

Issue: Denial of back pay; Hearing Date: October 23, 2001; Decision Date: November 21, 2001; Agency: Department of Correctional Education; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5310



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5310

Hearing Date: October 23, 2001
Decision Issued: November 21, 2001

PROCEDURAL HISTORY

This matter came before the Hearing Officer after qualification for hearing by the Director of Employment Dispute Resolution. Grievant filed a grievance on June 12, 2000 but was not qualified for a hearing by the Agency Head. Ultimately the matter was qualified for a hearing by the EDR Director on September 17, 2001. On September 24, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 23, 2001, a hearing was held at the Agency's regional office. Upon motion of a party, the Hearing Officer found just cause to grant an extension of the 30 day time frame for issuing the decision because of the conflicting schedules of the parties.

APPEARANCES

Grievant
Grievant's Counsel
HR Director
Agency Counsel
Division Director
Regional Principal

ISSUE

Whether Grievant should receive back pay?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency acted contrary to State policy. *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 Department of Correctional Education employed Grievant as a Program Support Technician Senior (PSTS) at one of its correctional centers from 1995 until June 2000. She was the only PSTS at her Facility.

A PSTS helps inmates transition from incarceration into employment in the community. Grievant’s duties included providing individual and group transitional education to no fewer than 120 inmates per year. She provided classroom instruction four out of five days per week. She was also responsible for establishing relationships with no fewer than 20 state and community agencies per year in order to provide quality programs and to provide assistance to ex-offenders upon their release. In Grievant’s 1999 evaluation, Grievant’s supervisor rated Grievant’s performance as Exceptional and wrote, “[Grievant] while attending school full time has continued to maintain a full time transition program, maintain [Vocation Transitional Advisory Council] meetings, and meet the individual needs of her students from teaching them to write a cover letter to getting VA college benefits.” She has consistently received Exceptional ratings on her evaluations.¹

In order to assist inmates in transitioning from incarceration to employment, the Agency also employs Adult Transition Specialists (ATS). An ATS instructs and supervises inmates “in individual and group learning experiences.” In addition, an ATS “[I]nitiates contact with resource persons both in the community and in the institutions.”²

¹ Grievant Exhibit 7.

² Grievant Exhibit 8.

ATS positions are teaching positions which require licensure by the Virginia Department of Education.”³

Grievant had been performing all of the duties of an Adult Transition Specialist (ATS) for several years.⁴ Her Facility did not employ an ATS but asked Grievant to perform the duties of an ATS.

On April 6, 2000, the Agency created a new ATS position at Grievant’s Facility. Grievant had completed her bachelor’s degree in March 2000, so she applied for the ATS position. She was selected for employment beginning on June 25, 2000 with a semi-monthly salary of \$1,609.04. As a condition of employment the Agency required Grievant to agree⁵ that:

You will be required to maintain a current Virginia Teaching License, with the appropriate subject area endorsement, in accordance with the rules set forth by the Virginia Board of Education. Your application indicates that: (a) you do not have a current teacher’s license or (b) you do not have the appropriate subject area endorsement. You must submit your application for licensure within 30 days of the effective date of your employment.⁶

Grievant applied for a teaching license with the Virginia Department of Education. On September 29, 2000, the Virginia Department of Education responded that it could not issue her a license because “Virginia does not have endorsements in the Transition/Employability Skills, General Clerical or Purchasing/Budget.”⁷

CONCLUSIONS OF LAW⁸

³ Grievant Exhibit 9.

⁴ The Agency contends that while Grievant was a PSTS she was performing only 65% to 75% of the duties of an ATS. The Hearing Officer finds Grievant was performing all of the duties of an ATS and all of the duties of a PSTS. To the extent Grievant may not have performed each and every specific duty of an ATS, those duties were *de minimis*.

⁵ Grievant Exhibit 2.

⁶ The Agency permitted an employee to serve as an ATS prior to having actually received a license from the Virginia Department of Education so long as the employee had applied for a license.

⁷ Grievant Exhibit 3.

⁸ This decision is based on DHRM Policy 3.05 effective September 16, 1993. Policy 3.05 was later changed effective September 25, 2000 and revised again on March 1, 2001. In addition, this decision is based on the *Grievance Procedure Manual* effective July 1, 2001. One could argue that because Grievant filed her grievance on June 12, 2000 this decision and appeal rights should be based on the *Grievance Procedure Manual* in effect before July 1, 2000. Because the EDR Director cites the *Grievance Procedure Manual* effective no later than July 1, 2000 and the *Rules for Conducting Grievance Hearings* effective July 1, 2001, the Hearing Officer concludes that the EDR Director has concluded that

If the Hearing Officer had unlimited equity powers, fairness may very well justify awarding Grievant back pay for many months. A Hearing Officer's authority, however, is created by State statute and governed by the *Grievance Procedure Manual*. A Hearing Officer may "order that the agency comply with applicable law and policy" but may not award "[d]amages or attorneys' fees."⁹ A Hearing Officer has no equity power (except with respect to mitigating disciplinary actions).

