Issue: Discrimination, harassment, retaliation; Hearing Date: August 21, 2001; Decision Date: August 22, 2001; Agency: Virginia Department of Transportation; AHO: David J. Latham, Esquire; Case Number: 5262

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of Virginia Department of Transportation Case Number 5262

Hearing Date: August 21, 2001
Decision Issued: August 22, 2001

APPEARANCES

Grievant
Three witnesses for Grievant
Representative for Agency
Three witnesses for Agency

ISSUE

Has the grievant been subjected to discrimination, harassment or retaliation?

FINDINGS OF FACT

Grievant filed a grievance alleging that he had been subjected to discrimination, harassment and retaliation. Following failure to resolve the matter at the third resolution step, the agency head qualified the grievance for a hearing. In filing the instant grievance, grievant has requested as relief that he be transferred back to residency A.

The Department of Transportation (hereinafter referred to as agency) has employed grievant as a classified equipment repair technician senior since November 1999. Previously, the agency had employed grievant as a wage employee for one year. The grievant met expectations on his most recent performance evaluation. Grievant is considered a diligent worker who is willing to take on any tasks assigned to him.

Grievant began employment as a classified employee on November 10, 1999 at residency A. As his six-month probationary period neared an end in the spring of 2000, the resident engineer determined that grievant should not be retained in employment. The agency notified grievant on May 10, 2000 that his employment was terminated on that date. Grievant filed a grievance stating that his termination violated state policy because it occurred after he had completed his six-month probation. After consultation with the Department of Human Resource

Management, the agency realized that grievant was correct and that the termination of employment violated Policy 1.45 because it occurred one day after the six-month period had ended.[1]

The grievant was reinstated effective May 11, 2000 with full back pay and no loss of service credit. As part of the grievance settlement, grievant was advised that his position was being transferred to residency B – which is located approximately 24 miles from residency A. (Grievant lives approximately the same distance from both residency A and residency B.) Grievant accepted in writing the terms of this reinstatement,[2] including the change to residency B, and began work at residency B on June 13, 2000.

On September 15, 2000, grievant filed another grievance in which he petitioned to be transferred back to residency A. The agency advised grievant that he did not initiate his grievance within the 30-day period required by the grievance procedure. Grievant requested a compliance ruling from the Department of Employment Dispute Resolution (EDR). On November 15, 2000, the Director of EDR ruled that grievant was out of compliance with procedure because he filed his grievance beyond the 30-day period without just cause.[3]

On April 24, 2001, grievant had a lengthy discussion with his supervisor. Grievant told his supervisor that he felt the supervisor was not treating him fairly and was treating him differently from other coworkers. Both grievant and his supervisor aired their views at length and by the end of the meeting, had a good understanding with each other. Prior to that meeting, grievant had never complained to his supervisor or made known his feelings that he was not being treated fairly. Since that meeting, grievant feels that he has been treated fairly and that he has not been the subject of discrimination, harassment or retaliation.

Grievant was displeased when he learned that his supervisor at residency A had completed a performance evaluation in November 2000 that rated him higher than the performance evaluation he received from his current supervisor at residency B. However, grievant did not appeal his performance evaluation after he received it in November 2000.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 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

[1] DHRM Policy 1.45, *Probationary Period,* effective September 16, 1993. [This policy was revised effective September 25, 2000 and now provides that the probationary period is a minimum of 12 months]
[2] Exhibit 5. *Grievance Form A*, filed May 15, 2000; settled June 9, 2000.
[3] Exhibit 2. *Compliance Ruling* of EDR Director, November 15, 2000. [Note: In discussing this matter, the compliance ruling inadvertently reversed the two residency locations stating that grievant was transferred from residency B to residency A. In fact, grievant was transferred from residency A to residency B.]

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 § 2.1-116.05(A) 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 § 2.1-116.09.

In grievances that do not involve disciplinary actions and dismissals for unsatisfactory performance, the grievant must present evidence first and must prove his claim by a preponderance of the evidence.[4]

This case presents a rather unusual circumstance. During the hearing, grievant readily acknowledged that he is not the subject of discrimination, harassment or retaliation. Moreover, he states that, since his meeting with his supervisor on April 24, 2001, his working relationship has been fine. Thus, it appears that the lengthy discussion between grievant and his supervisor was both cathartic and therapeutic. Both parties heard the other's concerns and have had an acceptable working relationship since that time.

In addition, the evidence presented at this hearing failed to reveal any discrimination, harassment or retaliation prior to April 24, 2001. While grievant had concerns about certain procedures, it appears that once explanations were provided, grievant understood them and is now satisfied. Some of his concerns appear to have been attributable to different procedures in effect at the two residencies, and to the difference in supervisory style between his current and previous supervisors. In any case, those concerns have been resolved and grievant currently has no dissatisfaction. Therefore, even if the conditions of which grievant complained had existed, they have been resolved to his satisfaction and no further relief is necessary.

Grievant specifically requested as relief a transfer back to residency A. The Hearing Officer is without authority to grant such relief for two reasons. First and foremost, the grievance procedure specifically states that transfer is not an available type of relief.[5] Second, even if such relief was available, this matter has been resolved in a previous grievance. The grievant agreed in writing that his reinstatement in June 2000 included a transfer from residency A to residency B. Once he made that agreement, the grievance was closed; this hearing officer has no authority to reopen a grievance which both grievant and the agency agreed to settle.

DECISION

The grievant's request for relief is DENIED.

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[4] § 5.8, Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2000.
[5] § 5.9(b) Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2000.

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.

David J. Latham, Esq., Hearing Officer