Issues: Misapplication of Layoff Policy and Retaliation (grievance participation); Hearing Date: 11/12/09; Decision Issued: 02/19/10; Agency: VDACS; AHO: John V. Robinson, Esq.; Case No. 9212; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 02/24/10; Reconsideration Decision issued 04/16/10; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 02/24/10; EDR Ruling #2010-2557, 2010-2558 issued 06/08/10; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 02/25/10; DHRM Ruling issued 07/22/10; Outcome: AHO's decision affirmed; Judicial Review: Appeal to the Circuit Court in Prince William County on 08/12/10; Outcome pending.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9212

Hearing Officer Appointment: October 6, 2009
Hearing Dates: November 12-13, 2009
Decision Issued: February 19, 2010

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge his layoff from employment effective 5:00 p.m. on November 9, 2008, pursuant to a letter and Notice of Layoff or Placement, both dated October 10, 2008 by Management of Department of Agriculture and Consumer Services (the "Department" or "Agency"), as described in the Grievance Form A dated October 9, 2008.

The parties duly participated in a second pre-hearing conference call on October 23, 2009 at 1:00 p.m. The Grievant's student advocate (who ceased to represent the Grievant shortly after the call), the Agency's attorney (the "Attorney") and the hearing officer participated in the call. The Grievant is seeking the relief requested in his Grievance Form A, including reinstatement.

The parties previously discussed the issues in the Grievant's Form A and the hearing officer confirmed his understanding that the issues for the hearing raised by the Form A are that the Grievant is challenging his layoff by the Department on the grounds that it was retaliatory and/or that the Department misapplied policy. In his opening statement at the hearing, the Grievant reiterated the issues raised on his Form A.

The Grievant moved for a relatively short continuance. The hearing officer found that the process was best served if the Grievant was represented by an advocate of his choosing and that, under the facts and circumstances of this proceeding, a relatively short continuance would serve the interests of justice. Accordingly, just cause existed for the continuance. The hearing was rescheduled to November 12-13, 2009.

Following the pre-hearing conference, the hearing officer issued a First Amended Scheduling Order and Decision concerning Grievant's Motion for Continuance entered October 23, 2009, which is incorporated herein by this reference.

At the hearing, the Agency was represented by the Attorney. The Grievant represented himself. 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 binder (A through K) and all of the exhibits in the Grievant's binder (1 through 54).[1]

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant was employed by the Agency for approximately 19 years before the layoff of which he complains in this proceeding as a Compliance Safety Officer IV. GE 1; AE B.

2. The Grievant was previously a regional supervisor for the Agency.

3. On March 1, 2007, the Grievant was transferred from his regional supervisor position to a special assignments position as a Special Projects Officer.

4. In the special assignments position, the Grievant was assigned to work from home, instead of at the regional office.

5. The Grievant was given certain special assignments, the most important of which was the task of rewriting and/or creating the program's policies and manuals. The Grievant also performed trend analysis in this position. This initially temporary assignment was continued through 2007.

6. In December, 2007, the Grievant filed a grievance concerning the continuation of the special assignments position, particularly without an updated Employee Work Profile (EWP) and a telework agreement.

7. That grievance resulted in mediation, after which the Grievant agreed to be permanently assigned to the special assignments position and was afforded the

[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.

opportunity to provide input to management concerning his work, job duties and EWP.

8. The Grievant was involved in supporting another employee's grievance concerning the selection for Position #00350 as early as March 28, 2007.

9. The Grievant's position was identified and selected for layoff in October 2008.

10. The Grievant asserts that the Agency has retaliated against him in selecting his special assignments position for elimination and has raised the additional issues specified in his Form A concerning how the layoff was effectuated.

11. The Agency concedes that the Grievant engaged in various protected activities and, in any event, the hearing officer finds that the Grievant has proven that he engaged in the following relevant, material protected acts.

12. The Grievant participated as a witness in another Agency employee's grievance hearing on February 7, 2008. GE 3.

13. The Grievant contacted elected public officials, including on June 12, 2008 and on July 14, 2008 to express several matters of public concern. GE 28 and GE 29.

14. The Grievant has expressed concerns relating to the handling of investigations and the roles of various Agency employees to his immediate supervisors and management on various occasions from 2006 until August 2008.

15. The Grievant suffered a materially adverse action when he was laid off.

16. However, the Grievant has failed to carry his burden of proving by a preponderance of the evidence that a causal link exists between the materially adverse action and the protected activity; in other words, that Management took a materially adverse action because he engaged in the protected activity.

17. In August 2008, the Agency was directed by the State to prepare general fund budget reductions of 5%, 10%, and 15%.

18. In preparing the different budget reduction strategies, the various divisions within the Agency considered the Agency's mission and critical functions to identify positions, resources and services that could be reduced or eliminated.

19. Management's overriding goal was to limit as much as possible the adverse impact on direct services to Agency clients and to citizens of the Commonwealth. To achieve this overriding goal, management placed the highest priority on maintaining the level of field operations as much as possible. Accordingly, administrative positions which were not considered to be of critical need were

particularly vulnerable to elimination or layoff. Grievant's special assignments position was considered by management to be essentially an administrative position not of critical need.

20. Program Managers in the Division of Consumer Protection were asked to evaluate their core services and work with the Division's Business Manager in the compilation of the different budget reduction strategies, all of which originated at the program level.

21. The decision to eliminate the Special Projects Officer position in the Office of Product and Industry Standards ("OPIS") was made exclusively by program management based on program needs.

