

STATE OF MICHIGAN
DEPARTMENT OF CIVIL SERVICE
HEARINGS, EMPLOYEE RELATIONS, AND MEDIATION

CRAIG PETERSEN

HERM 2006-051

and

Mailing Date: June 16, 2006

DEPARTMENT OF LABOR AND ECONOMIC
GROWTH

Ref. No.: 2005-03194

GRIEVANCE DECISION

Hearing Officer: William P. Hutchens
Representatives:
Grievant: Craig Petersen, *In Pro Per*
Department: Patricia Gamin, Labor Relations Director

CASE SUMMARY

KEY WORD(S): Position Abolishment

The grievant demonstrated through circumstantial evidence that his position was abolished for partisan political reasons or, at a minimum, for reasons other than administrative efficiency. Article 11, section 5 of the Michigan constitution requires that positions be established and abolished solely for reasons of administrative efficiency. Since that was not the case here, the grievance is granted. The grievant is to be restored to his former position and is to be made whole for all losses in compensation and in fringe benefits that he has suffered in the interim. The grievance is granted.

This CASE SUMMARY is not an official part of the decision.

A grievance hearing was held on February 17, 2006, at the Capitol Commons Center, 400 South Pine Street, Lansing, Michigan. The parties were given full opportunity to present testimonial and documentary evidence, examine and cross-examine witnesses, and present oral argument. Closing arguments were submitted by April 7, 2006, at which point the record was closed.

THE ISSUE

Was the position occupied by the grievant abolished for reasons other than administrative efficiency?

THE FACTS

The grievant was employed by the Department of Labor and Economic Growth (DLEG) as the administrator of the Bureau of Workers' Compensation within the Bureau of Workers' and Unemployment Compensation (BWUC). That was an 18-level classified Civil Service position. The grievant was notified by letter dated August 15, 2005, that his position was being abolished pursuant to the goals of administrative efficiency outlined in Executive Order 2003-18. The grievant was notified in that letter that based upon his seniority and employment history, he was not eligible to bump into another position and that he would therefore be laid off effective September 9, 2005.

A Step 1 grievance was filed protesting the position abolishment and layoff on August 25, 2005. That grievance claimed that in abolishing the grievant's position and in laying him off:

- 1) The DLEG has violated Article XI, Section V of the Michigan Constitution and caused him substantial harm;
- 2) The DLEG abolished the 18-level position and concurrently created the 19-level position for reasons other than administrative efficiency;
- 3) The DLEG has discriminated against the grievant in violation of Civil Service Rule 1-8 (Prohibited Discrimination).
- 4) The DLEG has improperly denied the grievant severance pay compensation.

The grievant was informed at the beginning of the hearing that the issue of severance pay compensation could not be addressed since the severance pay fund had not been funded. Given the lack of funding, there existed no funds from which the DLEG could have paid the grievant funds to which he otherwise may have been entitled.

Issues #1 and #2 above form the core of this grievance and of the facts in dispute in this record. In a grievance concerning a position abolishment or creation, Regulation 8.01, Subsection 4(B)(13)(d) offers the following burden of proof:

If the grievant was aggrieved by the creation or abolition of a position, the grievant has the burden of proving by a preponderance of the evidence that (1) the grievant suffered a tangible adverse employment action as the result of the abolition or creation of a position and (2) the position was abolished or created for reasons other than administrative efficiency.

The above language does not mean that a hearing officer is to gauge the efficiency of the abolition/creation of a given position. The hearing officer is to determine, based upon the record as a whole, whether it is more likely than not that the decision to abolish/create was pretextual in nature.

The director of Human Resources for the Department of Labor and Economic Growth, Rita Canady, testified that she did not know who ordered the abolition of the position occupied by the grievant other than its genesis was Executive Order 2003-18. That Order (Joint Exhibit #3) abolished the position of the director of the Bureau of Workers' and Unemployment Compensation as well as the position of the assistant director of that bureau. The grievant did not occupy either of those positions. The DLEG, in its step two grievance answer, identified the grievant as the director of the BWUC and justified the abolition of his position as having been mandated by the Executive Order. The grievant did not occupy that position, however. The grievant was the administrator of the Bureau of Workers' Compensation. As was indicated above, that was an 18-level classified position. The testimony in this record indicates that the position of director of the BWUC was an unclassified position.

