Issue: Retaliation; Hearing Date: 08/04/03; Decision Issued: 08/06/03; Agency: JSRCC; AHO: David J. Latham, Esq.; Case No. 5763; **Administrative Review: HO Reconsideration Request received 08/18/03; Reconsideration Decision date: 08/27/03; Outcome: No basis to reopen hearing or change original decision.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5763

Hearing Date: August 4, 2003
Decision Issued: August 6, 2003

PROCEDURAL ISSUE

Grievant filed two grievances – one on February 5, 2003, and one on March 12, 2003. He requested that the Department of Employment Dispute Resolution (EDR) qualify both grievances for hearing. The EDR Director issued separate rulings that the February 5, 2003 grievance did not qualify for hearing, but that the March 12, 2003 grievance did qualify for a hearing.[1]

APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Vice President of Finance and Administration

[1] EDR *Qualification Ruling of Director* No. 2003-075, June 10, 2003 (February 5, 2003 grievance) and No. 2003-081, June 17, 2003 (March 12, 2003 grievance).

ISSUE

Did the agency retaliate against grievant?

FINDINGS OF FACT

The grievant filed a timely appeal after being directed to perform duties as a security officer full-time and to temporarily cease performing any administrative tasks.[2] Following failure of the parties to resolve the grievance at the third resolution step, the agency head declined to qualify the grievance for a hearing.[3] Subsequently, the grievant requested the Director of EDR to qualify the grievance for a hearing. In a qualification ruling, the EDR Director concluded that a sufficient question of possible retaliation remained such that the grievance should be qualified for a hearing.[4]

The Virginia Community College System (Hereinafter referred to as agency) has employed grievant for three years as a security officer senior. Grievant's position included the core responsibilities of patrol and security function (30%), enforcement (20%), safety and first aid (20%), general/physical services (15%), and public information and clerical services (15%).[5] During 2001, grievant's supervisor asked for volunteers to assist with policy planning and compliance duties.[6] Grievant volunteered and began performing such tasks as needed by the safety/security manager, in addition to his regular security and enforcement duties.

In February 2002, grievant resigned to take a security position at another state agency. Although the new position was a promotion and paid a higher salary, grievant concluded that the position was not worth the longer commute. Within 30 days of his resignation, grievant requested reinstatement in his previous position.[7] Grievant negotiated his return to work only with his former supervisor. Four days later, she advised him that he could return to work effective April 1, 2002.[8] Other than the supervisor's email message, there was no written offer made to grievant regarding the details of his return. When

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[2] Agency Exhibit 1. Email to grievant from Director of Facilities Planning and Development, March 12, 2003. "I do not wish for you to perform any administrative tasks *at this time*." (Italics added)

[3] Agency Exhibit 1. Grievance Form A, filed March 12, 2003.

[4] Agency Exhibit 2. Ruling Number 2003-081, *Qualification Ruling of Director*, June 17, 2003.

[5] Agency Exhibit 4. Grievant's Employee Work Profile (EWP), March 28, 2001.

[6] *See* Agency Exhibit 11. Safety/Security Manager's EWP, which allocates ten percent of her time to policy and procedure development.

[7] Agency Exhibit 12. Letter from grievant to whom it may concern, March 14, 2002.

[8] Grievant Exhibit 1. E-mail from supervisor to grievant, March 18, 2002.

grievant returned to work, he continued performing the same duties he performed prior to his resignation including planning and compliance duties as assigned by the safety/security manager. He continued to work under the same Employee Work Profile (EWP) and his core responsibilities (as discussed in the preceding paragraph) remained unchanged.[9]

During the fall of 2002, an outside auditing firm assessed the security and safety status of the college's facilities. Even before the final report was received in December 2002, college management recognized that significant improvements were needed to bring safety levels up to required Occupational Safety and Health Administration (OSHA) standards. During the winter of 2002-2003, management decided that the safety and security functions would be bifurcated into two separate operational areas.[10] On March 4, 2003, the president announced that the incumbent safety/security manager was to become responsible solely for the safety function, while a new position of Chief of Security was being created to manage the security function.[11] The Chief of Security would be under the supervision of the Director of Facilities Planning and Development (Hereinafter Facilities Director). The security function was an added responsibility for the Director who was already responsible for Planning and Development.

