

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9285; Ruling
Date: January 31, 2011; Ruling No. 2011-2811; Agency: Department of
Conservation and Recreation; Outcome: Remanded to AHO.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Conservation and Recreation
Ruling Number 2011-2811
January 31, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's October 6, 2010 remand decision in Case Number 9285.

FACTS

The salient facts as set forth in Case Number 9285 are as follows:

During the summer of 2009, the Governor's Office directed that all State Agencies prepare budgets that anticipated a five, ten or fifteen percent cut in funding. In prior years, when this Agency had dealt with potential funding cuts, it had eliminated vacant positions. The Director of Human Resources for the Division of Administration testified as a witness for the Agency. Regarding this potential reduction in funds, he testified that the Department of Planning and Budget, "...wanted blood in the street; you must actually fire people..." Several witnesses for the Agency testified that they had informal discussions with the Grievant regarding whether he would be interested in retiring at this time. Because of existing state policies, he and the other potential retirees would be offered an enhanced retirement which would increase their annual retirement payments. It appears from the testimony of all of the witnesses, that the Agency was attempting to meet its required fund reductions by securing the retirements of those people who were in the position to retire and who desired to retire.

Early in this process, the Grievant's name was put forward as someone who would be willing to consider retirement. After his name was put forward, the concept of his retirement took on a life of its own. The former Director of this Agency was requested as a witness by the Grievant, but he declined to testify. Agency witnesses defined him as a micro-manager and it appears that early in this process, according to Agency witnesses, he had determined that the Grievant would be a candidate for layoff and/or retirement.

The Grievant was laid off on December 31, 2009. On February 1, 2010, the Grievant was returned to his position and he is currently working approximately thirty (30) hours per week at the same hourly pay. He is also receiving his enhanced retirement. Agency witnesses testified that he was returned to his position because there was no one else at the Agency who could perform his tasks.

Considering the requirements for age, race, or national origin, discrimination is set forth earlier in this Decision, the Hearing Officer can find no evidence that the Grievant was laid off because of his age, race or national origin. Regarding the layoff, the Hearing Officer finds no evidence that this layoff took place because of his prior use of the Grievance Procedure, EEOC filings, EEO filings, court cases or FOIA filings. The question before the Hearing Officer is whether or not state policy was misapplied. In construing the state policy, considering the documentary evidence and the oral testimony, the Hearing Officer finds that the Grievant has not borne [sic] his burden of proof to establish that state policy was misapplied in this matter. The Hearing Officer heard from several witnesses, including the Grievant, who spoke of informal conversations that took place at various locations in the Agency regarding the pending reduction in Agency funds and the need to either terminate employees or to have employees accept a layoff with enhanced retirement benefits. The Hearing Officer finds that it is entirely credible that the Grievant entered into conversations with fellow employees and with members of the management of this Agency that he would certainly consider the enhanced retirement package that was going to be offered in order to reduce head count at this Agency without the need to fire employees. The Hearing Officer can find no misapplication of policy for the Agency to take that into consideration when creating a list of people to lay off in this matter. Once that decision was made and announced, the burden is on the Grievant to establish that his name was on that list by way of a misapplication of state policy or by way of the Agency retaliating against him or by way of the Agency discriminating against him because of his age, race or national origin. The Hearing Officer finds no credible evidence from the Grievant that any of those took place.¹

Based upon the preceding facts and conclusions, the hearing officer found that the grievant had not met his burden of proof.² The hearing officer subsequently upheld his original decision in a May 5, 2010 reconsideration decision.³

Thereafter, the grievant challenged the hearing officer's decision by requesting an administrative review by the Director of this Department and the Director of the Department of Human Resource Management (DHRM). In EDR Ruling Number 2010-2619, this Department

¹ Hearing Decision in Case No. 9235 and 9285, issued April 8, 2010, ("Hearing Decision") at 1-17 (footnotes omitted).