The testimony of Canady indicated that she was unaware as to who had ordered the abolition of the position occupied by the grievant. She testified that she was equally unaware as to who had ordered the establishment of the new 19-level classified position of director of the Workers' Compensation Agency. When asked whether anyone associated with the governor's office had called to say that it was time to establish the new 19-level position, Canady offered the following testimony:

Q. Nobody called you from the governor's office to say it's time to establish this job?

A. I don't believe so.

Q. You don't believe so or you don't know?

A. I don't believe so.

Q. Did you have any communication with anybody in the governor's office regarding the establishment of this job?

A. I don't believe so, but I don't know. I can't be honest about that.

Q. And you wouldn't think that you would remember talking to somebody in the governor's office about a position?

A. I talk to the governor's office almost daily, so, no, I don't. (Tr., p. 35)

Canady indicated that a number of bureau directors had their positions reallocated from the 18 level to the 19 level just prior to the issuance of Executive Order 2003-18, those identified being Andrew Metcalf, Douglas Kalinowski and Henry Green. She indicated that these reallocations were effected in the face of difficult budgetary times for the state in which all state employees were being asked to sacrifice part of their compensation to make up for the budgetary shortfalls. She indicated that she assumed that the reallocations were done to reflect the increase in complexity of these positions and had nothing to do with their political affiliations, of which she was unaware. Other employees with histories tying them to the administration of the previous

governor (Brian Devlin, Michael Zimmer and the grievant) found themselves not so fortunate in that they were demoted or had their positions abolished. Canady indicated that she had no knowledge of any of these employees' political affiliations or histories of employment with the staff of the previous governor. She indicated that it did not seem odd to her that certain bureau heads were being reallocated to higher levels and others were not.

The grievant's supervisor, DLEG Deputy Director David Plawecki, offered testimony in which he reviewed the position description of the new 19-level position and compared it to the duties formerly performed by the grievant at the 18 level. The hearing officer will not burden this decision with the details of that testimony. For the benefit of any reviewing body, the hearing officer has marked the 19-level position description with check marks to indicate those duties acknowledged by Plawecki as being in common between the grievant's former 18-level position and the new 19-level position. Review of the duties listed in Duties 1-4 as listed on the 19-level position description indicates that the 18-level and 19-level position descriptions are substantially the same. There was one duty in Duty #1 that Plawecki indicated was only partially done by the grievant, that of advising subordinate division directors regarding politically sensitive issues. That duty is found, however, in the 18-level position description, although it does not mention the word "politically" to modify the word "sensitive." I find that the duties listed in "Duty #1" are therefore substantially the same.

A similar distinction was drawn by Plawecki concerning Duty #2 where the 19-level position description discusses, "meet as a group to discuss issues of common interest, policy issues, political climate, and recommend course of action." This is sufficiently similar to the statement in the 18-level position description, "Determine workers' compensation program goals, objectives and priorities" that I find them to be substantially the same. Plawecki attempted to indicate that the new position was more policy oriented, but if the previous position was to determine the program goals, objectives and priorities, that sounds suspiciously similar to policy determination, set forth in black and white on the position description.

The memory of Witness Plawecki was similarly hazy as was that of Canady when it came to being questioned about contacts from the governor's office regarding the abolition of the grievant's position or the creation of the new position. Plawecki, one of three deputy directors of the Department of Labor and Economic Growth, and the immediate supervisor of the 18-level position occupied by the grievant and of the new 19-level position, indicated that he did not know who directed that the grievant's position be abolished, nor did he have any knowledge as to who ordered the establishment of the new 19-level position, only that the paperwork had come through "from personnel."

