

Issue: Alleged retaliation and harassment; Hearing Date: 06/15/04; Decision
Issued: 06/16/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No.
734



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 734

Hearing Date: June 15, 2004
Decision Issued: June 16, 2004

PROCEDURAL ISSUES

Grievant requested as part of her relief that the regional director be “dealt with.” By this grievant presumably meant that some form of corrective action should be taken. A hearing officer does not have authority to take any adverse action against an employee.¹ 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.”

Grievant also requested that sick leave she used be restored to her leave balance. A hearing officer does not have authority to revise benefits.² Moreover, it would be impossible for a hearing officer to assess either the etiology of the condition that resulted in grievant’s utilization of sick leave, or whether the condition was attributable to the disciplinary action.

¹ § 5.9(b)5, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

² § 5.9(b)3, *Ibid.*

APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Regional Director
Advocate for Agency

ISSUES

Did the grievant's transfer constitute retaliation? Did grievant's transfer constitute discipline? If so, did the agency act in compliance with policy when it transferred grievant?

FINDINGS OF FACT

The grievant filed a timely grievance alleging that her transfer from one facility to another facility constituted retaliation, harassment, and was a de facto disciplinary action.³ The agency head declined to qualify the grievance for a hearing. Grievant subsequently requested the Director of the Department of Employment Dispute Resolution (EDR) to issue a compliance ruling on whether her grievance qualifies for hearing. The EDR Director ruled that only the issues of disciplinary transfer and retaliation qualify for a hearing.⁴ The Department of Corrections (Hereinafter referred to as agency) has employed grievant for 26 years. She is a corrections lieutenant.

The Commonwealth's Standards of Conduct provides for two types of corrective action to address employment problems such as unacceptable performance and/or behavior. Corrective action may range from an informal action such as counseling to formal disciplinary action.⁵ The policy defines "disciplinary action" as an action taken in response to an employee's behavior, as described in Section V - Unacceptable Standards of Conduct (Offenses). Disciplinary actions may range from the issuance of an official Written Notice

³ Exhibit 6. Grievance Form A, filed December 31, 2003.

⁴ Exhibit 7. *Compliance and Qualification Ruling of EDR Director*, Ruling Number 2004-659, May 14, 2004. NOTE: As part of her request, grievant requested a ruling on the agency's failure to comply with a timeliness requirement of the grievance procedure. The EDR Director ruled that grievant's request was itself untimely, that the issue complained of had been remedied in the interim, and because it has been remedied, the request is now moot.

⁵ Section II.A. Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

only to issuance of a Written Notice and termination of employment.⁶ Disciplinary action also may include demotion or transfer in lieu of termination. In such cases, the agency *must* initiate a disciplinary salary action.⁷

Prior to her transfer, grievant had been a corrections lieutenant at a female correctional unit with security level 1 & 2 inmates.⁸ Because the correctional unit is a relatively small facility, there are no captain positions at the facility.⁹ Grievant functioned as watch commander during the day shift and supervised approximately 15 corrections officers. She reported to a major (Chief of Security). Grievant's transfer was to a security level 3 male correctional center in an adjoining county that houses three times as many inmates. Grievant retains the same title (lieutenant), pay band, and salary;¹⁰ she continues to work on the day shift at the new facility. She functions as the Operations Supervisor and supervises varying numbers of corrections officers depending on specific assignments given to her by a captain.

In November 2003, grievant appeared as a witness in a grievance hearing for a corrections officer. During her testimony, grievant admitted that she knew that the control room corrections officer had allowed inmates to go outside the facility on work gangs even though the inmates were listed on the hold board (restricted to the facility).¹¹ Grievant further testified that "I don't do anything to him because I know he was placed in there for a reason. That's *my* opinion."¹² Grievant had supervisory authority over the control room corrections officer but did not take any corrective action and did not notify her superiors about the security violations.