² Hearing Decision at 18.

³ Hearing Decision in Case No. 9235 and 9285, issued May 5, 2010, ("Reconsideration Decision") at 2.

remanded Case Number 9285 to the hearing officer for clarification. More specifically, this Department concluded:

The grievant asserts that the agency improperly selected him for layoff. He notes, as did the hearing decision, that neither his immediate supervisor nor the Division Director recommended his position for elimination. The grievant's request for administrative appeal asserts that the hearing decision erroneously upholds the agency's selection of his position for layoff on the basis of informal conversations/gossip that took place in the men's room. Indeed, the hearing officer's determination that the grievant failed to prove a misapplication of policy appears to have been based upon his conclusion that it was appropriate for the agency to consider the grievant's informal conversations about enhanced retirement benefits as a factor in determining who should be laid off.⁴ This question is ultimately a policy question and the grievant has appealed to the Director of the Department of Human Resources Management. However, the *Rules for Conducting Grievance Hearings* requires that hearing decisions contain "the findings of fact on material issues and the grounds in the record for those findings."⁵ Here, the hearing decision, while quoting specific provisions of the applicable Layoff Policy 1.30,⁶ does not contain the grounds in the record for the hearing officer's apparent determination that the grievant failed to prove that those provisions were misapplied.

More importantly, the substitution provision of Policy 1.30 seems to address employees who "request" to be considered as substitutes, not those who speculate as to whether they may be interested in enhanced retirement benefits. The hearing officer has not explained how he reached his conclusion that policy allows an agency to use informal discussions to determine who shall be laid off or what evidence or other grounds supports this conclusion. Accordingly, this decision is remanded for further clarification as to the grounds for this finding.⁷

In response to EDR Ruling No. 2010-2619, the hearing officer concluded the following:

In reviewing his notes regarding this matter pursuant to this Request by EDR, the Hearing Officer finds that the Grievant, in his direct testimony, stated that the Human Resource Director of the Division of Administration, "gave me a choice of layoff package or retirement package."

When he was cross-examined, the Grievant stated that he, "refused the enhanced retirement package." A witness called by the Grievant, the Operations Director of the Division of State Parks, stated that, "this layoff was based on

⁴ Hearing Decision at 17.

⁵ *Rules for Conducting Grievance Hearings*, V (C).

⁶ Hearing Decision at 15-16.

⁷ EDR Ruling No. 2010-2619 (footnotes omitted).

people who said that they wanted to be laid off or retire.” She was indicating that the Grievant had stated or indicated that he wanted to be laid off or retire.

The Human Resource Director for the Division of Administration was called as a witness for the Agency. He directly stated that the Grievant told him that, “the enhanced retirement package looked good to [the Grievant].” Upon cross-examination, this same witness stated that the Grievant told him that, “an enhanced buyout with a subsequent wage job would be good for [the Grievant].”

From the totality of the oral and written testimony presented to the Hearing Officer in this matter, it was clear that the Grievant had numerous discussions, both formal and informal, regarding enhanced retirement. It was also clear to the Hearing Officer that this Grievant signaled to management that he would accept the enhanced retirement package, particularly if it was followed up with a wage position. Of course, as it turns out, that is exactly what happened in this matter. The Grievant accepted the enhanced retirement package and a subsequent wage position.

When one considers that, in this matter, the Grievant had the burden of proof, the Hearing Officer does not find a violation of any State policy where the Hearing Officer has determined that the Grievant signaled to management that he wished to accept the enhanced retirement that was being offered. It is highly illogical to assume that the Grievant can signal his acceptance of a package, indeed accept the package, and then grieve the package.

