

Issue: Termination (unable to fulfill job requirements); Hearing Date: January 8, 2002;
Decision Date: February 15, 2002; Agency: Department of Conservation and
Recreation; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5348



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5348

Hearing Date: January 8, 2002
Decision Issued: February 15, 2002

PROCEDURAL HISTORY

Grievant filed a grievance on October 29, 2001 stating:

My employment was terminated on October 1, 2001. The termination was based on the fact that I was unable to attend the Cardinal Criminal Justice Academy to become certified as a Law Enforcement Officer, which is considered by the Department to be an essential function of the job. I was unable to gain admittance to Cardinal because of a work-related injury, suffered during my employ with the Department, and ongoing physical impairment. The Department's termination of my employment has directly affected an essential life function – my career – as a consequence of this physical impairment. I maintain that I could have met the condition of employment related to law enforcement responsibilities if a reasonable accommodation had been made. Additionally, the Department's offers to transfer to another position within the department were not reasonable, as these offers involved (a) transfer to a more physically demanding position, in which the work was not of the same nature as the work for which I was hired, (b) decrease in pay and benefits in excess of 30%, and (c) mandatory relocation to another area of the State.

The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 13, 2001, the Department of Employment Dispute

Resolution assigned this appeal to the Hearing Officer. On January 8, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Park Manager
Assistant Park Manager
Park Ranger
District Manager

ISSUE

Whether the Agency has provided reasonable accommodations to a qualified individual with a disability.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief he seeks should be granted. 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:

Grievant began working as a Chief Ranger for the Department of Conservation and Recreation on October 10, 1997. The Agency provided him with free housing on the park premises in order to benefit him and to benefit the Agency by having a Chief Ranger located inside the park in the event of an emergency. Grievant performed his job well until his removal on October 1, 2001.

As Chief Ranger, Grievant was required to enforce state laws and park regulations and complete law enforcement training. His position had been advertised with the requirement of completing law enforcement training.¹ The chief objective of his position was "[m]anagement of the visitor services and administrative sections of a

¹ Agency Exhibit 2.

major state park.”² His job description required that he maintain a conservation officer certification.³

The Agency expected Grievant to attend and complete law enforcement training at the Cardinal Criminal Justice Academy. The Agency chose this academy in 1999 because it offered the best training available and the training costs were not excessive.

Grievant was first eligible to attend law enforcement training in February 1999. He did not attend because of the Agency’s need at that time to focus on his concession duties. He was scheduled to attend the July 1999 training. Due to a back injury in the spring of 1999, Grievant was unable to attend the July 1999 training. Grievant’s training was re-scheduled for February 2000 but because of his concession duties, the Agency again delayed his participation in the training. The next class was available in July 2000.

Grievant began preparing to attend law enforcement training by starting a weight lifting and exercise program. In May 2000 he injured himself weight lifting. He felt something pop and burn in his left shoulder. He had two torn muscles, rotator cuff injury, and half of his biceps had to be removed during subsequent surgery. Several cortisone injections deteriorated the bone in his arm. He could not attend the July 2000 training.

On September 18, 2000, Grievant’s physician wrote⁴:

I have been treating [Grievant] for the last 3 months for left shoulder problems. He has both rotator cuff tendonitis and arthritis in the shoulder. This would necessarily mean that he could not perform the academy physical which requires pushups and pull ups. I feel this is [a] permanent condition and that he would therefore need to be excused from these activities if he were otherwise clear to go to the school.

Grievant sought treatment from a orthopedic specialist at a university medical center. On September 17, 2001, that physician wrote:⁵

This is in reference to my patient [Grievant] whom I have been following for a left shoulder problem. He has chronic tendinopathy of his left rotator cuff and has ongoing pain in his left shoulder. He had surgery on his shoulder last year. He was last seen on 20 August 2001, at which time he continues to have problems with pain on range of motion of his left

² Agency Exhibit 3.

³ Agency Exhibit 3.

⁴ Grievant Exhibit 1.

⁵ Grievant Exhibit 1.

shoulder and the inability to reach overhead. His restrictions are no lifting over 30 pounds, no overhead activity, no repetitive use of his left arm, and no climbing using his left arm. This is a permanent problem.

In September 2001, Grievant qualified for Workers' Compensation benefits due to his injuries.

An applicant to the Cardinal Criminal Justice Academy must present a letter from a physician certifying that the applicant is "physically capable of running up to three miles at a moderate pace, doing push-up, sit-ups, pull-ups, as well as participating in unarmed self-defense training."⁶ Grievant's injuries prohibited him from satisfying this requirement.

When it became apparent in June 2001 that Grievant would not be able to attend the required law enforcement training, the Agency offered him two lateral transfer opportunities at the same salary. Grievant rejected the transfers either because of the distance required to relocate or the higher cost of living in the new area or the inability of his spouse to find employment in an economically depressed area.

Agency employees with law enforcement certification issue approximately 300 summons per year and make 75 to 100 arrests per year in Agency parks and property. Although some park ranger positions are not required to have law enforcement certification, the Agency makes these decisions based on the position and needs of the locality and not based on the needs of the person holding the position.

CONCLUSIONS OF LAW

The Governor's Executive Order on Equal Opportunity prohibits employment discrimination against otherwise qualified persons with disabilities.⁷ Employees may not be discriminated against regarding many aspects of employment including, for example, hiring, transfer, demotion, layoff, termination, rehiring, and any other term, condition, or privilege of employment.⁸

The Agency must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability, unless the Agency can demonstrate that the accommodation would impose an undue hardship on the operation of its business.⁹

⁶ Grievant Exhibit 2.

