Issues: Misapplication of Layoff Policy and Retaliation; Hearing Date: 06/02/09; Decision Issued: 06/09/09; Agency: DOE; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9080; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: EDR Ruling Request received 06/22/09; Outcome pending; Administrative Review: DHRM Ruling Request received 06/23/09; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9080

Hearing Date: June 2, 2009
Decision Issued: June 9, 2009

PROCEDURAL HISTORY

The grievant filed a timely grievance after being removed from employment by layoff in November 2008. Following failure of the parties to resolve the grievance at the third resolution step, the agency head declined to qualify the grievance for a hearing. Subsequently, the grievant requested the Director of EDR to qualify the grievance for a hearing. In a qualification ruling, the EDR Director concluded that a sufficient question of possible misapplication of policy or retaliation remained such that the grievance should be qualified for a hearing. (Ruling No. 2009-2198, *Qualification Ruling of Director*, April 2, 2009.)

The Department of Education ("agency") has employed the grievant for five years prior to the layoff. Grievant timely filed a grievance to challenge the agency's action. On April 27, 2009, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on May 4, 2009. The hearing was scheduled at the first date available between the parties and the hearing officer, June 2, 2009. The grievance hearing was held on June 2, 2009, at the agency's headquarters office, lasting more than twelve hours. At the conclusion of the grievance hearing, and because of the complex issues involved, the parties agreed to submit their closing argument and authorities in writing by June 5, 2009. The parties' written submissions were received on June 5, 2009, and made a part of the hearing record. Because of the necessary scheduling arrangements and extensive testimony, I find good cause to extend the prescribed 35-day time period for the hearing officer to conduct the hearing and issue a decision.

The grievant initiated his grievance on November 7, 2008, to challenge the elimination of his position and subsequent layoff. From a mandated budget reduction measure, the grievant's position was identified for elimination. The Superintendent of Public Instruction was notified that the agency would experience a 15% cut in general funds for Fiscal Year 2009. The superintendent requested each assistant superintendent to identify functions within their units that could be eliminated as well as situations where the number of staff members assigned to a function could be reduced. Among those functions identified for potential reduction within the

Division were the assessment specialists assigned to the development of the English reading tests, which included the grievant and another full-time employee. Because the grievant had less seniority (5 years) than the other full-time reading specialist (9 years), the grievant was laid off.

A part-time employee (whom the agency describes as primarily involved with English writing tests but who nevertheless provided assistance to the reading assessment specialist) was initially not targeted for layoff because of the perceived difference in duties assigned to this position. Based on advice from DHRM, the employee in the part-time position was subsequently laid off because the duties of the position were in the broader area of English. Because this part-time position was still necessary for the unit to carry out the duties in the development of the writing of tests, the part-time position was not eliminated. The agency then offered the part-time position to the grievant, which he declined.

The grievant asserts that the true reason for his layoff was retaliation for voicing concerns about alleged deficiencies in Standards of Learning (SOL) test development, construction and production for the Commonwealth, performed by agency testing contractors. He claims that his layoff is essentially the last act in a series of retaliatory actions carried out against him and that allegations leveled against him by agency contractor employees regarding his purported behavior are "slanderous," and "purposeful[] distort[ions]" that are part of a "smear campaign."

In addition, in the latter part of the summer of 2008, an employee from an agency contractor accused the grievant of speaking to her on July 30, 2008, in an accusatory and intimidating fashion about the testing materials being developed for the agency. An employee from a sub-contractor purportedly overheard the conversation and seems to have largely agreed with the contractor employee's version of events. While the grievant agrees that a conversation occurred, he has a very different view of how that conversation transpired and contends that the contractor employee's inability to satisfactorily respond to the grievant's questions regarding issues such as lack of control over test versions, prompted embarrassment. The grievant asserts that this embarrassment served as the true impetus for the contractor employee's complaint against him.

After the contractor employee's complaint, the agency apparently approached the sub-contractor to gather information about any other allegedly inappropriate behavior by the grievant with any of the sub-contractor's staff. As a result, the agency was presented with an approximately year-old memorandum, dated August 13, 2007, that outlined several incidents including but not limited to the grievant (1) purportedly making disparaging comments about his supervisor to the sub-contractor, (2) giving coupons to a sub-contractor employee but also referring to that employee as a "bastard," and (3) replying to a question of how he was doing by saying "same old shit."

