Issues: Misapplication of Layoff Policy and Retaliation; Hearing Date: 06/15/09; Decision Issued: 06/18/09; Agency: DVS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9097; Outcome: Full Relief; **Administrative Review: AHO Reconsideration Request received 07/01/09; Reconsideration Decision issued 07/14/09; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 07/02/09; EDR Ruling #2010-2359 issued 09/04/09; Outcome: Remanded to AHO; Administrative Review: DHRM Ruling Request received 07/02/09; DHRM Ruling issued 10/01/09; Outcome: Remanded to AHO; Remand Decision issued 10/06/09; Outcome: Decision reversed – Agency Upheld in Full; Judicial Review: Appealed to Richmond Circuit Court on 10/22/09; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9097

Hearing Date: June 15, 2009
Decision Issued: June 18, 2009

PROCEDURAL HISTORY

The grievant filed a timely grievance after being removed from employment by layoff in October 2008. Following failure of the parties to resolve the grievance at the third resolution step, the agency head declined to qualify the grievance for a hearing. Subsequently, the grievant requested the Director of the Department of Employment Dispute Resolution (EDR) to qualify the grievance for a hearing. The EDR Director declined to qualify the grievance for hearing. From an appeal of EDR's ruling, the Circuit Court ordered the grievance qualified for a hearing.

On May 18, 2009, the Hearing Officer received the appointment from EDR. A pre-hearing conference was held by telephone on May 20, 2009. The hearing was scheduled at the first date available between the parties and the hearing officer, June 15, 2009. The grievance hearing was held on June 15, 2009, at the agency's headquarters office building.

The grievant initiated her grievance on October 16, 2008, to challenge the elimination of her position and subsequent layoff. From a mandated budget reduction measure, the grievant's position was identified for elimination. The grievant asserts that the true reason for her layoff was retaliation for exercising her protected activities.

The grievant submitted 19 exhibits; the agency submitted 13 exhibits.

APPEARANCES

Grievant
Counsel for Grievant
Four Witnesses called by Grievant including Grievant
Representative for Agency
Counsel for Agency
One Witness for Agency including Representative

ISSUES

1. Whether the Agency misapplied the layoff policy?
2. Whether Agency retaliated against the Grievant?

The Grievant requests reinstatement to her position, restoration of benefits, back pay, and attorney's fees.

BURDEN OF PROOF

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 claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Grievant.* 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.

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.

The agency head, agency's director of policy and planning, agency's human resources manager, and the grievant testified at the grievance hearing. After reviewing the evidence

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

By memo from the Governor's chief of staff, dated July 17, 2008, the agency head was notified that the agency would experience a cut in general funds for Fiscal Year 2009. Agency Exh. 3. The memo directed that new hiring would be subject to Cabinet Secretary approval, and that, as a general rule, the agency should refrain from entering into or renewing staff augmentation or consulting contracts unless approved by the Director of Department of Planning and Budget and the appropriate Cabinet Secretary. By the end of September 2008, the agency had submitted its proposals for meeting the budget cut. The agency head, together with a team of the executive staff, identified functions within their units that could be eliminated as well as situations where the number of staff members assigned to a function could be reduced. Among those functions identified for potential elimination was the grievant's position of general administration supervisor.

By all accounts, the grievant was a proficient employee, receiving at least "contributor" ratings.

To establish a *prima facie* case of retaliation, the grievant must show that: (1) she engaged in protected activity; (2) she suffered a materially adverse employment action; and (3) a causal connection exists between the protected activity and the materially adverse employment action. *Von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir. 2001). Only certain activities are protected activities under the state grievance procedure. They include "use of or participation in the grievance procedure or because the employee has complied with any law of the United States or of the Commonwealth, has reported any violation of such law to a governmental authority, has sought any change in law before the Congress of the United States or the General Assembly, or has reported an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." *See* Va. Code § 2.2-3004(A). The grievance statute also provides that it is "the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Va. Code § 2.2-3000.