On February 5, 2003, grievant filed a grievance alleging that the agency had reneged on an oral promise to give him a ten-percent in-band salary increase effective July 1, 2002. He contended that the safety/security manager had made such a promise before grievant was rehired in April 2002. The first-step respondent for that grievance was the safety/security manager's immediate supervisor - the Director of Financial Operations.

On March 5, 2003, grievant met with the Facilities Director and discussed the fact that the college was not in compliance with certain OSHA standards. The Director was not familiar with a letter from OSHA that grievant referenced during their conversation. On March 6, 2003, grievant met again with the Director, gave him a copy of the letter from OSHA, and observed that the college could be subject to substantial fines for noncompliance. During this meeting, the Director also discussed the impending Iraq war and the need to have increased security officer visibility on campus. He "indicated the possibility that [grievant] could be reassigned to the downtown campus due to the separation of [another officer]."[12] On March 9, 2003, grievant wrote to the Director's immediate superior advising that he objected to being assigned to the downtown campus because of a conflict he had with the supervisor at that location. He also stated that he

[9] Agency Exhibit 3. Grievant's EWP, November 1, 2002.
[10] Agency Exhibit 9. Letter from president to Chancellor, February 25, 2003.
[11] Agency Exhibit 9. Memorandum from president to all employees, March 4, 2003.
[12] Agency Exhibit 1. Grievant's letter to Vice President, March 9, 2003.

would interpret any change in his duties or assignments to be retaliatory unless he agreed to the change.[13]

The Facilities Director and the Vice President discussed grievant's March 9, 2003 letter with the human resources department. The Facilities Director expressed his conclusion that there should be more security officer visibility on campus. In addition, one security officer had just resigned and another had given notice that he was leaving soon. A third officer was frequently absent due to personal and family illnesses. Management and human resources agreed that, if necessary, grievant could be assigned full-time to patrol and enforcement duties because his EWP listed those as his core responsibilities. By early March 2003, the beginning of the war against Iraq was imminent.[14] The Homeland Security threat alert level was yellow – elevated risk.[15]. The Facilities Director subsequently directed grievant to resume full-time operations functions.[16] Grievant filed his grievance the following day. Another officer was assigned to the downtown campus and grievant remained at the same campus he had been working at. In addition some officers began working overtime to assure full coverage on all shifts.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 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 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 § 2.2-3000 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

[13] Agency Exhibit 1. *Ibid*.

[14] While the Iraq war officially started on March 20, 2003, news reports during late February and March suggested the war could begin at any time. During early March, the media reported that U.S. reconnaissance units had already clandestinely entered northern and western Iraq.

[15] The threat alert level was raised to orange – high risk on March 17, 2003.

[16] Agency Exhibit 1. Email from Facilities Director to grievant, March 11, 2003.

> the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[17]

Grievant notified the Vice President that he would consider any change in his duties or assignments to be retaliatory, unless the grievant personally agreed to such changes. An employee is hired to perform the core responsibilities (duties) outlined in his employee work profile. Supervisors have the authority to change specific assignments and duties as necessary to accomplish the agency's mission as long as the assignments fall within the general parameters of the EWP. The supervisor is not required to obtain an employee's agreement unless the new tasks are not included in the EWP. In this case, grievant had previously *volunteered* to perform certain tasks that are not included in his EWP. When a new supervisor (Facilities Director) was assigned to oversee the security function, he decided for operational reasons to relieve grievant from responsibility for those tasks and have him perform the duties specified in his EWP. Thus, the supervisor only directed grievant to perform the duties he is paid to perform. Grievant has proffered no statute, regulation, policy, or procedure that requires a supervisor to obtain grievant's approval when directing him to perform his job.

Grievant infers that his anticipatory notice to the vice-president barred the supervisor from taking any action. A supervisor is expected to utilize employees to accomplish agency objectives in the most effective and efficient manner. Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government." The removal of added tasks is not retaliatory merely because grievant notifies a supervisor that he considers it to be so. There is more to establishing retaliation than just expressing an opinion. Moreover, while some forms of employer conduct can be evaluated based upon employee perception, retaliation must be proven pursuant to the test described in the following paragraph.[18]

Grievant contends that the Facilities Director retaliated against him because grievant filed a grievance in February 2003, and because he had reported violations to the Virginia Occupational and Safety Health Administration (VOSH). Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or

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[17] § 5.8 EDR *Grievance Procedure Manual,* effective July 1, 2001.