Following the hearing, the Superintendent (who had been the agency party present for the entire hearing) told her superior (Regional Director) that she was concerned about the security breach and recommended that he listen to the audio tape of the hearing. The Regional Director listened to the tape, spoke with the Chief of Security and Superintendent, and interviewed grievant. He then consulted with Human Resources and his own superior (the agency's Deputy Director). It was agreed that the best course of action would be to transfer grievant to a different facility and assign her responsibilities that could be more closely monitored by a corrections captain. The Regional Director also specified

⁶ Section II.C. *Ibid.*

⁷ Section II.C. *Ibid*, revised September 2000. "With a disciplinary salary action, employees may be retained in their current positions and have their duties reduced or be moved to positions in the same or lower pay band with less job responsibilities. In either case, the **employee's salary must be reduced** by at least 5%." (Emphasis and underscoring added)

⁸ Virginia correctional facilities are rated from security level 1 (lowest) to 6 (highest).

⁹ At correctional centers, the watch commanders are captains. However at small correctional units there are no captain positions and, therefore, lieutenants perform the watch commander function.

¹⁰ See Exhibits 1 & 2. Grievant's previous and current Employee Work Profiles.

¹¹ Inmates who are escape risks or have medical problems are restricted from leaving the facility in work gangs until they are no longer an escape risk or their medical problem has been resolved.

¹² Exhibit 6. Attachment to Grievance Form A, partial transcript from a corrections officer's grievance hearing.

that grievant could not be utilized as a watch commander (or assistant watch commander) for at least six months. After that, the warden could consider her for such a position providing he consulted with the Regional Director first. The Regional Director advised grievant of her transfer on December 3, 2003. Grievant took medical leave from December 4, 2003 until sometime in February 2004, asserting that she was under stress.

In early 2003, an anonymous caller to the State Fraud, Waste and Abuse Hotline had complained of staff misconduct and poor management by the Superintendent. A special agent was assigned to conduct an independent investigation. All allegations but one were determined to be either unfounded or inconclusive.¹³ No evidence of retaliation was found.

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 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, such as claims of retaliation, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹⁴

¹³ Exhibit 5. Memorandum from special agent to chief of the investigative unit, June 11, 2003.

The one founded allegation resulted in disciplinary action.

¹⁴ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

Retaliation

In her written grievance, grievant alleged retaliation because she had participated in a May 2003 off-duty meeting with several corrections officers at which various complaints about the superintendent were aired. Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.¹⁵ To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Generally, protected activities include use of or participation in the grievance procedure, complying with or reporting a violation of law to authorities, seeking to change a law before the General Assembly or Congress, reporting a violation of fraud, waste or abuse to the state hotline, or exercising any other right protected by law.

Although grievant did not articulate the specific protected activity she participated in, it may be inferred from her grievance that she believes her expression of opinion in an off-duty informal meeting with coworkers falls into this category. Meeting informally with coworkers to air mutual complaints about management is not specifically protected by law. However, freedom of expression outside the workplace is generally protected by the First Amendment, providing the expression is done peacefully, and does not incite others to commit a violent crime. Accordingly, it may be concluded that grievant did participate in a protected activity and thereby satisfies the first prong of the test.

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment, such as a cut in pay.¹⁶ A transfer may constitute an adverse employment action if a grievant can show that the transfer had some significant detrimental effect on the terms, conditions, or benefits of her employment.¹⁷ A transfer with dramatic shift in working hours, appreciably different responsibilities, or one providing reduced opportunities for promotion can constitute an adverse employment action, depending on all the facts and circumstances.¹⁸ Here, although she was transferred, grievant has not shown that her opportunity for advancement has been reduced. Grievant retains the same title, pay band, salary, and hours of work. While her job duties have changed somewhat, she still supervises corrections officers, and after a six-

¹⁵ EDR *Grievance Procedure Manual*, p.24.

¹⁶ *Von Gunten v. Maryland Department of Employment*, 2001 U.S. App. LEXIS 4149 (4th Cir. 2001) (citing *Munday v. Waste Mgmt. of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997)).