On or about September 12, 2008, the grievant was presented with documents that outlined the contractor's and sub-contractor's employees' versions of the July 30, 2008, incident. The grievant was also provided a copy of the sub-contractor's August 13, 2007, memorandum. He was invited to respond to the documents and was told that his response would be reviewed with his management team to determine what, if any, additional actions may be necessary. The grievant was initially told to provide an immediate response to the complaints.

However, the agency initially refused to provide a copy of the complaint documents, and the grievant made a request under the Freedom of Information Act and obtained the documents that way. The grievant was later allowed to provide a written response, which he did on October 10, 2008. He was notified that he was being laid off a week after he provided his October 10th response, in which (1) he asserted that the charges of misconduct leveled against him by contractor employees were part of a "smear campaign," and (2) questioned whether the agency intended to retaliate against him "for voicing my concerns about the quality of test development and production cycles."

APPEARANCES

Grievant
Counsel for Grievant
Two Witnesses for Grievant including Grievant
Representative for Agency
Counsel for Agency
Five Witnesses for Agency including Representative

ISSUES

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

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

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Grievant.* Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act

balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

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

The grievant was employed as a reading assessment specialist at the agency from March 2003 to November 2008. As a reading assessment specialist, the grievant reviewed reading test items and test forms for grades 6-8 and End-of-Course ("EOC") Standards of Learning (SOL) tests. EOC tests are tests that are required for graduation. According to grievant's Employee Work Profile ("EWP") (grievant's exh. 4), the purpose of the position was to "assist in [the] development of program materials supporting the implementation of the SOL assessment program." Specifically, according to his EWP, the Grievant had the responsibility to "assist in the development of SOL test items and forms through work with other staff members and the testing contractor." The EWP also states that the Grievant was required to "routinely inform supervisors and colleagues of needs and issues," and to "maintain collaborative and collegial working relationships with supervisors, co-workers, clients, contractors, and/or customers, and use effective oral and written communication." The agency has two contractors for SOL test development. With assistance from the agency, the primary contractor develops the test forms and the sub-contractor develops the test items (test questions).

By all accounts, the grievant was a proficient reading assessment specialist. His last evaluation, prior to his layoff rated him as a "Contributor." Specifically, the evaluation dated September 27, 2007 stated that the Grievant "assisted in the development of SOL test items and forms as follows: (1) reviewed and edited passages and items submitted by the company prior to summer meeting to ensure conformity with basic rules of item construction, regarding the appropriateness of syntax, word choice at grade level, and cognitive degree of difficulty for EOC and grades 3-8; (2) reviewed and made suggestions for the construction of grade 8 and EOC cores; (3) prepared memos for passage and item requirements at the company; and (4) informed supervisors and colleagues of needs and issues.

The grievant's superiors rated him similarly in previous years. The grievant's October 17, 2006 evaluation shows that he "reviewed and edited passages and items submitted by [the sub-contractor] . . . . regarding the appropriateness of syntax, word choice by grade level, and cognitive degree of difficulty." In 2005, the grievant was again rated a "Contributor" when he:

(1) made extensive revisions to Social Studies items and submitted 75 pages to [previous contractor]; (2) worked to resolve issues surrounding test irregularities; (3) reconciled the item and/or data books with [previous contractor] representative; and (4) informed supervisors and colleagues of needs and issues.

In addition to assisting in the development of SOL reading tests, the grievant served as a liaison for the agency during summer SOL Content Review Committee meetings. The purpose of these meetings was to review and approve new test items by K-12 teachers and representatives from the contractors. The grievant and other agency employees served as liaisons for the committees.

During the summer of 2008, the Grievant approached a contractor employee to discuss an issue with the test development process. After the interaction, the contractor employee was visibly upset, even 1-1/2 hours after the incident. A sub-contractor employee reported the incident to the agency's director of test development, who then brought the matter to the attention of his supervisor, the assistant superintendent and also to the agency's human resource office. The agency asked both contractors to provide in writing additional information about the grievant's interactions with them. The grievant was notified of the written information from the contractors on September 12, 2008, and, he responded in writing on October 10, 2008.

Meanwhile, on September 2, 2008, the agency received notice from the governor's chief of staff that all state agencies would have to submit budget reduction plans of 5%, 10%, and 15%. (Agency's exhibit 5.) The memorandum stated that "[i]t is important to focus on targeted cuts rather than across-the-board reductions." On October 8, 2008, the agency was notified that it would have to reduce its budget by 15%. (Agency's exhibit 7.) The 15% budget reduction required the agency to layoff personnel.

