

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9097;
Ruling Date: September 4, 2009; Ruling #2010-2359; Agency: Department of
Veterans Services; Outcome: Remanded to Hearing Officer.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Veterans Affairs
Ruling Number 2010-2359
September 4, 2009

The Department of Veterans Affairs (agency) has requested an administrative review of the hearing officer's June 18, 2009 award of attorney's fees in Case Number 9097. For the reasons set forth below, the decision is remanded for clarification.

FACTS

The grievant timely filed a grievance asserting that the agency had misapplied the state's layoff policy and retaliated against her. The grievance advanced to hearing and on June 18, 2009, the hearing officer found that the agency had misapplied the layoff policy by not considering placement options for the grievant after determining that her position should be eliminated. The decision held:

[T]he agency has shown that it acted within its discretion *in within* [sic] 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 rigidity 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.¹

Accordingly, the hearing officer ordered what *appears to be* fairly described as a conditional reinstatement. Specifically, the hearing decision held:

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.²

The hearing officer affirmed his decision in a July 14, 2009 reconsidered decision.³

¹ Hearing Decision in Case No. 9097, issued June 18, 2009 ("hearing decision") at 6-7.

² *Id.* at 7.

³ Reconsideration Decision of the Hearing Officer, issued July 14, 2009 ("reconsideration decision"). The reconsideration decision held:

DISCUSSION

The agency asserts that the hearing officer exceeded the scope of his authority when he ordered the award of attorney's fees. Specifically, the agency asserts that a hearing officer cannot award attorney's fees to an employee who prevails in a layoff case because the statute authorizing fees is limited to "discharge" cases.

This Department ruled on this issue in EDR Ruling Number 2004-901. In that ruling we held the following:

The grievance statutes provide that "[i]n grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust."⁴ For an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to her former (or an objectively similar) position.⁵ . . . In the absence of controlling court precedent to the contrary, we do not interpret the statutory term "discharge" so narrowly as to exclude all layoff situations. Indeed, "discharge" may be viewed simply as an involuntary separation from employment, including involuntary layoffs.⁶ Further, based on the particular facts of this case, this Department concludes that the award of attorney's fees was appropriate. Here, the hearing officer essentially found that the grievant was 'fired' or 'discharged,' as she was not laid off in accordance with state layoff policy, but rather terminated through a manipulation of that policy.

. . . .

He further found that [the agency] made no attempt to determine whether alternate job placement options existed for the grievant. In sum, the hearing officer found that the [agency] had violated state layoff policy

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.

Reconsideration decision at 2.

⁴ Va. Code § 2.2-3005.1(A).

⁵ *Rules for Conducting Grievance Hearings* VI(D).

⁶ See Va. Code § 40.1-27, which categorizes former employees as either "discharged" or as having "voluntarily left" their employment, the implication being that a discharged employee is one who did not voluntarily leave, for whatever reason.

by manipulating the system to reach a particular result -- the grievant's involuntary separation from employment -- an action that is, in essence, a discharge. We therefore conclude that under the facts of this case, the hearing officer did not abuse his authority under the grievance procedure by ordering the grievant's reinstatement or by awarding attorney's fees.

Thus, EDR Ruling No. 2004-901 expressly answered in the affirmative the question of whether attorney's fees are available in a layoff case. Moreover, the instant case is sufficiently analogous to that in Ruling No. 2004-901 that we believe that attorney's fees *could be* appropriate. While the agency asserts that this case did not involve a "discharge," it appears that what happened to the grievant here could be tantamount to a discharge, as was the case in Ruling No. 2004-901. Like the employee in Ruling No. 2004-901, it appears that the agency's actions may have deprived the grievant of continued employment. We state that fees *could be* appropriate because it is not clear at this time whether the agency deprived the grievant of continued employment. Only when the agency reviews whether any vacant positions were available will it be determined whether the grievant is entitled to reinstatement. If she is reinstated, based on prior precedent, she would be entitled to fees.

What is not entirely clear from the Hearing Decision is whether the fees award was conditional. The decision seems to require as a prerequisite for a fees award that the grievant accept a position identified by the agency as a placement option. Assuming that this is what the hearing officer intended, there would appear to be no error with such an award. In other words, if the hearing officer's order to reapply policy leads to a reinstatement, then an award of fees would appear appropriate.⁷ However, to the extent that the decision is to be read such that the grievant is entitled to recover fees even if no placement options are identified, then such an award would appear to be inconsistent with the *Rules for Conducting Grievance Hearings* requirement that the hearing decision contain an order for reinstatement. Because the decision is not clear as to whether the award of attorney's fees is conditional, the decision is remanded for clarification.

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.

⁷ The agency asserts that fees are not available because the decision does not contain an order for reinstatement. While it is true that the hearing decision does not appear to contain an express unconditional order of reinstatement, it clearly contains an order that could result in reinstatement. The apparent conditional nature of relief cannot be used to deny the grievant the fees to which she would otherwise be entitled upon any reinstatement. It appears that the hearing officer merely determined that the grievant should not be unjustly enriched through reinstatement if there were no vacancies available at the time of layoff; thus he seems to have made the award conditional.

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.⁸ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁰ This Department's rulings on matters of procedural compliance are final and nonappealable.¹¹

Claudia T. Farr
Director

⁸ *Grievance Procedure Manual*, § 7.2(d).

⁹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

¹⁰ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 445, 573 S.E. 2d 319, 322 (2002).

¹¹ See Va. Code § 2.2-1001 (5), 2.2-3003(G).