature of the Grievant's allegations as follows: "The crux of the allegations were of hazard corrections that were shown to be abated when there was insufficient documentation of corrections made; that hazards had been improperly reduced in classification from "Serious" to "Other than Serious"; that NCR data with "back-dated" information had been entered without cause and that abatement corrections were improperly extended."

8. The Assistant Commissioner discovered in the course of his investigation systemic and programmatic flaws and inadequacies and a general lack of accountability in the management system.

9. The investigation report contained twenty-one (21) recommendations to improve the Program. The Grievant was advised of the investigative findings and recommended actions. The Grievant was also told of the new federal OSHA Directive concerning Consultative Services operational and procedural requirements. During the investigation, the Department instituted stricter controls of hazard abatement and requests for abatement extensions.

10. In addition to the new directive, the Department created a "Pilot Program" to improve Consultation case file creation, data entry and case file management by allowing continual monitoring of the system by management. Essentially, the Program has evolved to where it is no longer paper-driven but electronic and more streamlined and efficient.

11. The Grievant in an e-mail communication of May 18, 2007, to the Assistant Commissioner described the new Consultation Directive as "so excellent!" AE 8.

12. The Grievant also admitted during the hearing that she was happy and grateful that the Department conducted the investigation and that she agreed with certain of the Assistant Commissioner's findings. Tape 1, Side B.

13. In his finding and corresponding recommendation #20, the Assistant Commissioner stated as follows:

> *There is some evidence that shortcuts were taken in the evaluation of abatement extension requests, the evaluation of abatement actions and possibly data entry techniques.*
>
> The deviance from good faith procedures and the resultant errors made in some of the files reviewed could have been unintentional but I suspect that at least some were done intentionally. This contention is an opinion based upon my investigation and would be very difficult to substantiate to the extent needed to recommend moderate disciplinary action. The possible motive for any intentional negligent action, in my view, is that certain measures of our program's performance is monitored by OSHA and is used to rate our performance. These measures are known as Mandated Activities Measures and are listed in the Mandated Activities Report for Consultation (MARC). There is a possibility that some of the cases reviewed were expedited at the last moment to avoid detection as a MARC measure.
>
> Those measures are as follows:
>
> - Percentage of initial visits made to "high hazard" industries. National goal = at least 90%; Virginia's latest rating = 99%.
> - Percentage of initial visits made to small employers (less than 250 employees). National goal = at least 90%; Virginia's latest rating = 99%.
> - Percentage of initial visits to include employee involvement. National goal = 100%; Virginia's latest rating = 100%.
> - Percentage of serious hazards that are verified as corrected within 14 days of agreed upon correction time. National goal = 100% (this goal has been identified by OSHA as being "unrealistic" and the proposed new goal is 85%); Virginia's latest rating = 92%. ***** Potential motive for re-classifying hazards, "back-dating" NCR data and/or accepting abatement verification prematurely*****

- Percentage of hazards verified as corrected within 90 days of the visit's closing date. National goal = 100%; Virginia's latest rating = 99% (one case with eight hazards was found but is believed to be a double entry in the NCR system. Once corrected, this measure will be back to 100%). ***** Potential motive for re-classifying hazards, "back-dating" NCR data and/or accepting abatement verification prematurely*****

14. The Assistant Commissioner recommended no disciplinary action be taken at the time of his report: "I recommend that a [redacted] be held with [redacted] to explain the findings and the recommended corrective actions of the investigation. Since no distinction can be made between unintentional and intentional error and the absence of guidance documents for policies in effect at the time, I do not, at this time, recommend further actions such as [redacted] in this case. Once the measures recommended in this report are carried out any deviance from the newly established standards could warrant more extreme measures of disciplinary action."

15. The Commissioner commissioned the investigation and accepted all of the recommendations of his Assistant Commissioner.

16. The Commissioner acted in a neutral, impartial and reasonable manner throughout the Period.

17. The implementation of the New Directive affected all the employees in the Program and not just the Grievant. The changes effected by Management, including the Commissioner, were undertaken in an effort to improve the Program, including the hazard abatement component, to foster safety checks and balances, to make the Program more efficacious and efficient and to make management responsible for specific duties and accountable for any failures. The changes designed and implemented by Management, including the Commissioner, were not undertaken to retaliate against the Grievant as she alleges.