22. The Division's Business Manager compiled the different reduction strategies submitted by the programs and aggregated them, which the Division Director then reviewed and approved as a package for submission to the Agency's Budget Director.

23. The Commissioner looked at the proposals before the Agency subsequently submitted a number of scenarios to the Department of Planning and Budget ("DPB") for its consideration.

24. Staff in DPB and the Governor's Office made the final decision on the functions, funding and positions to reduce or eliminate.

25. In all, there were layoffs relating to four (4) positions (including the Grievant) and about fifteen positions were eliminated.

26. The Agency was notified late on Wednesday, October 8, 2008, regarding the positions targeted by the Governor's Office for layoff.

27. At that time, the Agency was advised that the Governor would announce the State's budget reductions the following day, Thursday, October 9, 2008,.

28. The budget reductions information was embargoed at the direct order of the Governor's Office until the Governor released the information at his 11:00 a.m. news conference.

29. However, the Agency decided to notify employees subject to layoff just prior to the Governor's news conference so that when the reduction information was released they would have some advance warning prior to the Governor's announcement to the general public.

30. Accordingly, management decided that the Agency's best practical option to make a preemptive notification to those persons about to be laid off (including the

Grievant) before the Governor's announcement was by telephone. Thus the Grievant was notified by management verbally of his layoff on October 9, 2008. The notification was provided in writing on October 17, 2008 and the layoff was effective on November 9, 2008.

31. The Agency's Human Resource Office ("HRO") prepared a layoff letter, the initial notice of layoff, and the Interagency Placement Screening Form yellow-card on Friday, October 10, 2008.

32. These documents were signed by the HRO Director on Tuesday, October 14, 2008, and subsequently mailed to the Grievant.

33. Monday, October 12, 2009 was Columbus Day, a holiday and the HRO Director was on leave in Florida the previous week.

34. Pursuant to DHRM Policy, notice must be given at least two weeks prior to the effective date of layoff.

35. The effective date of the Grievant's layoff was November 9, 2008. Accordingly, the Agency complied with DHRM's notification requirements and, in fact, exceeded that policy requirement.

36. The Grievant's position was the only Compliance/Safety Officer IV position designated as Special Projects Officer and performing such work and duties. There were five other employees in the Agency classified in this role code, and four of those are in OPIS but they perform difficult work and have different duties and are Regional Team Leaders.

37. The Governor's Office and DPB required the Agency and all other state executive agencies, to submit budget reduction proposals, including one for a 15% general fund reduction, which was the one ultimately utilized by the Governor's Office.

38. The request from DPB included criteria for assessing specific items to be included in the proposals, particularly those items that should have the least direct impact on the Agency's direct services to its clients and to the general public.

39. The OPIS management who prepared the OPIS portion of the Agency proposal considered only those criteria as requested by DPB, and Agency senior management reviewed the various agency divisions' proposals only to ensure that they considered only those criteria as requested by DPB before submitting the proposals to the Governor's Office.

40. The elimination of the Grievant's position and layoff of the Grievant was listed 40th out of 46 possible proposed items for reduction, of which the Governor's Office accepted 30 items for reduction. The Governor's Office also made its own

independent assessment of priorities and this assessment differed from the prioritization submitted by the Agency.

41. The Grievant was initially asked to take the special assignments position from which he was laid off due to a legitimate business need principally to review and improve the Agency's policies and procedures.

42. The Grievant voluntarily chose to remain in that same special assignments position on a permanent basis after the mediation.

43. The Agency has used some of the Grievant's policy revisions and is still in the process of reviewing others due largely to the extensive revisions to existing policies proposed by the Grievant.

44. The Agency could not have been aware of the nature of any impending budget reductions at the time the Grievant was initially placed in his special assignment position or when he chose to remain there, nor could the Agency have been aware at that time of the criteria it would be asked by the Governor's Office to consider if forced to prepare future budget reduction proposals.

45. The Agency has hired several new employees since the Grievant's layoff, including administrative employees, but only in positions of critical need.

46. The Grievant was the only employee in the Agency with the particular role and performing the particular work duties that role required, and therefore the Agency did not misapply policy by not identifying other employees with less seniority for layoff instead of Grievant.

47. The Agency had at the time of notification of the layoff, no internal vacancies which DHRM Policy would require to be offered to the Grievant.

48. The Agency properly provided at the time of the Grievant's written notification of layoff, and more than two weeks before the effective date of the layoff, the required Interagency Placement Card and all other required documentation.

49. Any alleged misapplication of policy concerning payment of accrued leave due to the Grievant has been cured by the Agency and is therefore moot.

50. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

51. The hearing officer also makes additional findings of fact in the following section of this Decision.

APPLICABLE POLICY AND LAW, ANALYSIS, ADDITIONAL FINDINGS AND DECISION

In disciplinary actions and dismissals for unsatisfactory performance, the Agency must present its evidence first and must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances. In all other actions, such as the Grievant's claims of retaliation and misapplication of policy in this proceeding, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *See* EDR Grievance Procedure Manual § 5.8; *see also* EDR Decision #9080. A preponderance of evidence is evidence which shows that what is sought to be proved is more probable than not. *See* EDR Grievance Procedure Manual § 9; *see also* EDR Decision #9080.

When the Governor's Office and DPB requested that all state executive agencies prepare several budget reduction proposals, including a proposal for a 15% reduction in those agencies' general fund expenditures, DPB provided specific guidance on the criteria to be considered. AE B-11 to B-20. Included in these criteria were the consideration of eliminating lower-priority activities that don't affect the services provided to the Agency's clients and not to eliminate core services to the public. AE B-16 to B-17.

