

Issue: Unfair treatment (reassignment); Hearing Date: 10/18/02; Decision Date: 10/25/02; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5546



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5546

Hearing Date: October 18, 2002
Decision Issued: October 26, 2002

PROCEDURAL HISTORY

Grievant was reassigned from the day shift to the evening shift at the same Facility. On March 21, 2002, Grievant filed a grievance to contest the reassignment. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On September 26, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 18, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Assistant Training Officer
Three Corrections Officers
Lieutenant
Sergeant
Human Resource Officer
Assistant Warden Operations
Corrections Officer
Corrections Officer

ISSUE

Whether Grievant's shift reassignment was primarily disciplinary in nature or primarily based on the organizational needs of the Facility.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency failed to follow 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 Corrections employs Grievant as a Corrections Officer Senior. Grievant's Facility employs 128 officers who work during three shifts. Grievant is a good employee who is security-minded and valuable to the Facility. As a condition of employment, corrections officers "must be willing to work any shift and any post"¹

On March 14, 2002, Grievant and Corrections Officer W² were returning to the Facility from a transportation run.³ They began arguing about work assignments for transportation officers, and their argument became heated. Once they arrived at the Facility, they got out of the vehicle and walked in front of the vehicle. They spoke loudly to one another and were standing with only a few inches between them. As the Sergeant came out of the Facility, he observed the two officers and concluded they were about to get into some type of physical altercation. He was also concerned because Grievant and Officer W were carrying loaded weapons. He stepped in between the officers and instructed them to calm down. Officer W went inside the Facility. The Sergeant⁴ later instructed Officer W to write an incident report after completing some other tasks. Officer W remained in the Facility for approximately an hour after the initial confrontation with Grievant. He walked out of the Facility and into

¹ Agency Exhibit B.

² Corrections Officer W and Grievant worked on the day shift.

³ Corrections officers conduct transportation runs to transport inmates from one institution to another.

⁴ The Sergeant testified that he continued to have concerns about whether Grievant and Officer W would be able to get along in the future.

the parking lot towards his vehicle. Grievant was in the parking. As Officer W walked pass Grievant, Grievant told Officer W "If you want to do something, we can take this down the road." Officer W construed this as an invitation to fight. Officer W continued walking to his vehicle and left the parking lot.

The incident was referred to the Assistant Warden Operations for disciplinary action. After a pre-disciplinary hearing, the AWO decided to issue a counseling memorandum to Officer W and to Grievant. By oversight, the Agency failed to draft the counseling memorandum and present it to Grievant. Grievant was not issued a Written Notice for the incident.

On March 20, 2002, the Major moved Grievant from the dayshift to the evening shift (4 p.m. to midnight).⁵ The Major moved Grievant because of the number of complaints he had received from Grievant's co-workers. Grievant's co-workers complained that Grievant was overly argumentative and always seemed to have to have the last word on every issue.⁶

CONCLUSIONS OF LAW AND POLICY

When an Agency disciplines an employee it must do so according to its *Standards of Conduct*. Formal disciplinary action requires issuance of a Written Notice. Rather than issuing Grievant a Written Notice, the Agency chose to give him a written counseling memorandum. Grievant contends he was reassigned from the dayshift to the evening shift to discipline him for confronting another corrections officer on March 14, 2002. He contends the Agency failed to issue the proper Written Notice and present sufficient facts to support the disciplinary reassignment. The Agency argues that it reassigned Grievant not to discipline him for his behavior on March 14, 2002, but based on Agency needs arising from so many of his coworkers preferring not to work with him.

An agency has the authority to reassign its employees based on the Agency's needs to manage a productive workforce. How well certain employees work with other employees is a factor an agency may consider when deciding which employees should work specific shifts. The Agency has presented sufficient evidence of dayshift employees who objected to working with Grievant such that the Agency was justified in moving Grievant to a different shift. The Hearing Officer concludes that the Agency did not reassign Grievant to punish him, but did so to reduce the risk of conflict among its dayshift staff. Thus, the shift reassignment was for a legitimate management purpose.

⁵ Shifts for three other corrections officers were also changed. Agency Exhibit A-6.

⁶ When a dispute arose between Grievant and his co-workers, it is not significant as to which employee was correct about the point at issue. It is significant, however, that co-workers complained about Grievant because whether Grievant was right or wrong, several co-workers did not wish to work with Grievant. Agency management may consider the number of complaints from co-workers when deciding which shift to work an employee.

Grievant contends the Major targeted him for disciplinary action. Grievant argues that during a supervisor's meeting the Major singled out Grievant for criticism. The evidence showed, however, that the Major was informing supervisors to pay closer attention to making sure that employee performance is documented in employee fact files. The Major mentioned the names of several employees including Grievant. Based on the evidence presented, the Hearing Officer cannot conclude that the Major targeted Grievant for disciplinary action.

DECISION

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

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁷

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

Carl Wilson Schmidt, Esq.
Hearing Officer