⁷ DHRM Policy 2.05.

⁸ 42 U.S.C. § 12112. 29 CFR § 1630.4(b)(i). (Although no federal agency has been given authority to issue regulations interpreting the Americans with Disabilities Act, the EEOC has done so.)

⁹ 42 U.S.C. § 12112(b)(5)(A); 29 CFR § 1630.9(b).

A qualified individual with a disability is one with a disability who “satisfies the requisite skill, experience, education and other job-related requirement of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.”¹⁰

An individual is considered to have a disability if that individual either (1) has a physical or mental impairment which substantially limits one or more of his or her major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.¹¹ Under the first option, “[m]erely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity.”¹² “Major life activities means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”¹³ An individual must also show that the limitation on a major life activity is substantial.¹⁴ “[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairment’s impact must also be permanent or long-term.”¹⁵ The existence of a disability must be determined on a case-by-case basis.¹⁶

The Agency’s policy provides:

The satisfactory completion of the Basic Law Enforcement Training Academy shall be required of all management level employees, in which law enforcement is a function of their position, entering service with the Department of Conservation and Recreation within two years of initial employment.

Based on Grievant’s description of his limitations and notes from Grievant’s physicians, the Hearing Officer concludes that Grievant has a permanent physical

¹⁰ 29 CFR § 1630.2(m).

¹¹ DHRM Policy 2.05. 42 U.S.C. § 12102(2). The evidence is insufficient for the Hearing Officer to conclude that the Agency considered Grievant to be an individual with a disability. Prior to Grievant filing his grievance, Agency managers believed that Grievant’s injuries were temporary. In addition, the evidence is insufficient for the Hearing Officer to conclude that Grievant had a record of an impairment.

¹² Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. ____, 122 S.Ct. 681 (2002).

¹³ 45 CFR § 84.3(j)(2)(ii). Congress drafted the Americans with Disabilities Act definition of disability almost verbatim from Section 706(8)(B) of the Rehabilitation Act. Thus, referencing relevant sections of Title 45 of the Code of Federal Regulation is appropriate.

¹⁴ 42 U.S.C. § 12102(2)(A).

¹⁵ Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. ____, 122 S.Ct. 681 (2002).

¹⁶ Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. ____, 122 S.Ct. 681 (2002).

impairment that substantially limits one or more of his major life activities. He is a qualified individual with a disability who is entitled to reasonable accommodations regarding the Agency's policy governing law enforcement.

Reasonable accommodation includes "reassignment to a vacant position."¹⁷ The Agency has met its obligation to provide reasonable accommodations by allowing Grievant to transfer to other positions not requiring law enforcement certification and not requiring a loss in pay. Grievant rejected¹⁸ these transfers because he felt he would suffer a loss of professional or financial status. Even if this would be true, the Agency is not required to transfer Grievant to a nearly identical position as the one that he held which no such position existed.¹⁹ The Agency is only required to provide a transfer that is reasonable under the circumstances, and the Agency offered such a transfer.

Grievant contends that law enforcement certification is not a bona fide job requirement and should not be required of him. He argues that his position is primarily a management position and that to the extent law enforcement duties are ever necessary, they are handled by local law enforcement.

The Governor's Executive Order "does not permit or require the lowering of bona fide job requirements, performance standards, or qualifications to give preference to any state employee or applicant for state employment."²⁰ Although it is clear that law enforcement represents a small portion of the duties of a Chief Ranger, the Hearing Officer finds that those duties are an essential function of the position.²¹ Having law enforcement training and certification enables the Chief Ranger position to uphold the Agency's public safety obligations. Consequently, Grievant's request to have his position re-classified to remove the law enforcement responsibility must be denied.

Providing reasonable accommodations does not mean the employee is entitled to dictate the method of accommodation. For example, Grievant seeks transfer to specific positions that would enable him to retain his level of compensation and provide him with the job responsibilities he prefers. Because the Agency has offered to transfer

¹⁷ 29 CFR § 1630.2(o)(2).

¹⁸ One consequence of Grievant's rejecting the Agency's reasonable accommodations is that Grievant loses his status as a qualified individual with a disability. 29 CFR § 1630.9.

¹⁹ Grievant contends the Agency could have transferred him to vacant positions comparable to a Chief Ranger position. The Hearing Officer is not convinced that those positions were vacant and not promotions. As such, it was appropriate for the Agency to offer transfers to positions with lesser status in different locations of the State. See Appendix to Part 1630 of Title 29 relating to section 1630.2(o).

²⁰ Executive Order 1 (2002).

²¹ Grievant contends he should be permitted to attend a less demanding criminal justice academy. He located an academy that he believes would accept him with his physical limitation. The Agency, however, is not required to reduce a bona fide job requirement and that includes reducing the quality of the program required.

Grievant to other positions and the Agency's offer was reasonable under the circumstances of this case, the Agency has met its burden of providing Grievant reasonable accommodation for his disability.

An employee who does not obtain necessary certifications for a particular position may be removed from employment.²² Because Grievant was unable to obtain the necessary certification, his removal must be upheld.

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 three 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.

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

²² DHRM Policy 1.60(IV)(A).

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 DHRM, 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