

Issue: Denial of requested cross-training; Hearing Date: October 16, 2001; Decision Date: November 14, 2001; Agency: Department of Transportation; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5303



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5303

Hearing Date: October 16, 2001
Decision Issued: November 14, 2001

PROCEDURAL HISTORY

On August 21, 2001, Grievant filed a grievance alleging:

I was not provided with the requested cross training provided to others in my section. As a result I was not able to apply for positions that would afford me the opportunity to get a promotion.

The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On September 18, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 16, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
HR Manager
Agency Representative
Engineering Technician Supervisor
Transportation Right of Way Agent

District Utility Engineer
Assistant District Right of Way and Utilities Manager
Assistant Right of Way Manager
Assistant Right of Way Manager
Engineering Technician III
Training and Development Coordinator
Personnel Analyst
Division Manager

ISSUE

Whether Grievant was improperly denied requested cross-training?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency improperly denied her requested cross-training. *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*.

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 Department of Transportation employs Grievant as an Executive Secretary in the Right of Way Division at one of its Facilities. She has worked in this position for four years. Under the prior compensation system, an Executive Secretary position was compensated as a Grade 6. Her former supervisor rated her overall performance as Exceptional in her November 2000 evaluation. The Former Supervisor stated:

This employee continues to benefit from seminars and teaching sessions on procurement and fiscal issues. Once she receives such training she immediately puts procedures and skills into practice.¹

In October or November 2000, Grievant filed a grievance seeking to have her position re-graded to a higher pay grade. Her Former Supervisor was aware of the grievance. On February 11, 2001, the Former Supervisor's position² was filled with a

¹ Grievant Exhibit 8.

² The Former Supervisor left the Agency because of retirement.

new manager – the Division Manager. Grievant reports directly to the Division Manager. The Division Manager was not aware of Grievant’s prior grievance until she filed the current grievance and made certain allegations regarding the prior grievance.

The Division is organized into four sections with each section having separate responsibilities. Each section has a manager. One section has a unit of Engineering Technicians with four Engineering Technician III positions. At least one of the positions had been vacant for several months. The Office Service Specialist³ (“OSS”) was interested in performing some of the duties of an Engineering Technician III and she asked the Division Manager if she could assume some of those duties. The OSS had previous experience with some of the tasks performed by an Engineering Technician III so the Division Manager agreed to her request.

The Agency later decided to fill one of its Engineering Technician III positions⁴ with a full time employee. June 1, 2001, was the last day to submit applications for the position. Both Grievant and the OSS applied for the position by submitting detailed State applications describing their employment history and experience. On July 3, 2001, Grievant was excluded from consideration for a panel interview by the human resource staff. After reviewing Grievant’s application, the human resource staff⁵ believed she lacked the necessary knowledge, skills, and ability to perform the job. Upon learning that Grievant had been excluded from a panel interview, the Engineering Technician Supervisor asked the Division Manager if she could ask the human resource staff to reconsider their exclusion of Grievant. The Division Manager agreed that this should be done.⁶ The human resource staff rejected this request for reasons independent of Grievant. On July 10, 2001, the remaining candidates for the position were interviewed. On August 24, 2001, the Office Service Specialist (“OSS”) was hired as an Engineering Technician III. She obtained the position in part based on having received cross-training in CAD and plan reading.

Grievant took several steps to obtain cross-training. During a morning staff meeting on May 25, 2001, the Division Manager informed staff of the importance of training and indicated staff could be cross-trained as necessary. After the meeting, Grievant sent her supervisor an email requesting training. She stated, “I am requesting that I be allowed the opportunity to obtain cross training in right of way.” The Division Manager spoke with Grievant that afternoon and said he was planning to set up classes to cross-train employees and that Grievant would be included in those classes along

³ Under the prior compensation system, an OSS was compensated as a Grade 5.

⁴ Although the organizational chart shows the position as an Engineering Technician IV, a witness serving in one of the Engineering Technician positions referred to herself as an Engineering Technician III. For the sake of simplicity the Hearing Officer will describe this position as an Engineering Technician III.

⁵ The human resource staff are not part of Grievant’s division.

⁶ Prior to July 3, 2001, the Division Director was not aware that Grievant had applied for the Engineering Technician III position.

with other employees. He asked if she had received information from the Assistant Right of Way Manager about property management cross-training scheduled for other employees. She indicated she would contact him.

In the afternoon of May 25, 2001, Grievant sent the Assistant Right of Way Manager an email asking to be included in the property management training. She indicated that the Division Manager authorized her participation.⁷ The Assistant Right of Way Manager informed her she would be included in the next cross-training class. That class had been delayed several times and remained pending at the time of the hearing. The delay was not for any reason relating to Grievant.

In June 2001, the Agency offered a four-day training program on plan reading. Seating was limited for the training, but a space opened shortly before the training was to begin. The Division Manager asked one of the Assistant Right of Way Managers for recommendations regarding who should receive the training. Although not first on the list, the Agency decided to send the OSS to the training. She had been performing some of the duties of an Engineering Technician III and the training would directly benefit her. Grievant was considered for the training but she was not the preferred person to attend the training because the training would not relate to her current duties.