The grievant initiated her October 16, 2008, grievance to challenge the elimination of her position and subsequent layoff. The grievant asserts that the layoff was in retaliation for participating in the grievance process and for other protected activities identified in her July 4, 2008, grievance.[1] The agency states that as a budget reduction measure the grievant's position was identified for elimination. The agency maintains that there are very few positions in the

[1] On July 4, 2008, the grievant initiated a grievance to challenge many issues related to her employment with the agency. The grievant's supervisor issued her a written memorandum of counseling on June 5, 2008 regarding an allegedly "unprofessional and inappropriate" e-mail sent by the grievant accusing another agency employee of wasting her time. The grievant was counseled about working cooperatively with other members of the agency's staff. In conjunction with the counseling memo, the grievant's supervisor amended the "Measures" language for the Core Responsibility of "Other duties as assigned" on the grievant's Employee Work Profile (EWP). The language changed from "Performs other duties as may be assigned in support of the overall needs of the agency" to "Performs other duties as may be assigned by the Agency Head and/or other executive staff in support of the overall operation of the agency."

agency that were both funded by the General Fund and did not involve direct services to veterans, a core mission of the agency. Consequently, the grievant's position, according to the agency, was one of the few that was selected for elimination.

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). For the grievant to seek relief, she must show that the agency misapplied or unfairly applied policy, or discrimination, retaliation or discipline improperly influenced the decision. See Va. Code § 2.2-3004(A); Grievance Procedure Manual § 4.1(c). In this case, the grievant claims retaliation and, effectively, that the agency misapplied or unfairly applied policy.

As the agency argues, if the grievant had made a *prima facie* case of retaliation, the agency merely had to proffer a legitimate, non-discriminatory reason for the layoff decision, which it did. In cases where a plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the agency to articulate some legitimate, nondiscriminatory reason for the agency's action. *See McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802, 803 (1973). The agency needs only to proffer a legitimate, non-discriminatory reason; it is not required to prove it. Put another way, the burden is one of production, not persuasion; it "can involve no credibility assessment." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993). The burden of proof is at all times with the grievant. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). (The ultimate burden of persuading the trier of fact remains at all times with the plaintiff).

An agency's decision as to what work units to be affected by layoff and the business functions to be eliminated or reassigned are generally within the agency's discretion. However, even though agencies are afforded great flexibility in making such decisions, agency discretion is not without limitation.

The agency states that it identified administrative functions in the central office, of which the grievant's were included, for elimination or reassignment. Some of the grievant's former job duties were eliminated, while some were reassigned because those functions were not direct services to veterans, the agency's core mission. For instance, it appears the agency has utilized a temporary wage employee to perform some administrative tasks such as answering phones.

The grievant disputes the agency's rationale as pretext and argues that the agency did not comply with Department of Human Resource Management's Policy 1.30 that governs layoffs. Specifically, the grievant asserts that other positions, such as contract/wage positions, should have been eliminated instead of her position.

For an allegation of misapplication of policy or unfair application of policy, the grievant must show that management violated a mandatory policy provision, or that the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. The Department of Human Resource Management (DHRM) Layoff Policy allows "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." DHRM Policy 1.30, Layoff. Policy mandates that each agency identify employees for layoff in a manner consistent with its

business needs and the provisions of the Layoff Policy. As such, the policy states that before implementing layoff, agencies must:

> • determine whether the entire agency or only certain designated work unit(s) are to be affected;
>
> • designate business functions to be eliminated or reassigned;
>
> • designate work unit(s) to be affected as appropriate;
>
> • review all vacant positions to identify valid vacancies that can be used as placement options during layoff, and
>
> • determine if they will offer the option that allows other employee(s) in the same work unit, Role, and performing substantially the same duties to request to be considered for layoff if no placement options are available for employee(s) initially identified for layoff. Id.