A Hearing Officer is bound by the qualification rulings of the Director of Employment Dispute Resolution. If the EDR Director places restrictions on the issue to be addressed at the hearing, the Hearing Officer's authority to grant relief may not exceed those restrictions. In his September 17, 2001 qualification ruling, the EDR Director states:

Even if the hearing officer finds that the agency misapplied or unfairly applied applicable ... state classification and reallocation policies, the hearing officer may only direct the agency to apply those policies correctly and to provide [back pay] to the grievant, if appropriate, in accordance with policy and the grievance procedure. A hearing officer may not substitute his judgment for that of management's regarding the correct classification or level of an employee's position. Thus, a hearing officer may not order the agency to classify the grievant's position at a certain level, award monetary damages, or grant any other form of relief.

It should also be noted that even if the agency determines that the grievant was misclassified, the potential for [back pay] is very limited. The maximum back pay for which the agency could be liable would be the difference in pay between the ATS position and the PST Sr. position. Moreover, the grievant would be entitled to [back pay] only for the 30 calendar day period immediately preceding the initiation of her grievance.

Acting pay is defined as "[A]dditional pay, on a temporary basis, provided to an employee required to perform the duties of a higher level position in an agency due to the incumbent's prolonged absence or departure from the classified service."¹⁰ "Employees are permitted to receive supplemental compensation for performing the duties of a vacant position in a higher salary grade when there are no reasonable

this grievance (including the right of appeal) is governed by the *Grievance Procedure Manual* in effect on July 1, 2000 with minor changes effective July 1, 2001. Parties who disagree with the Hearing Officer's conclusion should govern themselves accordingly.

⁹ GPM § 5.9(a); 5.9(b).

¹⁰ P&PM § 3.05(II)(A). The Agency's practice is to grant acting pay even when there is no underlying position which is vacant because of the incumbent's prolonged absence or departure from classified service.

alternatives to filling the vacant position.”¹¹ The amount of acting pay is “two pay steps, but shall not exceed one pay step less than the employee would receive if promoted into the vacant position.”¹²

Grievant had been performing the duties of an ATS for over a year. Thus, she is entitled to acting pay.¹³ Because of the EDR Director’s qualification ruling, Grievant is entitled to acting pay for only 30 days. Based on the evidence presented, Grievant’s monthly compensation as a PSTS was \$2,062.75. A two step increase would result in an additional payment of \$94.00.¹⁴

Grievant asks the Hearing Officer to reallocate her PSTS position to an ATS position for the 30-day period before she filed her grievance. This request cannot be granted because Grievant does not satisfy the terms for reallocation. Under the facts of this appeal, a reallocation can only be granted if the old and new classes are in the same occupation group and no more than two salary grades apart.¹⁵ An ATS is in the professional group at a grade 10.5 and the PSTS is in the administrative and support group at a grade of either 6 or 7.¹⁶ These differences show reallocation is not appropriate under the policy.

Grievant contends the Agency violated the Commonwealth’s hiring policy, Policy 2.10. This argument is untenable. When an ATS position was created at the Facility, Grievant applied for the position and was hired as the ATS. Thus, with respect to that position, the Agency did not violate the hiring policy. Grievant argues that she was incorrectly informed that the ATS position required a bachelor’s degree. Assuming this is true, the Agency did not violate the hiring policy because no ATS position was created at the Facility until April 2000.

Grievant contends the Agency violated State policy by requiring her to hold a bachelor’s degree for an ATS position while allowing two individuals in other localities to hold ATS positions¹⁷ without having bachelor’s degrees. The evidence does not

¹¹ P&PM § 3.05(III)(H)(1).

¹² P&PM § 3.05(III)(H)(4)(a).

¹³ As part of the process of filling the new ATS position, Grievant’s PSTS position was abolished. The Agency’s practice is not to require the existence of two positions before acting pay is granted. The Agency prefers to look at the employee’s duties.

¹⁴ The Agency represented that if Grievant received monthly compensation of \$2,156.75, her compensation would not exceed “one pay step less than the employee would receive if promoted into the vacant position.”

¹⁵ P&PM § 3.05(III)(D)(1)(c)(1) and (3).

¹⁶ Testimony of HR Director.

¹⁷ No evidence was presented suggesting Grievant was prohibited from applying for the ATS positions in the other facilities.

support Grievant's argument. The two ATS positions Grievant identified are identical to her ATS position in that each requires licensure by the Virginia Department of Education. It is the Virginia Department of Education that permits licensure for some teachers who do not have bachelor's degrees. These individuals typically teach vocational classes and hold a Technical Professional License which requires experience and training in a trade. In other words, it is the Virginia Department of Education which ultimately controls whether an ATS position requires a bachelor's degree.¹⁸

DECISION

For the reasons stated herein, the Agency is ordered to provide Grievant with **back pay** equaling acting pay for a thirty-day period.

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.

¹⁸ If the Hearing Officer assumes for the sake of argument that the Agency did not actually require a bachelor's degree for any ATS position and that the Agency intentionally mislead Grievant about the requirement, it is unclear what remedy would be available to Grievant. She only applied for one ATS position and was selected for that position. If Grievant was unnecessarily delayed in applying for other ATS positions, she cannot be awarded damages because the Hearing Officer lacks authority to award damages.

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