Accordingly, the Hearing Officer finds no reason to change his Decision as originally rendered on April 8, 2010.⁸

In an October 18, 2010 decision, the Director of the DHRM also remanded Case No. 9285 to the hearing officer for further clarification. More specifically, the DHRM decision states:

The DHRM cannot determine from the summary of the evidence presented in the hearing decision whether the layoff of the grievant was “position or function based” rather than “personalized.” Therefore, we remand this decision to the hearing officer so he may clarify what steps the agency took to ensure that the layoff was either “position or function based”.⁹

The hearing officer issued a response to the DHRM Ruling on November 18, 2010. In his November 18th decision, the hearing officer states:

⁸ Decision of Hearing Officer, Case No. 9285, issued October 6, 2010 (“Remand Decision in response to EDR”) at 2.

⁹ Policy Ruling of the Department of Human Resource Management, issued October 18, 2010 (“DHRM Ruling”) at 15.

The burden of proof in this matter was upon the Grievant to show, by a preponderance of the evidence, that the relief he seeks should be granted. Said another way, the burden was on the Grievant to prove that the Agency misapplied policy in this matter. The appropriate policy is DHRM Policy 1.30, Layoff. The Grievant did not present sufficient evidence before the Hearing Officer that would allow the Hearing Officer to determine whether or not the layoff was “position or function based.” Indeed, the Hearing Officer need not even reach that technical determination.

When considering the totality of all of the evidence presented before the Hearing Officer, both the Grievant’s and the Agency’s, and in particular when considering the demeanor and character of the witnesses testifying, the more important finding was as follows:

...The Hearing Officer finds that it is entirely credible that the Grievant entered into conversations with fellow employees and with **members of the management** of this Agency that he would certainly consider the enhanced retirement package that was going to be offered in order to reduce head count at this Agency without the need to fire employees. (Emphasis added)

The preponderance of the evidence presented to the Hearing Officer was that this Grievant fully understood the retirement package that was being offered to him and entered into it freely, and fully intended to accept it. Only after the fact, did this Grievant determine that, for reasons not presented at the hearing, he did not wish to be retired. The Hearing Officer can find nothing in Policy 1.30 that would require an Agency, after it had reached a consensual agreement with an employee to enter into an enhanced retirement package, to then be forced to comply with all of the technical requirements of Policy 1.30. In this matter, the Hearing Officer finds that the Grievant freely and fully entered into an enhanced retirement package, and only after the fact did he decide to complain. Policy 1.30 simply does not appear to require an Agency to fully justify a layoff when an employee has voluntarily and consensually asked for and received an enhanced retirement.¹⁰

This Department will now address the grievant’s request for administrative review of the hearing officer’s Remand Decision in response to EDR.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions ...

¹⁰ Decision of Hearing Officer, Case No. 9285, issued November 18, 2010 (“Remand Decision in response to DHRM”) at 1-2.

on all matters related to procedural compliance with the grievance procedure.”¹¹ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.¹²

In his request for administrative review, the grievant challenges the hearing officer’s findings with regard to the grievant’s alleged request to be laid off and receive the enhanced retirement package. Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹³ and to determine the grievance based “on the material issues and grounds in the record for those findings.”¹⁴ 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, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

In this case, to determine who would be laid off and to avoid terminating employees if possible, the agency created a list of employees that apparently wanted to be laid off or retire and receive the enhanced retirement benefits.¹⁵ The grievant’s name was on this list. However, the grievant asserts that he did not want to be laid off and that contrary to the hearing officer’s findings, he did not signal to management that he wished to accept a layoff with the enhanced retirement package that was being offered. In other words, the grievant argues that the inclusion of his name on the list of employees that wanted to be laid off and receive the enhanced retirement benefits was erroneous. Accordingly, the outcome of this case would appear to depend on whether the evidence supports the conclusion that the grievant desired to be on the list of employees to be laid off.

If we are to assume for this ruling only that the hearing officer is correct that policy allows one to be laid off if he or she requests to be laid off,¹⁶ the hearing officer has failed to identify what record evidence supports his finding that the grievant definitively wanted to be on

¹¹ Va. Code § 2.2-1001(2), (3), and (5).