The grievant argues that her position should not have been abolished because there were other employees, notably wage and contract positions, that should have been eliminated instead. Additionally, the grievant asserts that the agency did not comply with the layoff policy because it did not review all vacant positions to identify valid vacancies that can be used as placement options for her. Additionally, the agency did not, contrary to policy, consider reducing her full-time position to part-time status. In addition to the policy directives above, the layoff policy also provides

> To achieve the required savings, or to respond to changed workload patterns, agencies may reduce a full-time classified position to part-time status (minimum of 20 hours per week). If the employee chooses to remain in the part-time position, he or she is eligible for recall rights and continuation of health benefits for one year through this policy. If an eligible employee declines to remain, he or she may be eligible for layoff and severance benefits.

The agency's representatives and witnesses, including the agency head, director of policy and planning, and the human resources manager, all testified that they did not explore or consider these layoff policy options before deciding to impose the layoff on the grievant's position. The agency's witnesses agreed that the grievant was at least minimally qualified for other vacant positions, including a new program hire.

Before the budget cut announcement, the agency had authority to hire a new full-time administrative assistant for a new program. At about the same time as the agency's budget cut was being implemented with layoffs, it was hiring for the new program. The agency ultimately elected to reduce the new hire position to a part-time status. The agency did not consider the grievant for this newly filled vacancy. The grievant's layoff notice was dated October 14, 2009, although it was certainly contemplated before that date. According to the documentation produced by the agency, the new hire's first day was October 16, 2009, although the human

resources manager testified that the hire date was days earlier than October 16, 2009. The operative reality, however, is that the agency knew of this vacancy while it was determining layoffs and did not consider this option for the grievant, all without adequate explanation.

While I find the agency acted within its policy discretion in identifying the grievant's central office administrative position for layoff, and that the decision is not shown to be tainted by retaliation, I also find that the agency's actions, or inactions, fail to comply with the layoff policy and the obvious intent of the layoff policy. The layoff policy intends to provide to existing classified employees some options and deference ahead of new hires.

In addition, the agency may not insulate itself from the layoff policy by converting wage or part-time positions to "contract" temporary employees. The grievant questioned why she was not given the option of taking the part-time assistant position in her own office, which position shared the same responsibilities for which the grievant was at least minimally qualified. The agency contends that by converting the same functions from a wage or part-time employee to the contract temporary position, that falls outside the scope of the layoff policy. While a contract employee is not an employee of the Commonwealth, and apparently governed by "procurement" and not human resources, such transfer of human resources effectively evaded the Governor's directive against agency staff augmentation without prior approval, providing the agency cover against the reach of the DHRM layoff policy.

As stated above, for her to show retaliation, the grievant must show that (1) she engaged in a protected activity; (2) she suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the employee must then present sufficient 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.

The grievant has clearly engaged in protected activities, including filing a grievance, filing complaints with the State Employee Fraud, Waste and Abuse Hotline, and filing a complaint with the EEOC. However, the agency has shown that it acted within its discretion in within policy directive in eliminating her position. I do not find that the decision to eliminate the position was pretextual. The agency has explained that the grievant's position was identified for elimination because it did not involve direct services to veterans. However, the agency has failed to explain adequately why or how it failed to follow DHRM Policy 1.30. Based on the totality of the evidence, the only explanation for the agency's apparent rigidness in not following DHRM Policy 1.30 appears directed to the grievant as an individual, rather than the occupant of the position eliminated by layoff. At this point, the layoff process became tainted as it pertains to consideration of options for the grievant following the elimination of her full-time position.

Certainly, it would be improper for the agency to utilize the layoff policy as a substitute for disciplinary procedures. Likewise, it would be just as wrong for the grievant to benefit from or receive any special protection from layoff because of a concurrent disciplinary process. However, since the layoff policy was not followed, either by letter or spirit, as it pertained to at

least considering offering the grievant prescribed alternatives to layoff, and since the agency either could not or did not provide any legitimate explanation for the failure, the reasonable inference is that the agency retaliated against this employee.