On October 9, 2008, the assistant superintendent identified employees within her division that she recommended for layoff. The grievant and another employee were reading assessment specialists. A part-time employee was a writing assessment specialist, even though she also assisted in reading assessment when necessary. The grievant was among the four employees that the assistant superintendent recommended for layoff.

The superintendent received layoff recommendations from each assistant superintendent and made the first layoff decisions October 14, 2008. However, that list did not meet her target budget reduction. Therefore, the superintendent added to the initial list to establish a final list of employees to be laid off on October 16, 2008.

The grievant alleged that the agency's motivation for laying him off was retaliatory. Specifically, the grievant alleged that the agency retaliated against him because of the October 10, 2008 memorandum, in which he responded to the assertions of the contractors and his interaction with the contractor employee during the summer SOL Content Review Committee meetings. The October 10, 2008, memorandum also alleged that the agency wished "to silence" the grievant for voicing his concerns about the quality of test development and production cycles at the contractor and sub-contractor. The grievant further alleged that the fact that the agency initially laid him off before the part-time employee is evidence of pretext for retaliation.

To establish a *prima facie* case of retaliation, the grievant must show that: (1) he engaged in protected activity; (2) he suffered a materially adverse employment action; and (3) a causal

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

The grievant may have made many statements and took many actions throughout his tenure at the agency, but every statement or action does not protected activity make. It is therefore important to distinguish which acts and statements the grievant made and to whom to correctly determine whether the grievant actually engaged in protected activity, and, if so, when. The evidence showed that what the grievant claimed to be "complaints" and protected activity are merely examples of the grievant simply doing his job.

The grievant did not engage in protected activity by pointing out errors in the test forms and test items. Throughout the hearing, the grievant stated, that he pointed out errors on test forms and in test items regularly. The grievant also put forth evidence that he revised the reading passages because he did not think that some of the reading passages were of sufficient quality. Generally, the grievant was critical of some of the work product by the contractors. As clearly indicated through the grievant's own testimony and his EWP, however, the express purpose of an assessment specialist was to review and edit test forms and test passages and items. Grievant was merely doing his job when he told his supervisor and contractors about errors in test forms and test items, and as such, was not engaging in protected activity.

Similarly, the grievant did not engage in protected activity when he raised the issue of whether the reading passages and test items were "too difficult" or "too easy." Again, that was his job. His supervisor evaluated him on his ability to determine whether the passages and test items conformed to the "cognitive degree of difficulty" for EOC and grades 3-8. His supervisor also noted that he had made extensive revisions to a test produced by the prior contractor and that he had resolved issues surrounding test irregularities under the prior contractor. For his efforts in these areas of responsibility, his supervisors and management gave him a "Contributor" rating. (Grievant's exhibit 4.)

The grievant asserts that his cumulative activities in zealous pursuit of his job responsibilities have led to the agency's complicity with the contractor and sub-contractor for his dismissal through layoff. I find that the grievant has not borne his burden of proving such action by the agency. The grievant provided absolutely no evidence whatsoever of the agency taking steps to hide alleged deficiencies in its student assessment program. The grievant pointed to a high achievement gap between minorities and whites as evidence of a "cover-up," but he provided no response to the uncontroverted fact that the achievement gap is well-known throughout the country and exists in all states. He provided no explanation as to how the existence of such achievement gap, which is the subject of journal articles, research articles, and

think tank reports, prove that the agency is part of a "cover-up" to hide the absence of student achievement in Virginia.

In contrast, the agency put forth evidence of the public process of establishing cut scores and the fact that the Board of Education ("the Board"), a board established in the Virginia Constitution, sets policies related to SOL tests and student assessment. The superintendent even testified that the Board and the agency are working to improve the reading skills of Virginia's students with a literacy plan that has been openly debated at public meetings of the Board. The grievant admitted that he never (1) called the state's fraud, waste, and abuse hotline; (2) contacted the press; or (3) contacted any public official about his concerns.

The grievant did not engage in protected activity when he brought issues related to test development to the attention of his supervisors and the assistant superintendent because it was his job to do so.