¹² See *Grievance Procedure Manual* § 6.4(3).

¹³ Va. Code § 2.2-3005.1(C).

¹⁴ *Grievance Procedure Manual* § 5.9.

¹⁵ See Hearing Decision at 15 and Remand Decision in response to EDR at 2.

¹⁶ In his Hearing Decision, the hearing officer states:

The Hearing Officer finds that it is entirely credible that the Grievant entered into conversations with fellow employees and with members of the management of this Agency that he would certainly consider the enhanced retirement package that was going to be offered in order to reduce head count at this Agency without the need to fire employees. The Hearing Officer can find no misapplication of policy for the Agency to take that into consideration when creating a list of people to lay off in this matter. Once that decision was made and announced, the burden is on the Grievant to establish that his name was on that list by way of a misapplication of state policy or by way of the Agency retaliating against him or by way of the Agency discriminating against him because of his age, race or national origin.

Hearing Decision at 17. Whether such a list is permissible under policy is questionable given the DHRM Policy Ruling in this matter which appears to indicate that all layoffs must be position based. See DHRM Ruling at 15.

the list or otherwise requested to be laid off in order to receive the enhanced retirement package. The evidence certainly supports a finding that the grievant indicated he may be “interested” in the enhanced retirement package.¹⁷ However, while the evidence supports that the grievant indicated interest in the enhanced retirement package, the hearing decision fails to state where the record evidence supports the apparent finding that the grievant definitively told anyone with the authority to place him on the list that he wanted to be on the list of employees to be laid off so that he could receive such benefits. In fact, this Department’s review of the hearing recording revealed evidence to the contrary. More specifically, during his hearing testimony, the HR Director testified that the grievant was given a due date in which to definitively notify the agency whether he wanted to be laid off and accept the enhanced retirement package, but he failed to do so.¹⁸

Moreover, the hearing officer’s apparent reliance on the grievant’s eventual acceptance of the enhanced retirement package to support his contention that the grievant wanted to be laid off so that he could receive the enhanced retirement package is misplaced. The grievant’s request for, and acceptance of, the enhanced retirement benefits appears to have occurred only after he was already told he was on the list of employees to be laid off.

Based on the foregoing, the hearing officer has failed to identify what record evidence supports his findings that the grievant somehow “volunteered” to be laid off and accept the enhanced retirement package or that there was some sort of “consensual” agreement in this regard thereby making the inclusion of his name on the list of employees to be laid off appropriate. A mere assertion of interest in the enhanced retirement package is not tantamount to a consensual agreement between the grievant and the agency to place the grievant on the list of employees to be laid off and to receive such benefits. As such, the decision is remanded to the hearing officer for further consideration as to the grounds in the record for these findings.

CONCLUSION, APPEAL RIGHTS, AND OTHER INFORMATION

This case is remanded to the hearing officer for further clarification and consideration in Case Number 9285 as set forth above. Both parties will have the opportunity to request administrative review of the hearing officer’s reconsidered decision on any other new matter addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).¹⁹ Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.²⁰

¹⁷ It is undisputed that the grievant told a co-worker that he was interested in the enhanced retirement package. *See* Grievant’s “Request for Reconsideration of the Hearing Officer’s Statements and Decision of October 6, 2010” dated October 19, 2010. Moreover, the HR Director testified that the grievant told him in July 2009 that he may be interested in enhanced retirement but that he would want to see some specific information regarding the enhanced retirement and what it would mean for him specifically. Hearing Recording, Case No. 9285.

¹⁸ Hearing Recording, Case No. 9285, Testimony of HR Director.

¹⁹ *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.

²⁰ *See Grievance Procedure Manual* § 7.2(a).

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.²¹ 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.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³

Claudia T. Farr
Director

²¹ *Grievance Procedure Manual* § 7.2(d).

²² Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²³ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).