In conclusion, the grievant has borne her burden of proving a misapplication or unfair application of policy, and, by reasonable inference from the totality of circumstances, that the reason for the misapplication and unfair application of policy is retaliatory.

DECISION

For the reasons stated herein, I find that the agency failed to follow DHRM Policy 1.30 by failing to determine whether internal placement options were available and by not considering a reduction of grievant's position to part-time in lieu of using a contract temporary employee. Because of this failure to comply with policy, the agency is directed to reapply the layoff policy by identifying all vacant positions that could have been used as placement options, including part-time or wage positions, or by reducing the grievant's full-time position to part-time. In fulfilling this reapplication of the layoff policy, the agency may use such positions that existed at the time of layoff or objectively similar positions. Depending upon the outcome of properly applying the layoff policy, and considering other placement options, should the grievant accept any proffered position she is awarded full back pay, benefits, and seniority, if any, incumbent to the position she accepts. For instance, if the agency identifies and the grievant accepts a full-time position, her back pay, seniority and benefits will be based on that position; if the position is a part-time or wage position, the back pay will be based on 30 hours per week (the average maximum for a part-time wage employee), with any continuing benefits in accordance with layoff policy and any other applicable policy. Interim earnings must be deducted from any back pay. The grievant is further entitled to recover a reasonable attorney's fee, which cost shall be borne by the agency.

Further, the agency is ordered to create an environment free from retaliation and to take corrective actions to cure the violation and to minimize its reoccurrence.

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, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 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 the 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

RECONSIDERATION
DECISION OF HEARING OFFICER

In the matter of: Case No. 9097

Decision Issued: July 14, 2009

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. 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]

OPINION

Both the agency and grievant timely requested reconsideration of the June 18, 2009, decision. The agency asserts errors of law or incorrect legal conclusions by the hearing officer. In sum, the agency asserts:

(1) There can be no retaliation because the premise for the finding of retaliation—that there was a violation of the Layoff Policy—was incorrect.

(2) At the hearing, grievant specifically identified only two positions which she alleged should have been offered to her. One was a temporary worker's assignment and the other was a wage position. As shown by agency's argument, neither would have been a valid placement under the Layoff Policy.

(3) The temporary worker's assignment is not a position of employment under the Policy and is not addressed by it. The wage position does not have the same work Role, nor is it in the

[2] § 7.2 Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, effective August 30, 2004.

same Work Unit as grievant's position. Accordingly, the Policy did not require its elimination before or in lieu of the elimination of grievant's position.

The Grievant requests clarification of the hearing officer's finding on misapplication of the policy, a more direct order to the Agency to reinstate the Grievant to a specific 32 hour wage position rather than reapplying the Layoff Policy, and to award the backpay based on 32 rather than 30 hours per week.

Upon careful consideration of the merits of the grievance and the points raised by the agency's and grievant's reconsideration requests, I reiterate my initial decision in this grievance. By way of clarification or amplification, I note that the applicable layoff policy requires that the Agency

> shall attempt to identify internal placement options for its employees. After an agency has identified all employees eligible for placement, an attempt must be made to place them by seniority to any valid vacancies agency-wide in the current or lower Pay Band. Such placement shall 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. Once such a position has been offered and declined by the employee, the agency has no obligation to consider additional placement options for the employee.

Policy 1.30. Here, the agency did not follow the policy. There were other placement options that could have been considered, such as the new hire for a new program that ultimately was a part-time placement. The agency did not consider the grievant for this newly filled vacancy or other possibilities, including the indefinite hire of a temporary worker. The agency's failure to do so was not adequately explained. The hearing officer found, by reasonable inference from the totality of the circumstances, that the agency's failure or refusal to follow the layoff policy was retaliatory. The agency's posing of potential other reasons or motivations for failing to follow the layoff policy ignores the fact that the agency did not assert any of those possible reasons as the reason for the policy violation.