Each office within the Agency was directed to prepare budget reduction proposals in accordance with the DPB criteria. For OPIS, Mr. D and Mr. B worked together to prepare the OPIS proposals. The OPIS proposal was collected with the proposals of the other offices within the Division of Consumer Protection, with no changes being made to the proposals by the Division Director or Division Business Manager. The proposals from each division within the Agency were collected by the Agency's Senior Management and Budget Personnel for review to ensure that the proposals met the requested criteria, and to prioritize the items for all of the proposals in one agency wide proposal. AE B-31 to B-36.

The Agency wide proposal included 46 items of which the elimination of the Grievant's position was rated the 40th least-impactful to the Agency's services, but not the highest rated proposed layoff. AE B-31 to B-36. The Governor's Office made the final decision to accept 30 of the proposed items, including the elimination of the Grievant's position. AE B-49 to B-50.

The persons within the Agency tasked with developing the proposals considered only the appropriate factors as requested by DPB. No direct evidence was provided by the Grievant to show that any retaliatory intent existed during the preparation of those budget proposals.

Instead, the Grievant largely relies on the hearing officer making adverse inferences against the Agency due to Agency responses to various document production requests by the Grievant during the grievance process.

Fortunately for the hearing officer the Director of EDR has already issued several compliance rulings concerning this grievance, many of which relate to the Agency's document production. The hearing officer hereby incorporates the following rulings in his decision:

Ruling #2009-2173, Ruling #2009-2238, Ruling #2009-2239, Ruling #2009-2258, Ruling #2009-2269 and Ruling #2009-2347.

The Agency-wide proposals submitted to DPB were initially withheld as Confidential Governor's Working Papers. Although the proposals were prepared on forms provided by DPB that were labeled "Confidential Governor's Working Papers" and were for review by the Governor's Office, the proposals were ultimately released to the public shortly after the initiation of this grievance. When the Agency initially declined to provide those documents, EDR ruled that the exemption no longer applied. GE 4 at 4. However, at the time of that ruling, EDR also acknowledged that the final submitted proposal of the Agency had been provided to the Grievant. GE 4 at 4.

The documents initially withheld as "Confidential Governor's Working Papers" ultimately were provided to the Grievant and to the hearing officer, and therefore no adverse inference can be made with respect to those documents under any theory.

The budget reduction proposal draft documents of the Division Director and Division Business Manager did not exist, as testimony from numerous witnesses confirmed, because the proposals from OPIS where Grievant was employed, were prepared by the OPIS management, particularly Mr. D.

The notes of the Division Director from a meeting with an ExxonMobil official in 2006 did not exist, as confirmed by the testimony of the Division Director and a statement by another attendee of that meeting that no notes were taken (*See* GE 24, page 1. ("[Mr. D.] does not think any case file was generated or meeting notes were taken.")) and, accordingly, no adverse inference may be made concerning any alleged notes (*See* GE 4, pages 5-6).

Several EWP's requested and produced by the Agency contained signatures with dates inconsistent with the dates on the front of those EWP's. However, credible testimony was provided that EWP's are reviewed as part of each employee's annual performance evaluation, which occurs in October of each year, and therefore the signatures on the EWP's are consistent with those reviews. Further, the EWP's are not alleged to contain evidence of retaliatory intent by the Agency, and therefore no adverse inference supporting a finding of a retaliatory causal link may be made from such documents.

Documents showing the criteria that the Governor, through DPB, requested that agencies follow in preparing budget reduction proposals, and the OPIS draft proposals were ultimately provided to the Grievant and to the hearing officer.

Any adverse inferences under a theory of spoliation would apply only if the contents of the documents were not known, as when they are destroyed. *Wolfe v. Va. Birth-Related Neuro. Injury Comp. Program*, 40 Va.App. 565, 580-81, 580 S.E.2d 467, 475 (2003).

Because, as the uncontroverted testimony of Agency witnesses indicated, the Division Director and Division Business Manager made no changes to the proposals provided to them and

the Senior Management and Budget Personnel did not add or eliminate any proposed items, any documents relating to the proposals that may have been in the possession of the Division Director and Division Business Manager would have been the same as those submitted to the Governor's Office.

Additionally, because the Division Business Manger did not prepare any draft proposals, those requested documents did not exist and could not be provided to the Grievant. The OPIS proposals drafted by Mr. D. were provided to Grievant and are included in the record before the hearing officer. GE 43, pages 4-9.

Although Virginia law recognizes a "spoliation or missing evidence inference," (*Wolfe v. Va. Birth-Related Neuro. Injury Comp. Program*, 40 Va.App. 565, 580-81, 580 S.E.2d 467, 475 (2003)), that law treats it as a mere permissible *inference* rather than a true *presumption* (*Jacobs v. Jacobs*, 218 Va. 264, 269, 237 S.E.2d 124, 127 (1977)). *See Rahnema v. Rahnema*, 47 Va.App. 465, 626 S.E.2d 448 (2006) (footnote 12). This inference can be weighed with all of the other evidence in any case.

The documentary evidence and testimony in the record before the hearing officer establishes that the Agency considered only appropriate and legitimate non-retaliatory business reasons in preparing its budget reduction proposals. Under the facts and circumstances of this proceeding, the hearing officer declines to draw an adverse inference that some alleged documents might have contained contrary evidence. The Grievant has not proven that management destroyed documents at a time when a reasonable person in management's position should have foreseen that the evidence was material to a potential civil action, an essential element of a spoliation claim. *Wolfe, supra*, at 580-581. The record concerning the Agency's document production does not warrant an adverse inference and would not be in keeping with the Director's preference for deciding cases on the merits rather than procedural violations.