18. Concerning Grievance 2, Management of the Department, including the Commissioner, moved the location of the offices of the Program away from the central office for valid reasons within Management's prerogative, including to diffuse hostility and tension between the Grievant and the CPM. At the hearing, the Grievant and others admitted there was a lot of tension between the Grievant and the CPM and the Grievant admitted that her co-workers were aware of the tension between her and the CPM. Tape 1, Side A.

19. Management, including the Commissioner, in so relocating the Program's offices, did not seek to retaliate against the Grievant as she alleges.

20. The Department's actions concerning the issues grieved in this proceeding were reasonable, warranted and appropriate under the circumstances.

21. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

22. The testimony of the witnesses called by the Agency was both credible and consistent on the material issue before the hearing officer of whether Management acted in retaliation against Grievant in either Grievance 1 or 2. The demeanor of such Agency witnesses at the hearing was candid and forthright. By contrast, actions taken by the Grievant during the Period undercut her positions and her credibility. For example, the Grievant acknowledged that she wrongly accused Management of acting improperly in accessing information on her state computer. In any event, this accusation was nonsensical in the first place because, after all, the computer is state property. The Grievant alleges that she has been a victim of retaliation for reporting the CPM's actions. The Grievant asserts that as of May 15, 2007, all of her job duties were transferred to the CPM and she was left with no substantial job responsibilities. Along with the change of duties, the Grievant complains she has no work to do. However, on August 10, 2007, Grievant wrote a memo to be added to her grievance proceeding, specifically stating that she refused to perform a task for her then supervisor on August 8, 2007 "prefer[ing] to await the ruling from EDR on my grievance against the Commissioner for retaliation by eliminating my job and giving it entirely to the Consultation Program Manager because I brought him several files where fraud was committed by the Manager when closing serious hazards without abatement, thereby endangering the lives of the workers of Virginia."

23. The Grievant retains her same salary, benefits and hours of work.

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).

Va. Code § 2.2-3000(A) 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.

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. Va. Code § 2.2-3004(B). Thus, claims relating to issues such as the method, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the Grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have influenced management's decision, or whether state policy may have been misapplied or unfairly applied.

An agency may not retaliate against its employees. To establish retaliation, a grievant must show he or she (1) engaged in a protected activity; *See Va. Code § 2.2-3004(A)(v) and (vi)* (2) suffered a materially adverse action; *See EDR Ruling Nos. 2005-1064*, *2006-1169* and *2006-1283* and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the grievant's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See, EDR Ruling No. 2007-1530, page 5* (Feb. 2, 2007) and *EDR Ruling No. 2007-1561* and 1587, page 5 (June 25, 2007).

Concerning both Grievance 1 and Grievance 2, the Agency has articulated and proven by overwhelming evidence legitimate, non-retaliatory reasons for its actions.

The Agency's actions with respect to the Grievant were not retaliatory or otherwise improper. Quite the contrary, the Agency thoroughly investigated the Grievant's claims, took specific concrete actions to address her concerns about worker safety, kept the Grievant briefed throughout the process and then took proactive steps to reduce the chance of retaliation by physically removing from her workplace the most likely protagonist, the CPM. These are not the actions of a person set on retaliation.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

As long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb

to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Commissioner's actions were clearly consistent with law and policy and, accordingly, the exercise of his professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

DECISION

The Grievant has not sustained her burden of proof concerning retaliation in this proceeding and the action of the agency concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. The Grievant's request for relief is denied.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets 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 decision is subject to three types of administrative review, depending upon the nature of the alleged defect of 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. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

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. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 786-0111.

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 **15 calendar** days of the **date of original hearing decision**. (Note: the 15-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 15 days; the day following the issuance of the decision is the first of the 15 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 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 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.

ENTER:

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John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by Certified Mail, Return Receipt Requested, U.S. Mail, e-mail transmission and facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).