The grievant did not engage in protected activity by bringing forth issues and concerns related to SOL test development. Again, the grievant was required to "inform supervisors and colleagues of needs and issues." Furthermore, the grievant's self-assessment from 2006 shows that the he knew that he simply was performing his duties as expected when he brought forward issues of concern to his supervisors. In the Employee Self-Assessment Form, the grievant wrote:

> Routinely informing supervisors and colleagues of needs and issues. When I sense an assessment issue may require attention, I always report my concern to superiors in the office, whether it's an issue of the statistical validity of cores or gaps in vendor deliveries or some other omission by the vendor. (Grievant's exhibit 4.)

Because informing supervisors and colleagues of needs and issues was a requirement of the grievant's position, his comments related to SOL test development and the tests themselves cannot be considered protected activity. The grievant's self-assessment, his EWP, and comments from his immediate supervisor contained in grievant's evaluations make clear that the grievant and his supervisors understood that the grievant was required to bring forward issues about potential problems with the SOL tests to his supervisors.

The grievant alleges that the contractors retaliated against him after he noted a problem with version control to a contractor employee on July 30, 2008. He further alleges that the written statements from the contractors following that incident amounted to "retaliation for my calling attention to flaws in [the contractor's] production matrix, raising concerns about certain psychometric practices and lapses in the quality of item and passage development by [sub-contractor]." (Grievant's memorandum of October 10, 2008.)

Of course, before one can be retaliated against, one has to engage in protected activity. Grievant's behavior does not constitute protected activity. The grievant spoke to a contractor employee about what he considered to be the employee's job. The grievant was not raising employee concerns to his supervisors and management, as required under Va. Code § 2.2-3000, nor was it the type of activity listed under Va. Code § 22-3004(A).

The grievant's comments to the contractor employee on July 30, 2008, ultimately lead to a disciplinary counseling memorandum. Although described by the grievant as a benign interaction, testimony from the director of test development revealed that the contractor

employee was shaken by the incident. Testimony from the grievant's own witness, the part-time co-worker, revealed her observation that the grievant often would be demeaning, insulting, and condescending to the contractor employees. She also testified that he would raise his voice at the contractor employees. Although no direct witness to the encounter, other than the grievant, testified at the grievance hearing, the weight of the evidence shows that the grievant did, in fact, approach the contractor employee in a manner upsetting to the contractor employee. Regardless of how this encounter is characterized, I find this not to be a protected activity.

The grievant did not engage in protected activity in 2006 when he mentioned the JLARC study involving the Agency during an Agency staff meeting. The grievant alleged and the agency acknowledged that the grievant mentioned that the Joint Legislative Audit and Review Commission ("JLARC") conducted a study about the procurement process for the contractor's state contract with the agency. That study began on October 25, 2005 and JLARC issued the report on February 1, 2006." (Grievant's exhibit 6.) The JLARC study and its conclusions were of public record, yet the grievant testified that the study was news to him and others in his unit at the time. Reporting something that is a matter of public record may not be considered a protected activity. The clear purpose of Va. Code § 2.2-3004(A) is to ensure that employees were able to bring forward allegations of fraud, waste, or mismanagement, or to report violations or other problems in order to stop such behavior and to take corrective steps. The grievant could not have believed that he was doing so by mentioning the mere existence of a public report that had been issued, a year before his statement.

The grievant may have engaged in protected activity when he submitted his written response to the contractor complaints on October 10, 2008. The grievant alleged that the agency wished to silence him, and alleged that it was retaliating against him. More importantly, the grievant alleges on his grievance form that the agency retaliated against him for the October 10, 2008 memorandum.

Considering the grievant's October 10, 2008, memorandum as a protected activity, the issue now is whether the grievant suffered a materially adverse employment action. The grievant was laid off pursuant to the implementation of a layoff process that followed a 15% budget reduction. The effective date of grievant's layoff was November 7, 2008. The grievant voluntarily retired, effective December 1, 2008, under the enhanced retirement plan. The grievant's layoff satisfies the second prong of a *prima facie* case of retaliation.

The Grievant has failed to prove a causal connection between the protected activity and the materially adverse employment action. The agency proved with uncontroverted evidence that the initial recommendation to lay him off occurred on October 9, 2008. The assistant superintendent testified that she made the recommendation to the superintendent to lay off the grievant along with three other employees within her division on October 9, 2008. Agency's Exhibit 11 reflects the assistant superintendent's annotations on a spreadsheet containing a list of full-time employees. The date on Exhibit 11 is October 1, 2008. The footnote on Exhibit 11 shows that the document was printed on October 9, 2008. On the Exhibit, the assistant superintendent placed an asterisk next to the names of the employees she recommended for layoff. In fact, all the individuals whose names were asterisked were recommended for layoff and ultimately laid off from their positions. The assistant superintendent also testified that she sent an email to the agency's head, the superintendent, on the evening of October 9, 2008, to notify her that she had made her decisions about whom she would recommend for layoff.