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.

Department of Human Resource Management (DHRM) Policy 1.30 (the "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.

The Grievant has alleged retaliation but has failed to carry his burden of proof in this regard. 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[2] 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). This is addressed in greater detail below.

To prevail on his claim of retaliation at hearing, the Grievant bears the burden of proving, by a preponderance of the evidence, that (1) he engaged in a protected activity; (2) he suffered a materially adverse action; and (3) a casual link exists between the materially adverse action and the protected activity; in other words, that Management took a materially adverse action because he engaged in the protected activity.

The hearing officer has found above that the Grievant engaged in protected activities and that he suffered a materially adverse action. However, the hearing officer finds and decides that the Grievant has not borne his burden of proving by a preponderance of the evidence that a causal link exists between the layoff and the protected activity. The Agency, in contrast, has shown by substantial evidence that the Grievant's layoff was for legitimate budget-reduction purposes as required by the Governor's Office.

In *Va. Polytechnic Instit. and State Univ. v. Quesenberry* (2009), which involved the university's anti-discrimination and harassment prevention policy, the Virginia Supreme Court emphasized that the Court of Appeals had strayed from *Barton*, which constituted "the proper review process" and had erred in applying an analysis grounded on "sexual harassment" claims brought under Title VII. The Court emphasized that the focus must be the state agency's "exclusive right" to manage its affairs and operations, as provided by Va. Code § 2.2-3004(B).

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[2] On July 19, 2005, in Ruling #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 might well have dissuaded a reasonable worker from engaging in a protected activity.

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).

Pursuant to the Layoff Policy, management is given wide latitude to exercise its discretion and manage its employees. Accordingly, 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.*

DECISION

The Grievant has failed to prove by a preponderance of the evidence that the Agency retaliated against him or that the Agency misapplied the Layoff Policy. Accordingly, the hearing officer denies the Grievant's requested relief and dismisses the grievance.

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, 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:

____

John V. Robinson, Hearing Officer

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

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9212

Hearing Officer Appointment: October 6, 2009
Hearing Dates: November 12-13, 2009
Original Decision Issued: February 19, 2010

ISSUES

The Virginia Department of Employment Dispute Resolution's ("EDR") Rules for Conducting Grievance Hearings (the "Rules") provide that the hearing officer's decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision (Rules, Section VII):

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 ("DHRM"). 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 the grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the hearing 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, 600 East Main Street, Suite 301, Richmond, Virginia 23219 or faxed to (804) 786-0111.

If multiple requests for administrative review are pending, a hearing officer's decision on reconsideration or reopening should be issued before any decisions are issued by the DHRM Director or the EDR Director. Rules, Section VII.

DECISION

In his request to reconsider the decision, the grievant has not offered any probative newly discovered evidence. Similarly, the grievant has not presented probative evidence of any incorrect legal conclusions by the hearing officer as the basis for such a request.

Hearing officers are authorized to make "findings of fact as to the material issues in the case" (*Va. Code § 2.2-3005.1(C))* and to determine the grievance based "on the material issues and grounds in the record for those findings." *Grievance Procedure Manual § 5.9.*

Where, as in this proceeding, the Grievant alleges that management misapplied the applicable layoff policy and retaliated against him, the Grievant must prove his case by a preponderance of the evidence. Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, neither EDR nor DHRM can substitute its judgment for that of the hearing officer concerning those findings. Interpretation of policy is itself a policy matter and subject to the final say of DHRM. *Virginia State Police v. Barton*, 39 Va.App. 439, 573 S.E.2d 319 (2002). EDR makes final decisions on "procedure" and the hearing officer, provided he has acted in accordance with the grievance procedure, finds facts.

In making his arguments, the Grievant appears to contest the hearing officer's findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the Grievant has proved his case according to the applicable evidentiary standard.

Based upon a reconsideration of the hearing record, including numerous exhibits and the eight (8) tapes of the hearing, the hearing officer is satisfied that sufficient evidence supports the hearing officer's decision. The Grievant makes five (5) main points in his request for reconsideration. First, the Grievant argues that the temporal proximity between the Grievant's protected acts and the Grievant's layoff establish a causal retaliatory link.

In the Grievant's specification of the issues and the supporting facts in his Form A, the Grievant did not mention his reports to the Hotline (*See, e.g.* GE 8-10). Nevertheless, as the Grievant argues, these constitute protected acts and the hearing officer so finds.

However, for the reasons provided in the Attorney's Agency Response to Request for Reconsideration, the Grievant did not prove by a preponderance of the evidence that the Agency's knowledge of the Hotline investigation preceded the preparation of the OPIS budget proposals.

In any event, even if temporal proximity were assumed for argument's sake, the hearing officer still finds that the Grievant has not borne his burden of proving by a preponderance of the evidence that a causal link exists between the layoff and the protected activity.

In his Grievant Response to Agency Response for Reconsideration, the Grievant asserts that "[t]he Grievant has never willfully agreed to take any make work assignment . . ." (at page 9). However, as the record shows and as the Division Director testified credibly at the hearing, following the mediation of a prior grievance filed by the Grievant, Management offered the Grievant various options to resolve the prior grievance, including returning to his immediate past position as a regional supervisor; being reassigned as a regional inspector with no reduction in pay, management status or benefits for the term of his employment with the Agency; retirement if he qualified; or continuing on a permanent basis in his position as Special Projects Officer. *See*, Tape 7B (Testimony of the Division Director) and AE A-24.