On July 9 and 10, 2001, Grievant received CAD training. She felt the class was too limited in its presentation. She also received a half-day of individual CAD training with an Agency employee. The OSS also attended the individual training.

Grievant attended a course on Engineering Plan Development and Property descriptions on August 23 and 24, 2001.

CONCLUSIONS OF LAW

“It is the Commonwealth's objective to provide employee training in support of the Commonwealth's goals, and that this training shall be available without regard to race, color, religion, national origin, political affiliation, disability, age or sex.”⁸ An agency providing cross-training to its employees would be acting in accordance with the Commonwealth's objectives.

Grievant is clearly a talented, dedicated, and driven employee. She desires the tools to enable her to advance within her agency. Her demonstrated skills make her an ideal candidate for advancement. The question to be addressed, however, is not whether Grievant is capable of advancement, but rather whether the Agency has taken any action contrary to State policy that would prevent her advancement. The Hearing

⁷ Grievant Exhibit 9.

⁸ P&PM § 5.05.

Officer concludes that Grievant has not met her burden of proving the Agency acted contrary to State laws or policies.

Grievant contends she was improperly denied cross-training and because of this was unable to apply for higher-level positions.⁹ For example, Grievant contends she was denied computer aided design (“CAD”) and plan reading training. She further contends that the Office Service Specialist (“OSS”) was able to apply for and receive an Engineering Technician III position because the OSS received cross-training.

Although Grievant may have been denied access to certain classes on certain dates or been delayed in receiving training, there is no evidence the Agency’s training restrictions were improper. Grievant was provided with CAD training. No evidence was presented suggesting Grievant was intentionally and improperly excluded from CAD training before she took the training on July 9 and 10, 2001. In addition, Grievant was provided plan reading training. Excluding Grievant from the week long June 2001 plan reading training was not improper. Seating was limited for this training. When a space became available shortly before the class was to begin, the Agency selected the best suited employee to attend based on its business needs.¹⁰ The OSS was performing additional duties that would enable her to immediately implement the knowledge she gained from the plan reading training. Grievant could not have immediately implemented plan reading training in her position as an Executive Secretary. The OSS was a better candidate for the training than was Grievant in light of the Agency’s business needs.

Grievant contends she is being forced to work in hostile work environment.¹¹ Federal discrimination laws as interpreted by Federal courts prohibit a hostile work environment. A hostile work environment typically arises in the context of sexual harassment. No allegation was made or evidence presented suggesting Grievant was subject to unwelcomed sexual comments or behavior. There is simply no basis for the Hearing Officer to conclude Grievant is subject a hostile work environment. Although

⁹ Grievant was neither (1) prevented from applying for any position, (2) dissuaded from applying for any position, nor (3) had her application for employment refused. Because Grievant did not apply for a particular position and then file a grievance regarding that position, the Hearing Officer cannot conclude that the Agency misapplied its hiring policy. The Hearing Officer’s authority is limited to determining whether the Agency failed to “comply with applicable law and policy.” *GPM* § 5.9(a)(5).

¹⁰ At the time of the June 2001 training, the Division Director did not know Grievant had applied for the Engineering Technician III position. Thus, he could not have intentionally excluded Grievant from the training in order to reduce her chances at filling the vacant Engineering Technician III position.

¹¹ Grievant contends a hostile environment existed for several reasons: (1) an employee under her supervision was removed from her supervision, (2) walls next to her work area were removed without the courtesy of any notification being given to her, and (3) she has been denied cross-training. None of these examples are sufficient to establish a hostile working environment prohibited under federal and state law.

Grievant may feel some tension with her supervisor, any conflict that exists is not prohibited by law or policy.¹²

State agencies are prohibited from retaliating against employees who have participated in grievance proceedings. Retaliation is defined by the *Grievance Procedure Manual* as “Actions taken by management or condoned by management because an employee exercises a right protected by law or reported a violation of law to a proper authority (e.g. ‘whistleblowing’).”

Grievant contends she was denied cross-training in retaliation for her participation in a previous grievance. If the Hearing Officer assumes for the sake of argument that Grievant was denied cross-training, Grievant has not established that the alleged denial of training resulted from her participation in a previous grievance. Grievant contends the Division Director is the one who denied her cross-training. The Division Director joined Grievant’s section only after her grievance was concluded. The Division Director denied knowing about Grievant’s prior grievance until she brought it to his attention through her current grievance appeal. No evidence was presented suggesting his denial was untrue. Grievant has not established any retaliation against her by the Agency.

DECISION

For the reasons stated herein, 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

¹² The Hearing Officer considers Grievant’s claim of a hostile work environment to mean an unfriendly or unprofessional work environment. In the absence of a violation of State policy, the Hearing Officer lacks the authority to correct any unfriendly or unprofessional work environment.

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.

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