Moreover, the assistant superintendent did not receive the October 10, 2008, memorandum until October 14, 2008, at the earliest. Because the assistant superintendent decided to recommend the grievant for layoff prior to the protected activity (his October 10, 2008, memorandum), the grievant cannot prove causation.

The grievant also cannot prove a causal connection between the protected activity and the materially adverse employment action if the hearing officer uses the date of the final, layoff decision, made by the agency superintendent. The superintendent made the "first cut" of layoff decisions on October 14, 2008. After she recognized on October 15, 2008, that additional layoffs were necessary to meet the budget reduction of over $4 million, she added employees to the layoff list. The superintendent testified that the grievant was on her initial list for layoff.

Although the final layoff decision was made after October 10, 2008, the grievant cannot prove causation because the superintendent was not aware of the grievant's October 10, 2008 memorandum. Furthermore, the superintendent provided uncontroverted testimony that she was only vaguely aware of the incident that prompted the memorandum. This matter therefore, is unlike that in *McDonald v. Rumsfeld*, 166 F.Supp.2d. 459, 464-465 (E.D. Va. 2001). In *Rumsfeld*, the court looked beyond the ultimate decision-maker to determine whether ultimate decision may have been tainted by another supervisor's retaliatory intent, if the supervisor possessed leverage or exerted influence, over the ultimate decision-maker. Even if the superintendent knew about the October 10, 2008, memorandum, that is not sufficient proof of retaliation. *See Hughes v. Bedsole*, 48 F.3d 1376, 1.387 (4th Cir, 1995) ("mere knowledge on the part of an employer that an employee . . . has flied a discrimination charge is not sufficient evidence of retaliation . . . ."), cert. denied, 516 U.S. 870, 116 S.Ct. 190, 133 L. Ed. 2d 126 (1995).

Here, the superintendent testified that she made an independent decision about which employees would be laid off after she received the recommendations from all of her assistant superintendents. As she stated during her testimony, she knew the organizational chart and felt confident that she knew how best to meet her target based on all of her years at the agency. She also testified that the agency was under political pressure to reduce the number of employees in assessments because of the existence of the contractor's contract and rising assessment costs to explain why the area of assessments was hit harder than other functional areas. Therefore, even assuming that the assistant superintendent made the recommendation to lay off the grievant with retaliatory intent, the grievant still has not proved causation because the superintendent made her final decision independently and without any knowledge of the grievant's protected activity.

Throughout the hearing, the grievant stated that he routinely made "complaints" about the work products of the contractor and sub-contractor. What the grievant now categorizes as complaints was simply a job requirement. Therefore, the hearing officer finds that the grievant has not met the requisite proof of retaliation.

As the agency argues, if the grievant had made a *prima facie* case of retaliation, the agency merely had to proffer a legitimate, non-discriminatory reason for the layoff decision, which it did. In cases where a plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the agency to articulate some legitimate, nondiscriminatory reason for the agency's action. *See McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802, 803 (1973). The agency needs only to proffer a legitimate, non-discriminatory reason; it is not required to prove it. Put another way, the burden is one of production, not persuasion; it "can involve no credibility

assessment." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993). The burden of proof is at all times with the grievant. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). (The ultimate burden of persuading the tier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff).

The agency maintains that the grievant was laid off as part of a 15% budget reduction. The Governor required certain state agencies to reduce their budgets by 15%, and the chief of staff's memorandum of September 2, 2008, details the requirement for all state agencies to submit budget reduction plans of 5%, 10%, and 15%. The agency superintendent's uncontroverted testimony revealed that she received notice that the agency would have to reduce its budget by 15%, or $4,128,727, on October 8, 2008. She also provided uncontroverted testimony that layoffs were unavoidable with a 15% budget reduction. She also stated that had her assistant superintendents not planned for possible layoffs prior to October 8, 2008, they were not doing their jobs.