Upon checking with the appropriate department, Management determined that the Grievant was not the necessary age to qualify for any retirement package, so this option fell away. However, as the Division Director credibly testified, the decision concerning which option to elect was entirely the Grievant's. Tape 7B. The Grievant, without any undue pressure or influence, freely, voluntarily and intentionally agreed to stay on as Special Projects Officer on a permanent basis. The Grievant contributed a great deal of input to the content of his EWP for the position of Special Projects Officer, which he elected. *See, e.g.,* the testimony of the Director of Human Resources for the Agency at Tape 6B. The Grievant also agreed to the EWP, signing it to evidence his consent.

The record establishes that, at least from management's viewpoint, management considered the Grievant's role and position as a real role and an important position. By way of example, when the Grievant elected to remain on as the SPO, the Division Director communicated to appropriate Agency personnel that he considered the SPO role on a par or commensurate to the role of the other supervisors. It is true that EDR has found that this position was a make work assignment but the hearing officer has found nothing in the Layoff Policy (Policy No. 1.30) that insulates such a position from elimination or layoff, particularly under the circumstances of this case where the Grievant selected the position himself from one of a number of alternatives offered by management. AE D-1 to D-14.

The Grievant's theory is that management retaliated against the Grievant, targeting the Grievant for layoff when he was placed in the permanent position of Special Projects Officer. There are several obvious problems with this theory, including the following ones. First, the Grievant himself chose the position from several options. Management could not have foreseen which option the Grievant would elect.

Similarly, management could not have accurately forecast at the time the Grievant was allegedly targeted for layoff, many of the extraneous factors associated with such a ploy, which were totally beyond management's control. For example, the Grievant himself acknowledged during the hearing that his position was only subject to layoff when the budget reduction hit the 10% level and was not at risk at the 5% level. Tape 5A.

The Department of Planning and Budget and the Governor's Office set the parameters of the nature of the budget reductions and the criteria the Agency was to consider. Similarly, the Governor's Office made the final decision concerning what items submitted by the Agency would be accepted.

The Governor's Office and, accordingly, management tried to minimize the impacts to field operations and the citizenry. If Management had really targeted the Grievant and could have forecast the future accurately, management would not have offered both the regional inspector position and the regional supervisor position to the Grievant as alternatives. The Director of Human Resources for the Agency and other Agency witnesses credibly testified that both of these positions involved direct services to the Agency's clients very different from non-critical administrative functions and, accordingly, were much less likely to be cut. The Director of Human Resources for the Agency clarified that the regional supervisors actually supervised inspectors in the field and did inspections themselves.

The Division Director credibly testified that the Grievant was best suited for the position of Special Projects Officer and that the Division Director considered the position important. The record is also clear that management considered field operations to be already under stress because of budgetary cuts.

The Director of Human Resources for the Agency credibly testified that she did a lot of work and provided a lot of assistance to the Grievant in his effort to find a job at another state agency, which the Grievant ultimately secured. Tape 6A. This extra assistance, way beyond what is required by policy, does not show a retaliatory animus on the part of management.

Other non-critical administrative positions were eliminated by the Agency, including an environmental specialist in another division of the Agency doing similar administrative work to the Grievant. In other words, the Grievant alone was not singled out for disparate treatment but was treated consistently with many other positions in the Agency which did not involve direct service delivery to clients in the field.

The Grievant also asserts in his request for reconsideration that various policies were misapplied. During the hearing, the Grievant clarified concerning his misapplication of policy assertions that ". . . the primary one is in the layoff policy." Tape 5A. For the reasons provided in the Decision and in the Agency Response to Request for Reconsideration, the hearing officer believes that the record supports his findings and conclusions that the Grievant has not proven by a preponderance of the evidence that the Agency failed to comply with the layoff policy. Of course, DHRM will have the final word on all matters of "policy." *Barton, supra*. Similarly, the hearing officer sees no need to change his credibility findings because of the Grievant's assertions. However, the hearing officer did note a typographical error in paragraph 36 of his findings in the Decision, and wishes to correct the same. Accordingly, the word "different" is hereby substituted for the word "difficult" in such paragraph 36.

For the reasons provided herein, the hearing officer hereby denies the Grievant's request for reconsideration directed to him and hereby affirms his decision that the Grievant has failed to meet his burden of proving by a preponderance of the evidence that the Agency retaliated against him or misapplied the layoff policy.

APPEAL RIGHTS

The hearing officer incorporates herein Section VII of the Rules.

ENTER:

____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of Virginia
Department of Agriculture and
Consumer Services

July 22, 2010

The grievant has requested that the Department of Human Resource Management (DHRM) conduct an administrative review of the hearing decision in Case Number 9212. For the reason stated below, the DHRM will not disturb the hearing decision. The agency head of the DHRM, Ms. Sara Redding Wilson, has asked that I respond to this request for an administrative review.