Plawecki did testify that he and the grievant had discussed the candidacy of a Richard Scutt for a magistrate's position. Scutt, according to the grievant and according to Plawecki's testimony,

was being sponsored for this position by either the Michigan Trial Lawyers Association (the grievant) or "members of the bar" (Plawecki). Scutt did not receive an appointment. The grievant questioned Plawecki regarding magistrate appointments:

- Q. And you were in the negotiation process with the governor's office and Senator Sikkema's office with regard to these appointments, were you not?
- A. Well, I would certainly advise my opinion on appointments to the governor's office. That would be part of my responsibility.
- Q. Okay. And during our conversation, did you not say, "Because Mr. Scutt did not get a magistrate appointment," that my name—"Petersen's name came up as he has to go because of that." Do you remember saying anything like that to me?
- A. I wouldn't think in those exact words; however, it is very possible and I have no problem volunteering that at different points in time people would have complained about you in various roles. Internal staff, I can recollect letters; external customers. But that's highly unusual not to have occurred for any of my significant group fours...(Tr., p. 70)

As to conversations between himself and the grievant or between himself and the governor's office, or associates of the governor's office regarding the abolishment/establishment, Plawecki testified at 17 points in the transcript that he "did not recall," "did not recollect," "did not think so" or words to that effect. These are phrases of equivocation and evasion when giving testimony under oath, especially when utilized as often as they were by this witness. It is clear to the hearing officer that given his level of responsibility within the DLEG, Plawecki knew full well who ordered the position abolishment and the establishment of the new position. For reasons best known to himself, he chose not to disclose those contacts. The hearing officer is left to conclude, given the volume of testimony of this type, that the abolishment/establishment and the individuals behind it were known to Plawecki and Canady and that they chose not to disclose what they believed to be sensitive information.

Canady did testify when the department recalled her to the stand that she assumed that the decision to abolish the position had come from the Executive Office of the department, either former director, David Hollister, Deputy Director Robert Swanson, or Deputy Director David Plawecki. She indicated that it would not be unusual for her not to recall who had made the decision, since there are many decisions made in the Executive Office to which she is not privy. On questioning from the hearing officer, Canady indicated that the decision could well have come from the governor's office, but would have been communicated through the director or one of the deputies. She indicated that she was not directly contacted by the governor's office.

The grievant testified that Plawecki had told him in a conversation in early 2005 that since Richard Scutt was being rejected by the Senate for the position of chief magistrate on the Workers' Compensation Board of Appeals, and since Scutt was influential with the Michigan Trial Lawyer's Association, that the word was out that the grievant would have to go. (Tr., p. 128) He indicated that in a meeting with Plawecki on July 11, 2005, in the State Secondary Complex, Plawecki told him:

I don't know where this came from, from the governor's office, but it came over to the department without my knowledge about abolishing your job and creating a 19 level position. I had a long discussion with somebody in the governor's office about it, and I've warded it off at this time. I don't know how much longer I can do it. (Tr., p. 130)

Less than two weeks later, the grievant received a phone call from Plawecki in which he indicated that Plawecki told him:

"I want to let you know that your job is being proposed to be abolished. The governor's office, I had a long talk with them. I can't talk them out of it. Your job is going to be abolished with the concurrent appointment of— or establishment of the 19 level position." Again, I hemmed and hawed. I said, "Why can't I stay on and go back to a 17 level deputy director?" He says, "No, it's got to be you for that position—one for the other." Those were his exact words. (Tr., p. 130)

The grievant testified that this was part of a pattern of conduct that had rewarded staff with Democratic leanings, such as the aforementioned Kalinowski, Green and Metcalf, with reallocations to higher levels in the face of a budget shortfall, while employees with Republican leanings such as himself, Michael Zimmer and Brian Devlin either saw their positions eliminated or were subjected to demotion.

OPINION

The issue to be decided here is whether the position occupied by the grievant was abolished for reasons other than administrative efficiency.