¹⁷ *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999)

¹⁸ See *Boone v. Goldin*, *Ibid.*; *Webster v. Henderson*, 2000 U.S. Dist LEXIS 5777 (D. Md 2000) aff'd 2002 U.S. App. LEXIS 287 (unpublished opinion). See also *Garrison v. R.H. Barringer Distributing Co.*, 152 F. Supp. 2d 856 (MD N.C. 2001).

month period, can again be considered for the function of assistant watch commander. The percentage of grievant's direct management functions has been reduced; however, at least fifty percent of her core responsibilities still involve direct management-related functions. Because, on balance, the transfer cannot be considered an adverse employment action, grievant has not met the second prong of the test.

However, even if the transfer is deemed to be an adverse employment action, grievant has not established a nexus between her expression of opinion and the transfer. First, the transfer occurred more than seven months after grievant expressed her opinion. Retaliation generally occurs soon after an event that precipitates retaliation. The more remote in time from the precipitating event that the purported retaliation occurs, the more difficult it becomes to demonstrate a causal connection between the two. While cases of significantly delayed retaliation can occur, grievant has not shown this to be such a case.

Second, grievant's primary basis for alleging retaliation is second-hand hearsay testimony from a corrections officer who claims that someone heard the Superintendent make a retaliatory statement to her secretary. Neither the person who allegedly heard the statement nor the secretary was present to provide first-hand testimony on this assertion. When a party fails to offer witnesses who might have resolved such an assertion, it is presumed that their testimony would not be favorable to that party.

Grievant points out that two others involved in the May 2003 meeting have since suffered adverse employment actions and suggests that this provides corroboration of retaliatory actions by the Superintendent. However, one of the two employees was disciplined for possession at the facility of prescription medication that had not been prescribed for her. Another hearing officer conducted a grievance hearing in that case; he upheld the discipline and found no evidence of retaliation.¹⁹ A second employee who participated in the May 2003 meeting was removed from employment because she had lied about being sick when she was, in fact, working for another employer thereby drawing both state sick leave pay and pay from her other employer.²⁰ Thus, while the two employees were disciplined, there were valid, non-retaliatory reasons that justified the agency's actions in those cases.

Finally, the Regional Director testified that he alone decided that grievant should be transferred. The superintendent had no input into the decision. Thus, grievant's contention that the transfer was retaliation by the superintendent does not have any basis in fact. Grievant points out that the superintendent is friendly with the Regional Director's lady friend, inferring that the superintendent was

¹⁹ Case # 5843, Decision of Hearing Officer, November 25, 2003.

²⁰ See Section V.B.3, Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993. Falsification of leave records, and theft of state funds, are both Group III offenses for which the normal discipline is removal from employment.

thereby able to apply undue influence on the Regional Director. Grievant's assertion is speculative; she produced no testimony or evidence to support this speculation. Grievant also asserted in a memorandum to the Secretary of Public Safety that the Regional Director retaliated against her.²¹ However, grievant failed to offer any testimony or evidence that the Regional Director had any *reason* to retaliate against grievant.

Discipline

After evaluating grievant's admission that she failed to take appropriate action in the face of a potential security violation by a corrections officer, the Regional Director concluded that he was uncomfortable having grievant in the position of watch commander. He felt that with her years of experience, she should have either have taken corrective action herself or, at the very least, have reported it to her superiors. His decision to transfer grievant to a position where she would not be assigned as watch commander was constrained by the fact that she worked at a small facility where lieutenants are utilized as watch commanders. Thus, circumstances dictated that grievant be placed in a larger facility such as a correctional center where the watch commanders are captains.

Grievant averred during the hearing that she had told the Chief of Security about the incident; the Chief of Security testified that grievant had not told her about it. There were no other witnesses that could corroborate grievant's assertion. However, in her testimony at the previous hearing, grievant did not state that she had told the Chief of Security. Grievant stated only that she didn't do anything to the corrections officer because she felt that he was placed there "for a reason." Testimony established that the superintendent had selected the corrections officer to be assigned to the control room because of his experience. Thus, it is more likely than not that grievant did not take any action against the corrections officer because she believed that he enjoyed some special relationship with the superintendent.