FACTS

According to the hearing officer, the salient facts of this case are as follows:

1. The Grievant was employed by the Agency for approximately 19 years before the layoff of which he complains in this proceeding as a Compliance Safety Officer IV.
2. The Grievant was previously a regional supervisor for the Agency.
3. On March 1, 2007, the Grievant was transferred from his regional supervisor position to a special assignments position as a Special Projects Officer.
4. In the special assignments position, the Grievant was assigned to work from home, instead of at the regional office.
5. The Grievant was given certain special assignments, the most important of which was the task of rewriting and/or creating the program's policies and manuals. The Grievant also performed trend analysis in this position. This initially temporary assignment was continued through 2007.
6. In December, 2007, the Grievant filed a grievance concerning the continuation of the special assignments position, particularly without an updated Employee Work Profile (EWP) and a telework agreement.
7. That grievance resulted in mediation, after which the Grievant agreed to be permanently assigned to the special assignments position and was afforded the opportunity to provide input to management concerning his work, job duties and EWP.
8. The Grievant was involved in supporting another employee's grievance concerning the selection for Position #00350 as early as March 28, 2007.
9. The Grievant's position was identified and selected for layoff in October 2008.
10. The Grievant asserts that the Agency has retaliated against him in selecting his

special assignments position for elimination and has raised the additional issues specified in his Form A concerning how the layoff was effectuated.

11. The Agency concedes that the Grievant engaged in various protected activities and, in any event, the hearing officer finds that the Grievant has proven that he engaged in the following relevant, material protected acts.
12. The Grievant participated as a witness in another Agency employee's grievance hearing on February 7, 2008.
13. The Grievant contacted elected public officials, including on June 12, 2008 and on July 14, 2008 to express several matters of public concern.
14. The Grievant has expressed concerns relating to the handling of investigations and the roles of various Agency employees to his immediate supervisors and management on various occasions from 2006 until August 2008.
15. The Grievant suffered a materially adverse action when he was laid off.
16. However, the Grievant has failed to carry his burden of proving by a preponderance of the evidence that a causal link exists between the materially adverse action and the protected activity; in other words, that Management took a materially adverse action because he engaged in the protected activity.
17. In August 2008, the Agency was directed by the State to prepare general fund budget reductions of 5%, 10%, and 15%.
18. In preparing the different budget reduction strategies, the various divisions within the Agency considered the Agency's mission and critical functions to identify positions, resources and services that could be reduced or eliminated.
19. Management's overriding goal was to limit as much as possible the adverse impact on direct services to Agency clients and to citizens of the Commonwealth. To achieve this overriding goal, management placed the highest priority on maintaining the level of field operations as much as possible. Accordingly, administrative positions which were not considered to be of critical need were particularly vulnerable to elimination or layoff. Grievant's special assignments position was considered by management to be essentially an administrative position not of critical need.
20. Program Managers in the Division of Consumer Protection were asked to evaluate their core services and work with the Division's Business Manager in the compilation of the different budget reduction strategies, all of which originated at the program level.
21. The decision to eliminate the Special Projects Officer position in the Office of Product and Industry Standards ("OPIS") was made exclusively by program management based on program needs.
22. The Division's Business Manager compiled the different reduction strategies submitted by the programs and aggregated them, which the Division Director then reviewed and approved as a package for submission to the Agency's Budget Director.

23. The Commissioner looked at the proposals before the Agency subsequently submitted a number of scenarios to the Department of Planning and Budget ("DPB") for its consideration.
24. Staff in DPB and the Governor's Office made the final decision on the functions, funding and positions to reduce or eliminate.
25. In all, there were layoffs relating to four (4) positions (including the Grievant) and about fifteen positions were eliminated.
26. The Agency was notified late on Wednesday, October 8, 2008, regarding the positions targeted by the Governor's Office for layoff.
27. At that time, the Agency was advised that the Governor would announce the State's budget reductions the following day, Thursday, October 9, 2008.
28. The budget reductions information was embargoed at the direct order of the Governor's Office until the Governor released the information at his 11:00 a.m. news conference.
29. However, the Agency decided to notify employees subject to layoff just prior to the Governor's news conference so that when the reduction information was released they would have some advance warning prior to the Governor's announcement to the general public.
30. Accordingly, management decided that the Agency's best practical option to make a preemptive notification to those persons about to be laid off (including the Grievant) before the Governor's announcement was by telephone. Thus the Grievant was notified by management verbally of his layoff on October 9, 2008. The notification was provided in writing on October 17, 2008 and the layoff was effective on November 9, 2008.
31. The Agency's Human Resource Office ("HRO") prepared a layoff letter, the initial notice of layoff, and the Interagency Placement Screening Form yellow-card on Friday, October 10, 2008.
32. These documents were signed by the HRO Director on Tuesday, October 14, 2008, and subsequently mailed to the Grievant.
33. Monday, October 12, 2009 was Columbus Day, a holiday and the HRO Director was on leave in Florida the previous week.
34. Pursuant to DHRM Policy, notice must be given at least two weeks prior to the effective date of layoff.
35. The effective date of the Grievant's layoff was November 9, 2008. Accordingly, the Agency complied with DHRM's notification requirements and, in fact, exceeded that policy requirement.
36. The Grievant's position was the only Compliance/Safety Officer IV position designated as Special Projects Officer and performing such work and duties. There were five other employees in the Agency classified in this role code, and four of those are in OPIS but they perform difficult work and have different duties and are Regional Team Leaders.
37. The Governor's Office and DPB required the Agency and all other state executive agencies, to submit budget reduction proposals, including one for a 15% general fund reduction, which was the one ultimately utilized by the Governor's Office.