[18] For example, sexual harassment can be demonstrated based upon an employee's *perception* that she is being subjected to repeated, unwelcome conduct by the harasser.

reported a violation of law to a proper authority.[19] To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action.[20] Grievant meets the first criterion because filing a grievance is a protected activity.

To meet the second criterion, grievant must prove that he suffered an "adverse employment action," such as a loss in pay or benefits, demotion, formal discipline, or other tangible detriment to the terms and conditions of employment. The Fourth Circuit has observed that inquiries into whether there has been an adverse employment action have "consistently focused on the question of whether there has been discrimination in what could be characterized as ultimate employment decisions, such as hiring, granting leave, discharging, promoting and compensating."[21] In a more recent case, the Fourth Circuit held that a plaintiff must show that the action "had some significant detrimental effect" on him.[22]

The undisputed evidence in this case established that, after being directed to resume patrol, enforcement, safety and other assigned duties, grievant's pay, benefits, and other conditions of employment remained unchanged. He was not demoted, disciplined, discharged or otherwise adversely affected. The only tangible change was that he was no longer performing policy planning and compliance-related special projects. Grievant was hired, and later reinstated, pursuant to the same job description as a security officer senior. It is to grievant's credit that he volunteered to perform certain additional tasks not covered by his EWP. If grievant had been *directed* to perform tasks not covered by his EWP to which he did not agree, the outcome in this case might be different.

Grievant elicited testimony from his former supervisor (now the safety manager) that she had wanted to make changes in grievant's EWP to reflect that he performed policy planning and compliance tasks. However, she had nearly two years in which to effect such a change and never did so. If she had truly intended to change grievant's EWP, it was a simple matter for her to have prepared a revised EWP at any time. While she maintains that she had asked a subordinate to revise grievant's EWP, the fact remains that she never saw to it that the change was made.

Accordingly, it appears that the only effect of grievant being directed to return to full-time security and enforcement duties was that he no longer performed policy planning and compliance duties. The grievant has not

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[19] EDR *Grievance Procedure Manual*, p.24

[20] *Ross v. Communications Satellite Corp*., 759 F.2d 355, 365 (4th Cir. 1985).

[21] *Page v. Bolger*, 645 F.2d 233 (4th Cir.), cert. denied, 454 U.S. 892, 70 L. Ed. 2d 206, 102 {**18] S. Ct. 388 (1981).

[22] *Boone v. Goldin*, 178 F. 3d 253 (4th Cir. 1999).

demonstrated that this change was detrimental because it did not affect his compensation, his salary band, his rank, or any other tangible aspect of his employment conditions. Therefore, it must be concluded that grievant has not established an "adverse employment action."

Moreover, even if grievant had been able to establish the second prong of the test, he has also failed to establish the third criterion. While grievant had engaged in the protected activity of filing a grievance, he has not shown a nexus between the grievance and the removal of his extra duties. In fact, his first grievance in February was filed while the safety manager and Director of Financial Operations were his reporting superiors. These two management people – not the Facilities Director - would be involved in his grievance. The Facilities Director became grievant's supervisor on March 4, 2003 and therefore had no direct interest in the outcome of the first grievance. Moreover, no evidence was proferred to show that the Facilities Director ever discussed or mentioned the first grievance, or in any way based his decision on the fact that grievant had filed a prior grievance. Grievant must provide more than speculation in order to establish a causal link between his grievance and the Director's action.

Viewing the evidence in the light most favorable to grievant, it may be concluded that the Facilities Director became aggravated on March 6, 2003 when grievant pointed out to him that the agency was out of compliance and subject to possible OSHA fines.[23] However, with regard to grievant's complaint to VOSH, the only proferred evidence does not reflect the date on which grievant filed his complaint.[24] While VOSH conducted an inspection on March 20, 2003, that was after the date the grievance occurred. If grievant filed his complaint with VOSH after March 12, 2003, it could not have been a protected activity for the instant grievance. If he filed prior to March 12, 2003, that could have been a protected activity, providing the agency had notice of the filing.

However, even if the Facilities Director was irritated by grievant's complaints to VOSH, the agency has shown a non-retaliatory reason for taking its action. The undisputed evidence established that the security department was short-staffed due to two resignations and the illness of a third officer. This occurred during the run-up to the war in Iraq when tensions were high and the fear of terrorism was elevated. These factors constitute logical bases for utilizing all available uniformed security officers to perform their primary security duties. Further, the agency accommodated grievant to the extent that he was not transferred to the downtown campus, consistent with his expressed concern about the supervisor at that location.