Grievant contends that the superintendent's decision to remove locks from certain filing cabinets in the control room was retaliatory. It is undisputed that the superintendent has the authority to take whatever actions she deems necessary to properly operate the institution and assure public safety. Removal of locks from drawers is within the authority of a superintendent pursuant to departmental operating procedure. The superintendent removed the locks because the facility did not have a key for the locks.²² The locks were replaced with locks to which both the facility and the lieutenants had keys. Thus, the removal of locks was not retaliation directed at grievant.

Grievant's daughter was hired at grievant's facility as a corrections officer trainee in August 2003. The daughter has a different last name from grievant.

²¹ Exhibit 3. Letter from grievant to Director of Public Safety, December 20, 2003.

²² Exhibit 4. Memorandum from superintendent to lieutenants, May 7, 2003. Memorandum from superintendent to staff, May 16, 2003.

Management was not told that the new trainee is grievant's daughter. As the watch commander, grievant would be her daughter's direct supervisor. When the regional director later learned of the familial relationship, he transferred grievant's daughter to another facility. Grievant knew, or reasonably should have known, that nepotism is prohibited.²³ Grievant claims that her own transfer to the same facility where her daughter is now assigned shows that the agency's action was retaliatory. However, while both grievant and her daughter work at the same facility, they are working under different chains of command. Therefore, grievant will *not* be supervising her daughter at the larger facility.

There is no doubt that grievant's transfer was, in part, a corrective action because it addressed unacceptable performance. However, it was not a disciplinary action as that term is defined in the Standards of Conduct. The agency did not feel that grievant's action warranted a formal written notice or any other sanctions of Policy 1.60. If the agency had taken formal disciplinary action, it would have had to issue a Group III Written Notice and reduce grievant's salary by at least five percent because of the transfer. The agency concluded that the transfer was required in order to assure that institutional security would not be jeopardized. Thus, the agency took the much milder step of moving grievant to an equal position with different responsibilities. The action taken by the agency allowed grievant to retain the same salary, rank, and hours of work, and avoided having an active disciplinary action in her personnel file for four years. Grievant's transfer without formal disciplinary action effectively honors grievant's desire to retire from state employment in 2004 with a clean employment record.²⁴

Accordingly, it is concluded that grievant's transfer was made partially as a corrective measure for disciplinary purposes and, partially to ensure institutional security. The remaining question is whether the agency's action was warranted. The watch commander at an institution is responsible for the security of the facility during her watch. The watch commander is expected to make decisions to protect public safety at all times. When the watch commander becomes aware that a subordinate has breached a security procedure, she has the duty and obligation to take action to address the problem. In the case at hand, grievant should either have taken corrective action or notified her superiors of the security breach. Failure to take any action is unacceptable. Therefore, the agency was justified in taking corrective action to address grievant's failure.

The transfer of grievant to a position at a larger facility allowed her to retain all the benefits of her position, title, salary and other conditions of work with the exception that she will not perform the function of watch commander for a probationary period of at least six months. In addition, she is now able to be more closely supervised and mentored by a captain. Since the small facility at

²³ The Employee Handbook published by DHRM for all state employees addresses nepotism on page 22 and provides that employees are prohibited from supervising members of his or her immediate family.

²⁴ Exhibit 3. Letter from grievant to Director of Public Safety, December 20, 2003 states: "I plan to retire in 2004 and do not want to leave the department on a negative note ..."

which grievant worked had no equivalent position that did not also involve being a watch commander, it was necessary to move her to a nearby facility. It appears that the action taken by the agency was the least punitive action possible that also accomplished the objective of assuring institutional security. Therefore, it is concluded that the agency's action was warranted.

DECISION

Grievant has not borne the burden of proof to demonstrate that the agency retaliated against her when it transferred her to a different facility. While the transfer was, in part, a corrective action, it was also warranted because of the agency's paramount concern for institutional security. Grievant's request that the agency's action be reversed 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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

[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]

David J. Latham, Esq.
Hearing Officer

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.