38. The request from DPB included criteria for assessing specific items to be included in the proposals, particularly those items that should have the least direct impact on the Agency's direct services to its clients and to the general public.
39. The OPIS management who prepared the OPIS portion of the Agency proposal considered only those criteria as requested by DPB, and Agency senior management reviewed the various agency divisions' proposals only to ensure that they considered only those criteria as requested by DPB before submitting the proposals to the Governor's Office.
40. The elimination of the Grievant's position and layoff of the Grievant was listed 40th out of 46 possible proposed items for reduction, of which the Governor's Office accepted 30 items for reduction. The Governor's Office also made its own independent assessment of priorities and this assessment differed from the prioritization submitted by the Agency.
41. The Grievant was initially asked to take the special assignments position from which he was laid off due to a legitimate business need principally to review and improve the Agency's policies and procedures.
42. The Grievant voluntarily chose to remain in that same special assignments position on a permanent basis after the mediation.
43. The Agency has used some of the Grievant's policy revisions and is still in the process of reviewing others due largely to the extensive revisions to existing policies proposed by the Grievant.
44. The Agency could not have been aware of the nature of any impending budget reductions at the time the Grievant was initially placed in his special assignment position or when he chose to remain there, nor could the Agency have been aware at that time of the criteria it would be asked by the Governor's Office to consider if forced to prepare future budget reduction proposals.
45. The Agency has hired several new employees since the Grievant's layoff, including administrative employees, but only in positions of critical need.
46. The Grievant was the only employee in the Agency with the particular role and performing the particular work duties that role required, and therefore the Agency did not misapply policy by not identifying other employees with less seniority for layoff instead of Grievant.
47. The Agency had at the time of notification of the layoff, no internal vacancies which DHRM Policy would require to be offered to the Grievant.
48. The Agency properly provided at the time of the Grievant's written notification of layoff, and more than two weeks before the effective date of the layoff, the required Interagency Placement Card and all other required documentation.
49. Any alleged misapplication of policy concerning payment of accrued leave due to the Grievant has been cured by the Agency and is therefore moot.

50. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.
51. The hearing officer also makes additional findings of fact in the following section of this Decision.

APPLICABLE POLICY AND LAW, ANALYSIS, ADDITIONAL FINDINGS AND DECISION

In disciplinary actions and dismissals for unsatisfactory performance, the Agency must present its evidence first and must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances. In all other actions, such as the Grievant's claims of retaliation and misapplication of policy in this proceeding, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *See* EDR Grievance Procedure Manual § 5.8; *see also* EDR Decision #9080. A preponderance of evidence is evidence which shows that what is sought to be proved is more probable than not. *See* EDR Grievance Procedure Manual § 9; *see also* EDR Decision #9080.

When the Governor's Office and DPB requested that all state executive agencies prepare several budget reduction proposals, including a proposal for a 15% reduction in those agencies' general fund expenditures, DPB provided specific guidance on the criteria to be considered. Included in these criteria were the consideration of eliminating lower-priority activities that don't affect the services provided to the Agency's clients and not to eliminate core services to the public.

Each office within the Agency was directed to prepare budget reduction proposals in accordance with the DPB criteria. For OPIS, Mr. D and Mr. B worked together to prepare the OPIS proposals. The OPIS proposal was collected with the proposals of the other offices within the Division of Consumer Protection, with no changes being made to the proposals by the Division Director or Division Business Manager. The proposals from each division within the Agency were collected by the Agency's Senior Management and Budget Personnel for review to ensure that the proposals met the requested criteria, and to prioritize the items for all of the proposals in one agency wide proposal.

The Agency wide proposal included 46 items of which the elimination of the Grievant's position was rated the 40th least-impactful to the Agency's services, but not the highest rated proposed layoff. The Governor's Office made the final decision to accept 30 of the proposed items, including the elimination of the Grievant's position.

The persons within the Agency tasked with developing the proposals considered only the appropriate factors as requested by DPB. No direct evidence was provided by the Grievant to show that any retaliatory intent existed during the preparation of those budget proposals. Instead, the Grievant largely relies on the hearing officer making adverse inferences against the Agency due to Agency responses to various document production requests by the Grievant during the grievance process. Fortunately for the hearing officer the Director of EDR has already issued several compliance rulings concerning this grievance, many of which relate to the Agency's document production. The hearing officer hereby incorporates the following rulings in his decision: Ruling #2009-2173, Ruling #2009-2238, Ruling #2009-2239, Ruling #2009-2258, Ruling #2009- 2269 and Ruling #2009-2347.

The Agency-wide proposals submitted to DPB were initially withheld as Confidential Governor's Working Papers. Although the proposals were prepared on forms provided by DPB that were labeled "Confidential Governor's Working Papers" and were for review by the Governor's Office, the proposals were ultimately released to the public shortly after the initiation of this grievance. When the Agency initially declined to provide those documents, EDR ruled that the exemption no longer applied.

However, at the time of that ruling, EDR also acknowledged that the final submitted proposal of the Agency had been provided to the Grievant. The documents initially withheld as "Confidential Governor's Working Papers" ultimately were provided to the Grievant and to the hearing officer, and therefore no adverse inference can be made with respect to those documents under any theory.

The budget reduction proposal draft documents of the Division Director and Division Business Manager did not exist, as testimony from numerous witnesses confirmed, because the proposals from OPIS where Grievant was employed, were prepared by the OPIS management, particularly Mr. D.

The notes of the Division Director from a meeting with an ExxonMobil official in 2006 did not exist, as confirmed by the testimony of the Division Director and a statement by another attendee of that meeting that no notes were taken (*See* GE 24, page 1. ("[Mr. D.] does not think any case file was generated or meeting notes were taken.")) and, accordingly, no adverse inference may be made concerning any alleged notes.