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[23] Grievant so testified, and the agency did not recall the Facilities Director to rebut grievant's testimony on this point. Since the agency had the opportunity to offer rebuttal evidence and did not do so, grievant's version will be accepted as preponderant.

[24] Grievant Exhibit 2. VOSH Citation and Notification of Penalty, April 18, 2003. *See also* Grievant Exhibit 4. Letter from VOSH to grievant, May 23, 2003.

DECISION

The grievant has not demonstrated by a preponderance of evidence that the agency engaged in retaliation against him. Grievant's request for relief is hereby 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.[25] 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.[26]

[25] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[26] 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]

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David J. Latham, Esq.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5763

Hearing Date:	August 4, 2003
Decision Issued:	August 6, 2003
Reconsideration Received:	August 18, 2003
Reconsideration Response:	August 25, 2003

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request 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. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the Director of the Department of Employment Dispute Resolution (EDR). The 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.[27]

[27] § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

PROCEDURAL ISSUES

An attorney represented grievant during the hearing. Grievant submitted a request for reopening and reconsideration on a *pro se* basis. It is therefore assumed that the attorney no longer represents grievant.

To be considered timely, a reconsideration request must be *received* not later than the 10th calendar day following the date of the original hearing decision. Grievant's request was received on the 12th calendar day following issuance of the decision. However, because the 10th day fell on a Saturday, the request will be accepted as timely filed since it was filed on the next business day.

OPINION

Grievant believes that the decision in this case was based primarily on the fact that his employee work profile was not changed. In fact, as the decision makes clear, the basis for the decision is grievant's failure to meet the test enunciated in *Ross v. Communications Satellite Corp*.[28] While grievant met the first prong of the tripartite test, he failed to establish the second and third prongs by not demonstrating either an adverse employment action, or a connection between the removal of certain tasks and his previously filed grievance.

Certainly, if grievant's employee work profile (EWP) had been changed to include the tasks assigned by the manager, his case would be stronger. However, the fact is that the EWP was not changed. The Security Manager could have changed the EWP at any time, providing human resource requirements were met. The fact that grievant's immediate supervisor was allegedly reluctant to make the change is irrelevant. If, as grievant contends, human resources would not agree to the change, it strongly suggests that the manager had not made a sufficient case to support the proposed change. When a manager proposes changing an EWP, the manager must present a convincing case to demonstrate that the change is warranted; here, the security manager did not do so. Moreover, there is no evidence to show that the manager ever requested human resources to conduct a job evaluation audit to assess whether a change was warranted.

Grievant contends that he was working as an "Administrative Officer." There was no evidence or documentation about such a title ever being created or that grievant was working under such an appellation. He also states that he was eligible for advanced training not available to other officers. In fact, although grievant made such a contention, the testimony and evidence established that the training he took was available to any other officer who requested it. Grievant refers to a "new agreement he negotiated." However, grievant was unable to provide any documentation of such an agreement. The only terms and

[28] See *Decision of Hearing Officer*, beginning at last paragraph on page 5.

conditions of his employment are contained in the EWP. Grievant returned to work subject to the same EWP in place when he resigned six weeks earlier.

Grievant's argument regarding the date on which he filed a complaint to VOSH is moot. Even if he filed this complaint prior to March 12, 2003, grievant had already met the first prong of the *Ross* test by filing his first grievance on February 5, 2003.

Grievant contends that the agency denied his request for the work schedules of all officers during the time period of his reassignment. However, neither grievant nor his attorney gave a copy of such a request to the hearing officer prior to the hearing. Moreover, if the agency did decline such a request, grievant's attorney did not request the hearing officer to issue an Order for this information. Since the grievant did not use due diligence to obtain this information prior to the hearing, it does not constitute just cause to reopen the hearing. Grievant also attempts to present testimony regarding a "committee" assigned to revise policy and procedures. However, grievant has not shown that he could not have offered testimony about this during the hearing. Accordingly, this does not constitute newly discovered evidence.

DECISION

The hearing officer has carefully reconsidered grievant's arguments and concludes that there is no basis either to reopen the hearing, or to change the Decision issued on August 6, 2003.

APPEAL RIGHTS

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.[29]

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David J. Latham, Esq.
Hearing Officer

[29] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton,* 39 Va. App. 439, 573 S.E.2d 319 (2002).