As for the grievant's points raised in her reconsideration request, I found initially that the back pay should be based on 30 hours per week. I continue to find 30 hours is a reasonable figure since a wage position normally has a maximum of 1500 hours per year. As for the grievant's request for reinstatement to a specific position, the hearing officer declines to specify the position as intrusive to the agency's management discretion. The original decision directed the agency to reapply the policy and the hearing officer declines to modify that directive.

DECISION

Neither the Agency nor the grievant has established an incorrect legal conclusion. The hearing officer has carefully considered the parties' arguments and concludes that there is no basis to change the Decision issued on June 18, 2009.

APPEAL RIGHTS

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 HRM, 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.[3]

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer

[3] 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).

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Veterans Services
October 1, 2009

The grievant and the agency have requested that the Department of Human Resource Management (DHRM) conduct an administrative review of the hearing decision in Case Number 9097. For the reason stated below, the DHRM is remanding the decision to the hearing officer. The agency head of the DHRM, Ms. Sara Redding Wilson, has asked that I respond to this request for an administrative review.

FACTS

The Department of Veterans Services employed the grievant as a General Administrator/Coordinator I until she was laid off, effective October 28, 2008, due to budget reduction. She filed a grievance because she believed the Department of Veterans Services (DVS) had not followed the provisions of the lay off policy when her position was chosen for elimination and she was not offered placement options. When she did not get the relief she sought through the grievance procedure, she asked for a hearing. The hearing officer determined that the agency properly identified the grievant's position for elimination but retaliated against the grievant by not offering her placement opportunities. He directed the agency to redo the placement options part of the lay off procedure and, if placement options are available, to offer the grievant employment which would consist of at least 30 - 32 hours per week. The grievant and the agency filed appeals with this Department. The grievant contended that the relief, if placement options are available, should be full employment. The agency challenged that the hearing officer's ruling concerning placement options is inconsistent with the relevant layoff policy. Also, the agency requested a reconsideration of the hearing officer's original decision. Upon reconsideration, the hearing officer affirmed his original decision. Finally, the agency filed an appeal with the Department of Employment Dispute Resolution that challenged the award of attorney fees for the grievant.∗

∗ In a ruling dated September 4, 2009, the EDR stated, in part, "We note that the agency has appealed the hearing decision to the Department of Human Resources Management (DHRM) on the basis that the decision is inconsistent with policy. This Department's affirmance of the hearing officer's apparent conditional award of attorney's fees is premised on DHRM's affirmances of the hearing decision. If the DHRM director finds that the decision is inconsistent with policy, the hearing officer would be required to revisit the issue of fees on remand."

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is beyond reasonableness, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

On July 17, 2008, all agencies were advised that several of the major sources of revenues for the Commonwealth, such as individual income tax withholding and sales tax, were growing at a lower rate than required to meet the FY 2009 official revenue estimates found in the 2008 Appropriations Act. Therefore, all state agencies were instructed to take steps to reduce discretionary spending. Based on further instructions and as a follow-up, agencies were instructed to prepare three budgets that consisted of 5%, 10% and 15% reductions, respectively. The agency formed a task force that consisted of the agency's senior officials to determine how to meet the directives as per the instructions issued by the Chief of Staff. A key consideration was that the lay off was not to affect positions that provided direct services to veterans. The task force determined in one scenario that in order to meet the requirements of the Chief of Staff's directive, it was necessary to eliminate several positions, including the grievant's. After that determination was made as to which positions were to be eliminated, it became the task of the Human Resource Manager to find placement opportunities for the laid off employees.

In its appeal, the DVS officials are challenging the hearing officer's determination that the DVS violated DHRM's Policy 1.30, Layoff, in not identifying and offering the grievant alternate employment with the agency. The hearing officer's ruling inferred that DVS did not conduct a proper search for valid vacancies and place the grievant in any other available position because of retaliation.