Several EWP's requested and produced by the Agency contained signatures with dates inconsistent with the dates on the front of those EWP's. However, credible testimony was provided that EWP's are reviewed as part of each employee's annual performance evaluation, which occurs in October of each year, and therefore the signatures on the EWP's are consistent with those reviews. Further,

the EWP's are not alleged to contain evidence of retaliatory intent by the Agency, and therefore no adverse inference supporting a finding of a retaliatory causal link may be made from such documents.

Documents showing the criteria that the Governor, through DPB, requested that agencies follow in preparing budget reduction proposals, and the OPIS draft proposals were ultimately provided to the Grievant and to the hearing officer.

Any adverse inferences under a theory of spoliation would apply only if the contents of the documents were not known, as when they are destroyed. *Wolfe v. Va. Birth-Related Neuro. Injury Comp. Program*, 40 Va.App. 565, 580-81, 580 S.E.2d 467, 475 (2003).

Because, as the uncontroverted testimony of Agency witnesses indicated, the Division Director and Division Business Manager made no changes to the proposals provided to them and the Senior Management and Budget Personnel did not add or eliminate any proposed items, any documents relating to the proposals that may have been in the possession of the Division Director and Division Business Manager would have been the same as those submitted to the Governor's Office. Additionally, because the Division Business Manager did not prepare any draft proposals, those requested documents did not exist and could not be provided to the Grievant. The OPIS proposals drafted by Mr. D. were provided to Grievant and are included in the record before the hearing officer.

Although Virginia law recognizes a "spoliation or missing evidence inference," (*Wolfe v. Va. Birth-Related Neuro. Injury Comp. Program*, 40 Va.App. 565, 580-81, 580 S.E.2d 467, 475 (2003)), that law treats it as a mere permissible *inference* rather than a true *presumption* (*Jacobs v. Jacobs*, 218 Va. 264, 269, 237 S.E.2d 124, 127 (1977)). *See Rahnema v. Rahnema*, 47 Va.App. 465, 626 S.E.2d 448 (2006) (footnote 12). This inference can be weighed with all of the other evidence in any case.

The documentary evidence and testimony in the record before the hearing officer establishes that the Agency considered only appropriate and legitimate non-retaliatory business reasons in preparing its budget reduction proposals. Under the facts and circumstances of this proceeding, the hearing officer declines to draw an adverse inference that some alleged documents might have contained contrary evidence. The Grievant has not proven that management destroyed documents at a time when a reasonable person in management's position should have foreseen that the evidence was material to a potential civil action, an essential element of a spoliation claim. *Wolfe, supra*, at 580-581. The record concerning the Agency's document production does not warrant an adverse inference and would not be in keeping with the Director's preference for deciding cases on the merits rather than procedural violations.

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. Department of Human Resource Management (DHRM) Policy 1.30 (the "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.

The Grievant has alleged retaliation but has failed to carry his burden of proof in this regard. 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 non-retaliatory 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 there from 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)…

To prevail on his claim of retaliation at hearing, the Grievant bears the burden of proving, by a preponderance of the evidence, that (1) he engaged in a protected activity; (2) he suffered a materially adverse action; and (3) a casual link exists between the materially adverse action and the protected activity; in other words,

that Management took a materially adverse action because he engaged in the protected activity.

The hearing officer has found above that the Grievant engaged in protected activities and that he suffered a materially adverse action. However, the hearing officer finds and decides that the Grievant has not borne his burden of proving by a preponderance of the evidence that a causal link exists between the layoff and the protected activity. The Agency, in contrast, has shown by substantial evidence that the Grievant's layoff was for legitimate budget-reduction purposes as required by the Governor's Office.

****

Pursuant to the Layoff Policy, management is given wide latitude to exercise its discretion and manage its employees. Accordingly, 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.

DECISION

The Grievant has failed to prove by a preponderance of the evidence that the Agency retaliated against him or that the Agency misapplied the Layoff Policy. Accordingly, the hearing officer denies the Grievant's requested relief and dismisses the grievance.

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. 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.

In his request to this Department for an administrative review, the grievant asserts that the true reason for his layoff was retaliatory and/or that the hearing officer's decision is inconsistent with the relevant policy. In the instant case, the hearing officer ruled that the grievant failed to prove by a preponderance of the evidence that the Agency retaliated against him or that

the Agency misapplied the Layoff Policy. It is the opinion of this Department that any concerns regarding the hearing officer's decision regarding retaliation represents an evidentiary issue. As such, this Department has no authority to intervene.

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.

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. After identifying the work that is no longer needed or that must be reassigned, agencies must select employees for layoff within the same work unit, geographic area, and Role, who are performing substantially the same work, according to the following layoff sequence:

1. wage employee(s) performing the same work (wage employees are not covered by the provisions of this policy or Policy 1.57, Severance Benefits);

2. the least senior through the most senior part-time restricted employee; and then

3. the least senior through the most senior part time classified employee; and then

4. the least senior through the most senior full-time restricted employee (if the position is anticipated to be funded for longer than 12 months); and then

5. the least senior through the most senior full time classified employee.

CONCLUSION

In the instant case, based on the hearing officer's assessment of the evidence, VDACS officials were within their rights and properly applied the provisions of the Layoff policy when they identified the grievant's position to be eliminated in order to meet the agency's budget reduction goals. Based on our review of the foregoing information, it is the opinion of this Department that the hearing officer's decision is consistent with the relevant policy.

Thus, this Department has no basis to interfere with the application of this hearing decision.

____

Ernest G. Spratley