

Issues: Misapplication of Policy (Layoff) and Retaliation (other protected right);
Hearing Date: 09/29/08; Decision Issued: 03/12/09; Agency: VCU; AHO: Carl
Wilson Schmidt, Esq.; Case No. 8938; Outcome: No Relief – Agency Upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8938

Hearing Date: September 29, 2008
Decision Issued: March 12, 2009

PROCEDURAL HISTORY

The Agency abolished Grievant's position and offered her another position with lower pay. She objected to that action by the Agency and filed a grievance on January 30, 2008. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. The Agency denied her request and she sought a qualification ruling from the EDR Director. On June 11, 2008, the EDR Director issued Ruling 2008-2004 qualifying the matter for hearing. On October 25, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 29, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether the Agency misapplied State policy?
2. Whether the Agency retaliated and discriminated against Grievant?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she seeks should be granted. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Virginia Commonwealth University employed Grievant as a Human Resources Manager (HR Manager), a Pay Band 5 position, with a School at the University involved in teaching students to provide health care services. She earned approximately \$50,455. Grievant began working for the Agency in 2004. She reported to the Assistant Dean who reported to the Dean.

Agency Managers developed a Strategic Plan for the period 2008 through 2013. The Dean decided to change the curriculum at the Agency to make it more student-friendly and patient-centered. He believed a more student-friendly organization would significantly improve alumni relations and donor giving after graduation. He also believed a more patient-centered organization would enhance the Agency's ability to educate its students as they provided services to patients. To accomplish these new initiatives and fulfill its mission successfully, the Agency needed to expand its efforts in curriculum management, clinical administration, faculty development, and staff development and recognition. It also needed much improved systems of accountability.

The Dean decided to split the position of Associate Dean for Clinical Affairs into two positions and add new responsibilities to each of the new positions.

The Dean decided to create a new leadership position of Assistant Dean for Clinical Education. This position assumed some of the responsibilities of the previous position of Senior Associate Dean for Clinical Affairs and added new duties of coordinating the interdepartmental administration of the group practice teams of students, staff and faculty. This position was filled by a departmental chair administrator who took on the additional assistant dean responsibilities. The Agency did not have to create a new administrative reporting line.

The Dean decided to create a new leadership position of Assistant Dean for Staff and Patient Services. This position assumed the remainder of the patient service responsibilities from the Senior Associate Dean for Clinical Affairs. This new position also assumed responsibilities for staff services, to include retirement, development,

recognition and accountability. The latter duties were taken from Grievant's former position of HR Manager.

A new Human Resources Assistant (HR Assistant) position, Pay Band 3, was created to support the new Assistant Dean.¹ The salary range for a Pay Band 3 position was \$23,999 to \$49,255.

On July 13, 2007, the Dean sent Grievant a memorandum stating:

The purpose of this memo is to document our discussion on Friday, July 13, 2007. As you are aware, we are reorganizing the School to facilitate emphasis on several aspects of our strategic plan. We are placing much greater focus on staff services, patient services, and faculty development.

The reorganization will result in staffing changes that affect both faculty and staff. In fact, [you have] been helping with some of the faculty recruiting that is taking place because of the new structure. I plan to have all changes in place by January 1, 2008.

As we discussed, part of the staffing change requires us to realign FTE and salary in new staff positions to provide support to the administrative positions in the new structure. All of the new support positions will be pay band 3. This affects your position because we need to split your position into two FTE and use the dollars that support your current position for salary support for the new positions.

To accomplish our re-organization goals, we are going to abolish your current position, but we want to offer you the pay band 3 position supporting the Staff and Patient Services Dean. The job duties include assisting with staff recruitment, development, recognition and accountability

We hope you will consider the Staff and Patient Services Dean's support position. As [the Assistant Dean] began to explain, it would be considered a demotion in lieu of layoff, and require a cut in your pay to \$35,000 because of our funding constraints. We value your skills and services and want you to remain a member of the School's team.