The grievant alleged, however, that the agency's reason for laying him off is simply pretext for retaliation. It is the grievant's burden to show by a preponderance of the evidence both that the reason was false and that retaliation was the real reason for the agency's action. *See Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 143 (2000); see also *St. Mary's Honor Center* at 512, n. 4. To determine that the reason is false, the grievant must show that the agency's proffered reason is "unworthy of credence." *St. Mary's Honor Center*, 509 U.S. 502 at 517; *Burdine*, 450 U.S. at 256. The grievant failed to make this showing. Further, even a rejection of the agency's proffered reason does not compel judgment for the grievant; it merely permits it. *See St. Mary's Honor Center*, 509 U.S. 502 at 511.

The grievant attempted to show that the agency's proffered reason for its action was pretextual because the agency laid him off instead of a part-time employee who should have been laid off first. In short, the grievant argued that the agency's proffered reason is pretext for retaliation because the agency misapplied or unfairly applied the Commonwealth's layoff policy, DHRM Policy Number 1.30. The grievant's argument, however, must fail because he has not shown that the agency's reason is unworthy of credence.

The agency acknowledged its mistake and gave a reasonable explanation for the mistake. The agency provided evidence to show that employees, supervisors, managers, the agency head, and even the United States Department of Education consider reading and writing to be two distinct and separate functions. The grievant's own witness, the part-time employee, detailed the differences between the two assessment tests. The superintendent testified that under No Child Left Behind ("NCLB"), reading and writing are considered to be different, so much so that NCLB does not accept writing tests to satisfy the federal requirement for reading. Although it was wrong according to the layoff policy, the agency credibly believed that reading and writing assessments were different functions. This belief led the assistant superintendent to fail to consider the part-time employee for layoff. With two employees in reading assessment and one employee in writing assessment, the assistant superintendent recommended layoff for the least senior employee in reading assessment, and that employee was the grievant. However, the agency corrected its mistake by laying off the part-time employee and offering the Grievant the part-time position.

The grievant also attempts to show retaliatory intent by arguing that the agency treated him unfairly after receiving a complaint about the summer 2008 incident involving a contractor

employee. As the grievant puts it in his October 10, 2008 memorandum, the agency was complicit with the contractor in pursuing the complaint. He further alleged that the agency wanted to "silence" him for voicing his concerns. The agency explained why it wanted to get the complaints from both contractors in writing. The assistant superintendent explained that she wanted to get all of the issues out at the same time to avoid having to revisit the issue later. What the grievant characterizes as slanderous and a smear campaign was a mere personnel issue, and handled in the same way that the agency handled similar personnel issues.

The agency did not handle the personnel complaint well, and it did not even provide a copy of the complaint letter to the grievant until the grievant filed a Freedom of Information Act request for it. Only then did the agency provide to the grievant a copy of the complaint letter and allow him to provide his written response to it. This action by the agency clearly sent a suspicious message to the grievant, all the while the agency was considering his position for layoff. While the two courses of action were somewhat concurrent, I find no connivance between the two, even though it is understandable why the grievant sees a connection. Notably, I find the agency's course of disciplinary action, albeit rather misdirected in such issues as refusing to give the grievant copies of the complaint documents, to be corroboration of the agency's lack of retaliatory intent, rather than proof thereof. Were the agency intent on effecting a retaliatory layoff of the claimant, there would be no rational basis to proceed with a distracting disciplinary inquiry that obviously creates fodder for a grievance. Therefore, I find that the disciplinary inquiry was independent of the layoff procedure.

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.

The grievant is sincere in his passionate pursuit of his job duties, and the agency noted his skilled contributions throughout his employment. The timing and course of the disciplinary inquiry (such as the agency refusing to provide the complaint documents) certainly raised questions and doubts in the grievant's mind regarding a correlation between the two procedures. However, based on the evidence provided, the grievant did not prove by a preponderance of the evidence that the agency misapplied or unfairly applied the layoff policy (beyond that which the agency self-corrected). The agency self-corrected the misstep in the layoff sequence by laying off the part-time employee and offering that position to the grievant.

In conclusion, the Grievant has not proven his case for either retaliation or misapplication or unfair application of policy by a preponderance of the evidence. As such, all relief is denied.

DECISION

For the reasons stated herein, I find that the grievant has not borne his burden of proving that the agency's layoff policy was misapplied regarding the grievant or was a retaliation against him.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision.** (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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

Cecil H. Creasey, Jr.
Hearing Officer