The relevant policy, the Department of Human Resource Management's Policy No. 1.30, Layoff. states as its purpose:

> Permits agencies to implement reductions in the work force according to uniform criteria when it becomes necessary to reduce the number of employees or to reconfigure the work force including change of positions from full-time to part-

> time status. The decision to implement layoff must be non-discriminatory and must comply with the provisions of Policy 2.05, Equal Employment Opportunity. This policy should be used with Policy 1.57, Severance Benefits.

In the instant case, based on the hearing officer's assessment of the evidence, DVS officials were within their rights and properly applied the provisions of the Layoff policy when they identified the grievant's position, along with others, to be eliminated in order to meet the agency's budget reduction goals. Neither the agency nor the grievant contests that determination. Therefore, this ruling will not address that part of the hearing officer's decision.

In the second part of the decision, the hearing officer determined that the agency neither conducted a broad enough search for placement opportunities nor placed the grievant in positions that were available to her for placement. More specifically, he stated that the agency should have considered placement of the grievant into one of two other positions (one wage, one contract). He also inferred that the agency failed to consider other options, including reducing the grievant's position to a part-time classified position.

In his decision, the hearing officer stated, in part, the following:

> The agency has shown that it acted within its discretion in which [sic] policy directive in eliminating her position. I do not feel that the decision to eliminate the position was pretextual. The agency has explained that the grievant's position was identified for elimination because it did not involve services to veterans. However, the agency has failed to explain adequately why or how it failed to follow DHRM Policy 1.30. Based on the totality of the evidence, the only explanation for the agency's apparent rigidness in not following DHRM Policy 1.30 appears directed to the grievant as an individual, rather than the occupant of the position eliminated by layoff. At this point, the layoff process became tainted as it pertains to consideration of options for the grievant following the elimination of her full-time position.
>
> Certainly, it would be improper for the agency to utilize the layoff policy as a substitute for disciplinary procedures. Likewise, it would be just as wrong for the grievant to benefit from or receive any special protection form layoff because of a concurrent disciplinary process. However, since the layoff policy was not followed, either by letter or spirit, as it pertained to at least considering offering the grievant the prescribed alternatives to layoff, and since the agency either could not or did not provide any legitimate explanation for the failure, the reasonable inference is that the agency retaliated against this employee.
>
> In conclusion, the grievant has borne her burden of proving a misapplication or unfair application of policy, and, by reasonable inference from the totality of

circumstances, that the reason for the misapplication and unfair application of policy is retaliatory.

The Department of Human Resource Management respectfully disagrees with the hearing officer that DVS officials misapplied DHRM Policy 1.30 as related to finding placement options for the grievant. This disagreement is based on the evidence that the Human Resource Manager in her testimony indicated that she had researched available options and that the two positions identified by the grievant – a temporary position and a wage position – were filled and, therefore, not valid vacancies. The Layoff Policy does not give the grievant displacement rights to those positions.

According to the Layoff Policy, agency management should conduct the following process in implementing layoff:

- Identify position(s)/duties to be eliminated using steps provided in this policy.
- Identify employees affected by the decision to reduce or reconfigure the work force using steps provided in this policy. Determine if placement options exist within the agency and make offer(s) to affected employee (s). This may result in :

    - Placement in the same Pay Band
    - Demotion in lieu of layoff; or
    - Separated-layoff

- If no placement option exists prior to the layoff for employees identified by the layoff sequence, agencies may decide to notify other employees in the same work unit, geographic area, and Role, who are performing substantially similar job duties of the need to place an employee on LWOP-layoff. Employees may then notify management of their interest in being considered for LWOP-layoff.
- Management assesses the impact of placing specific employee(s) on LWOP-layoff and determines which employee(s) will be affected by that decision.