The testimony of Plawecki and Canady and comparison of the position descriptions demonstrates that the 19 level position and the 18 level position formerly occupied by the grievant were substantially the same. There was no reorganization or even realignment of the entities supervised by the grievant in his former position when the new position was created. It supervises the same subordinate entities and reports to the same deputy director position within DLEG. Plawecki testified that the new position has more involvement with policy formulation and interaction with the legislature and governor's office in the formulation of policy and legislation than did the position occupied by the grievant. That, however, would be consistent with the contention of the grievant that his position was abolished to eliminate him, a former

Engler staffer, from policy/legislation formulation within the Granholm administration. The grievant's testimony concerning the conversations that he had with Plawecki, quoted above, constitute prior statements on the part of Witness Plawecki and as such are not hearsay. That testimony of the grievant was not challenged with any cross-examination.

The Executive Order (2003-18, Joint Exhibit #3) abolished two positions within the area of Workers' Compensation. Those have been identified above. They were abolished as of the date of issuance of the Executive Order, October 2, 2003, or shortly thereafter. The grievant did not occupy either of those abolished positions. His position was abolished and he was laid off from state employment in September of 2005. There is no direct link therefore between the Executive Order and the position abolishment. The nexus is that in the abolition of the non-classified BWUC director position, there was a need to establish another position. That position was the new 19-level classified position. That new position performs substantially the same duties as were performed by the grievant in his 18 level position as the administrator of the Workers' Compensation Agency. The only duties added, according to the testimony of Plawecki (and the hearing officer does not view these as additional duties, but rather expansions of duties already in the grievant's 18-level position description) were increased policy and legislative interaction with the office of the governor and the legislature. That only leads to the conclusion, however, that those in charge of DLEG (and ultimately, the office of the governor) did not want policy and legislative input from a former Engler staffer.

In this case, (as in the case of *Ute VonDerHeyden and Department of Public Health* (ERB 95-042, ERB 94-109, HERM 156-94, May 3, 1995)) there is no "smoking gun" evidence to demonstrate that the position formerly occupied by the grievant was abolished to make way for the appointment of an individual more politically in tune with the objectives of the current administration. Both cases present similar circumstantial evidence that the positions were abolished for reasons other than administrative efficiency. In this case, the circumstances surrounding the abolishment, the fact that no one seems to know who ordered it or the creation of the new position, the fact that the old position description and duties formerly performed by the grievant are substantially the same as the duties being performed by the current incumbent lead inescapably to the conclusion that the abolishment/establishment done in this case was done for partisan political reasons; or, at a minimum, for reasons other than administrative efficiency.

Since the position occupied by the grievant has been demonstrated to have been abolished for reasons other than administrative efficiency, and since article 11, section 5 of the Michigan constitution requires that positions be established and abolished for reasons of administrative efficiency, the hearing officer has no choice but to order that the action of the DLEG in this abolition/creation be reversed. The position occupied by the grievant is to be reestablished and he is to be returned to it and to be made whole for all losses in compensation and in fringe benefits that he has suffered in the interim. The grievance is granted.

DECISION

The grievance is granted as is set forth above.



William P. Hutchens, Hearing Officer

This decision may be appealed to the Civil Service Commission through the Employment Relations Board within twenty-eight calendar days of the mailing date of this decision, as authorized by Civil Service Commission Rule 8-2.5, *Further Appeal to Commission Authorized*. Civil Service Regulation 8.05, *Employment Relations Board Appeal Procedures*, and Civil Service Regulation 8.06, *Computing Time and Filing Documents*, should be referenced for directions on filing an appeal. The applicable *Michigan Civil Service Commission Rules*; Civil Service regulations; and forms for filing an application for leave to appeal, claim of appeal, and proof of service are available at Web site www.michigan.gov/mdcs, or by contacting the Board office. Appeals, applications, and inquiries should be addressed to the Employment Relations Board, Department of Civil Service, Capitol Commons Center, 400 South Pine Street, P.O. Box 30002, Lansing, Michigan 48909; by telephone, at (517) 335-5588; by fax, at (517) 335-2884; or by e-mail to ERB@michigan.gov.