[You have] seen the new organization being built through new faculty recruitments and have helped with the recruitments. Although the new position [will not] be fully in place until January 1 and we will not make the position abolishment official until then, we want to give you this information

¹ A portion of Grievant's former salary was also reallocated to make another part-time administrative support position at the School full time.

about your position and your options now to give you ample time to make the best decision for yourself.

Again, we hope [you will] choose to continue with the School, but you have other options to consider and [we will] support you through the transition, whether it is to the new position or into layoff status, and provide whatever assistance we can. As we discussed I also expect your continued professionalism and excellent job performance in the office as long as you stay with us.²

Following the reorganization, Grievant would report to a different Assistant Dean if she accepted the HR Assistant position.

Grievant was offered this HR Assistant position at a salary of \$35,000, approximately \$15,000 less than she was making in her HR Manager position. Grievant declined the HR Assistant position and, as a result, was laid off. Grievant left the Agency effective December 31, 2007.

The Agency receives funds from the Commonwealth of Virginia. One of the Agency's budget categories is Education and General (E&G) funds. Education and General funds are appropriated by the General Assembly to the Agency and then allocated to its various schools. E&G funds are used to support the State salaries for faculty and staff, as well as a few operational expenses of the School. The amount remains the same year to year unless there is a new program or initiative funded by the State.

In fiscal year 2005-2006, the School's actual E&G expenses exceeded its allocation budget by almost \$125,000. In fiscal year 2006-2007, the School's actual E&G exceeded its allocated budget by approximately \$396,000.

In the fiscal year 2006-2007, the School had to borrow funds from another School within the Agency to cure a large deficit. Typically, the School does not have excess E&G dollars at the end of the fiscal year.

CONCLUSIONS OF POLICY

Department of Human Resource Management (DHRM) Policy 1.30 ("Layoff Policy") is intended to allow "agencies to implement reductions in workforce according to uniform criteria when it becomes necessary to reduce the number of employees or to reconfigure the work force." The Layoff Policy mandates that the Agency identify employees for layoff in a manner consistent with business needs and the Policy's provisions, including provisions governing placement opportunities within the Agency prior to layoff. During the time between Initial Notice and Final Notice of Layoff, the

² Agency Exhibit 2.

Agency shall attempt to identify internal placement options for its employees. After the Agency identifies all employees eligible for placement, the Agency must attempt to place them by seniority in any valid vacancies agency-wide in the current or a lower pay band. Additionally, the placement must “be in the highest position available for which the employee is minimally qualified at the same or lower level in the same or lower pay band, regardless of work hours or shift.”

Further, “[i]t is the intent of this policy to maintain employees’ salaries where possible; however, when that is not feasible due to budget constraints, agencies may offer lower salaries to employees who are placed in lieu of layoff.” Because the Agency sought to place Grievant in the HR Assistant position, which is in a lower pay band, the provisions relating to “demotion in lieu of layoff” are relevant. That portion of the layoff policy provides:

Employees who are placed in positions that are in lower Pay Bands normally will retain their salaries if the salaries are within the employee’s new Pay Band. If an employee’s salary is above the Pay Band’s maximum, the agency may freeze the employee’s current salary for a maximum of six months from the placement date, before reducing it to the maximum of the Pay Band. However, *if funding constraints exist*,³ the agency may reduce the salary to the maximum immediately or offer a lower salary upon placement. (Emphasis added).

The Agency’s reorganization was authorized by State policy. Agency managers complied with the layoff policy and gave Grievant adequate notice of the pending change in her role at the School.

Grievant’s salary as an HR Manager was above the pay band maximum for the HR Assistant position by about \$1,200. Under the Layoff Policy, however, the Agency could (1) freeze Grievant’s current salary for a maximum of six months from the placement date, before reducing it to the maximum of the new pay band (\$49,255), (2) reduce Grievant’s salary to the \$49,255 new pay band maximum immediately upon placement, “if funding constraints exist,” or (3) offer a salary lower than \$49,255 (but no lower than \$23,999, the pay band minimum) upon placement, “if funding constraints exist.”⁴ In this case, the Agency chose the third option and offered the HR Assistant position to Grievant at an annual salary of \$35,000.