According to the layoff policy, **Substantially the Same Work** is listed as one criterion used by agencies to determine which employee(s) will be impacted by the Layoff Policy. The following are indicators to assist agencies in making that determination:

- Positions are in the same work unit;
- Positions are in the same Role;
- Positions have the same work title;
- Positions are at the same reporting level in the organization structure;
- Positions have the same SOC Code; and
- Positions have similar job duties, KSAs and other job requirements based on the position description or Employee Work Profile.

Affected employees are to be offered placement options into valid vacancies for which they are minimally qualified. A valid vacancy is defined as a classified position that is fully funded and has been approved by the appointing authority to be filled. This may include a part-time or restricted position, depending upon agency needs and position funding. There is no obligation to displace a wage or contract employee whose work is not being reduced or eliminated in order to create a placement opportunity.

Concerning reducing a fulltime classified position to a part-time classified position, the policy states, in part, "To achieve the required savings, or to respond to changed workload patterns, agencies may reduce a full-time classified position to part-time status (minimum of 20 hours per week)…" However, the policy does not obligate an agency to consider reduction to part-time as a pre-layoff consideration. This is particularly relevant in that the agency indicated that converting the position to part-time classified would not have generated the savings necessary to meet the budget reductions.

This Department is remanding this decision to the hearing officer so that he can revise it to comply with the interpretation and application of the Layoff Policy as per the Department of Human Resource Management.

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Ernest G. Spratley

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

REMAND
DECISION OF HEARING OFFICER

In the matter of: Case No. 9097

Remand Decision Issued:
October 6, 2009

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. In this case, both EDR and DHRM have issued administrative rulings remanding the grievance decision to the hearing officer. In its September 4, 2009, ruling, EDR upheld the hearing officer's decision regarding the grievance procedure, except for direction to clarify the award of attorney's fees upon possible reinstatement. However, in its October 1, 2009, ruling, DHRM found that the hearing officer misinterpreted DHRM Policy 1.30 and remanded the grievance decision to the hearing officer to comply with its ruling.

OPINION

The hearing officer originally found that the agency did not follow DHRM Policy 1.30. There were other placement options that could have been considered, such as the new hire for a new program that ultimately was a part-time placement. The agency did not consider the grievant for this newly filled vacancy or other possibilities, including the indefinite hire of a temporary contract worker. The hearing officer found that the agency failed to follow DHRM Policy 1.30 by failing to determine whether internal placement options were available and by not considering a reduction of the grievant's position to part-time in lieu of continuing to use a contract temporary employee.

DHRM has reversed the hearing officer's interpretation of its Policy 1.30 and, although the hearing officer did not so find, DHRM has stated that there is no obligation to displace a wage or contract employee whose work is not being reduced or eliminated in order to create a placement opportunity. Further, DHRM stated that the policy does not obligate an agency to consider reduction to part-time as a pre-layoff consideration. While DHRM has not directly addressed the matter of the agency continuing to use contract temporary employee(s) while laying off full time employees, I must consider DHRM's remand directive to condone the layoff of state employees while continuing to employ temporary contract employees to perform similar work, regardless of all other considerations.

DHRM's remand to the hearing officer renders moot EDR's question of whether the award of attorney's fees was conditional on the grievant being reinstated to employment. However, for clarification, the hearing's officer's original award of attorney's fees was conditional, requiring that the grievant accept a position identified by the agency as a placement option.

DECISION

The relief originally provided to the grievant was based on the hearing officer's interpretation of DHRM policy. Since DHRM reversed the hearing officer's interpretation of policy, and as required by DHRM's remand decision reversing the hearing officer's interpretation of Policy 1.30, the hearing officer hereby rescinds and vacates the relief granted to the grievant in the June 18, 2009, original grievance decision and the July 14, 2009, reconsideration decision.

APPEAL RIGHTS

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 HRM, 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.[4]

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer

[4] 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).