

Issue: Retaliation for participating as a witness in another grievance matter; Hearing Date: August 23, 2001; Decision Date: August 24, 2001; Agency: Virginia State University; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5260

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS**

DECISION OF HEARING OFFICER

In the matter of Virginia State University Case Number 5260

Hearing Date: August 23, 2001
Decision Issued: August 24, 2001

PROCEDURAL HISTORY

On February 1, 2001, Grievant filed a grievance alleging he had been transferred to a new position in retaliation for his participation in a grievance filed by another employee at the University. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. The Director of Employment Dispute Resolution issued a Qualification Ruling on July 25, 2001 qualifying the grievance for a hearing. On July 31, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 23, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Lieutenant
University Representative
Captain
Police Officer
Investigator
HR Director

ISSUE

Whether the University retaliated or took an adverse employment action against Grievant?

FINDINGS OF FACT

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

The Virginia State University employed Grievant as a Sergeant in the University Police Department. He began working for the University in August 1997 as a Patrol Officer. One year later, the University promoted him to a Sergeant in charge of investigations. He received numerous commendations during his tenure and three evaluations rating his performance as exceeding the University's expectations.

Another Police Department Sergeant filed a grievance challenging the disciplinary action taken against him. During one of the three steps of the grievance, the Chief of Staff contacted numerous people, including Grievant, regarding the other Sergeant. On December 5th, 2000, Grievant met with the Chief of Staff and expressed both good and bad information about the other Sergeant. After considering the comments of many individuals including Grievant, the Chief of Staff decided to reinstate the other Sergeant to his former position. The Captain was not pleased that the other Sergeant had been reinstated. She believed his termination should have been upheld.

On December 13, 2000, the Captain told Grievant that the Chief of Staff told her he was reinstating the other Sergeant because of statements made by Grievant. Grievant informed the Captain that he had made both favorable and unfavorable statements about the other Sergeant and that her conclusion was wrong.

The other Sergeant returned to work on December 13, 2000.

An unnamed employee of the Police Department contacted Grievant at home on December 18, 2000 and informed him that he needed to watch his back because the Captain and Lieutenant were out to get Grievant for speaking in favor of the other Sergeant.

On January 2, 2001, the Investigator called Grievant at home and informed Grievant that he had heard from the Property Technician that the Captain and Lieutenant were going to transfer Grievant because they hoped Grievant would then resign. The Property Technician testified he did not inform the Investigator that Grievant would be transferred. He said he regularly jokes with the Investigator and the Investigator must have misunderstood him.

On January 4, 2001, the Lieutenant sent a memorandum to all staff indicating transfers of five employees. Two of the employees including Grievant were Sergeants. The other three were

police officers. The decision to transfer Grievant was made by the Chief of Police, Captain, and Lieutenant.

A year earlier, in January 2000, the University received a federal grant under the Community Oriented Policing program. Police department managers had been discussing how to reorganize the department to reflect the three additional positions funded by the grant. Transferring employees within police departments is not unusual.

CONCLUSIONS OF LAW

Grievant contends the University transferred him as retaliation for his participation in a grievance and for the purpose of disciplining him.

Retaliation

Retaliation against an employee is prohibited. Retaliation is defined by Section 9 of the Grievance Procedure Manual (“GPM”) as: “Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. ‘whistleblowing’).”

An employee’s right to file and pursue a grievance is protected by *Va. Code § 2.1-116.05 and § 2.1-116.06*. If a University transfers one of its employees because the employee participated in a grievance, the University has retaliated against the employee.

Grievant contends the University transferred him because of his participation in the grievance of the other Sergeant. Grievant argues that the timing of events and the reports he received from individuals overhearing statements¹ made by the Captain and Lieutenant show the University’s action was retaliatory. The University contends it transferred Grievant as part of an overall reorganization involving five employees that resulted from receipt of a federal grant expanding community policing.

The burden of proof is on Grievant to show by a preponderance of the evidence that the University retaliated against him. 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.

Grievant’s account and the University’s account of the events is equally likely to be correct. Grievant must show that his version is more likely than not. Grievant has not met this burden of proof. The Hearing Officer is not suggesting the University did not retaliate against him – rather, the Grievant did not prove the University retaliated against him.

¹ Grievant’s case essentially hinges on the testimony of the Property Technician. Had the Property Technician testified that he spoke with the Captain or Lieutenant about Grievant, Grievant would have met his burden of proof. Although the Property Technician once worked in the University Police Department, no evidence was presented that his relationship with the Captain or Lieutenant was such that he would be privy to their decision-making.

Adverse Employment Action

When an employee is transferred, that transfer may be voluntary or, if involuntary, based on objective reasons and in accordance with applicable State policies and procedures. The University may not transfer an employee to discipline that employee and avoid a grievance by failing to issue a Written Notice to the employee. Grievant has the burden of proving that the University has taken an adverse employment action. GPM § 4.1(b). If the Grievant can prove this, the burden shifts to the University to establish that its adverse employment action was appropriate. GPM § 5.8.

A uniform patrol position has less status than an investigator's position. Transferring Grievant from an investigator position to a uniform patrol position resulted in a lowering of his status. Even though Grievant did not suffer a change in salary or shift, the transfer would be a prohibited adverse employment action if the transfer resulted from the University's intent to discipline him.

Grievant has not established that he was transferred for disciplinary reasons. Examples of alleged poor performance were too nebulous and distant for the Hearing Officer to conclude that the University had any realistic concerns about his performance. Indeed, Grievant's evidence showed he was a very capable and successful employee.

Hearing Officer Comments

Grievant has raised a significant level of suspicion regarding the University's actions. A reasonable suspicion, however, is not sufficient to establish a preponderance of the evidence.

The Hearing Officer has some pause for concern in this case. The EDR Director's Qualification Ruling states, "management has affirmatively asserted that grievant's poor performance as an investigator was one factor in its decision to reassign him to patrol duty." This statement is consistent with testimony of a witness who claims he overheard the Lieutenant state to the prior Hearing Officer in the other Sergeant's hearing that Grievant was put in uniform for falsification of reports and poor work performance. The Lieutenant denies making this statement. Facts presented to the EDR Director are not facts upon which this Hearing Officer may rely in making his decision. The Hearing Officer is bound to consider only the testimony and documents presented at the hearing.

DECISION

For the reasons stated herein, the Grievant's request for relief is **denied**.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set 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 four 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.
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.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

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 **10 calendar days** of the **date of the original hearing decision**. (Note: the 10-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 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

Section 7/2(d) of the Grievance Procedure Manual provides that a hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 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 HRM, 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.

Carl Wilson Schmidt, Esq., Hearing Officer