Grievant contends the Agency should have offered her the HR Assistant position at her current salary for a maximum of six months and then reduced to the maximum of the new pay band. The Agency contends it could only offer Grievant the position with a salary of \$35,000 because it was experiencing funding constraints. The question is whether the Agency experienced funding constraints at the time of Grievant’s demotion.

³ DHRM provides “Frequently Asked Questions” regarding the layoff policy. This document is not actually part of DHRM Policy 1.30, Layoff. It serves as reference only.

⁴ See DHRM Policy 1.30.

Although the burden of proof is on Grievant, the Agency has established that it experienced funding constraints sufficient to justify a reduction in Grievant's salary if she had chosen to take the HR Assistant position. This conclusion is based on several factors. First, the Agency engaged in a reorganization that resulted in several positions being abolished and several new positions being created. The net effect of the reorganization was that at least one more position was created than existed prior to the reorganization. Without an increase in funding for the position, the Agency had to take funds from other positions to fund the additional position. Second, the Agency's funding for E&G remained in deficit. The Agency had to borrow funds to pay for its existing expenses in 2006-2007. Increasing the salary of the HR Assistant position to Grievant's salary as an HR Manager would likely have resulted in additional borrowing by the Agency at the conclusion of the fiscal year. Third, in July 2007, the School's overall budget was reduced by approximately \$500,000. The Agency attempted to cut travel and food expenses in order to avoid laying off employees. Fourth, in the Fall of 2007, the Dean "froze" bonuses and in-band pay adjustments based on the School's limited funds. Fifth, the School's overall budget including revenue other than E&G was reduced to zero at the end of each fiscal year.

Grievant argued that the Agency handled other positions differently when those positions had a change in duties or were part of a restructuring. None of the examples offered by Grievant were sufficiently similar to the circumstances of her case that the Hearing Officer can conclude that the Agency unfairly treated her differently from those other employees. For example, Grievant argued other employees had had their duties reduced without a reduction in salary. The Agency disputes this conclusion. Even if Grievant's assertion were true, the circumstance of an employee having some reduction in duties without a pay reduction is not the circumstance in which Grievant was placed. Grievant's position was abolished. The duties of her position were transferred to other employees. Grievant was offered a new position in a different chain of command with duties specific to that position. Grievant has not presented evidence of another similarly situated employee whose position was abolished and then that employee was permitted to retain his or her salary as part of a demotion in lieu of layoff.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁵ (2) suffered a materially adverse action⁶; and (3) a causal link exists between the adverse action and

⁵ See Va. Code § 2.2-3004(A)(v) and (vi). 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 the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

⁶ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

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 shows by a preponderance of the evidence that 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.⁷

Grievant engaged in protected activity by filing a formal complaint against the Assistant Dean in October 2006.⁸ Grievant suffered a materially adverse action because her position was abolished and she was offered a new position with a lower salary. Grievant has not established a causal link between the adverse action and the protected activity. Grievant contends that the Assistant Dean intended to retaliate against Grievant. The evidence showed that Grievant's position was abolished as part of a major Agency restructuring pursuant to the vision of the Dean. The Dean's actions were motivated by his desire to improve the Agency's operations and without consideration of any protected activities engaged in by Grievant. Grievant alleged the Assistant Dean was the person primarily responsible for retaliating against her. Although the Assistant Dean played a role in the reorganization, her role was minor when compared to the role of the Dean. The Agency did not retaliate against Grievant.⁹

DECISION

For the reasons stated herein, Grievant's request for relief is **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.

⁷ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

⁸ Grievant also appealed an evaluation of Grievant completed by the Assistant Dean.

⁹ Grievant also alleged that the Agency discriminated against her. No credible evidence was presented showing that the Agency discriminated her because of a protected status such as race, sex, color, national origin, religion, sexual orientation, age, political affiliation, or against otherwise qualified persons with disabilities.

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that 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. Please address your request to:

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
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 all of your appeals to the other party and to the EDR Director. 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. 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.¹⁰

[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/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.