

Issue: Gender discrimination and retaliation; Hearing Date: 10/04/04; Decision
Issued: 10/26/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 872



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 872

Hearing Date: October 4, 2004
Decision Issued: October 26, 2004

PROCEDURAL HISTORY

On March 18, 2004, Grievant filed a grievance alleging the Agency failed to apply Agency and State policy regarding gender discrimination and retaliation. The Agency refused to qualify the matter for a hearing and Grievant appealed to the Director of the Department of Employment Dispute Resolution. On September 2, 2004, the EDR Director issued her Ruling Number 2004-741 qualifying the matter for a hearing. On September 7, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 4, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant was discriminated against based on gender and whether he was retaliated against for filing a grievance.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence 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:

The Department of Corrections employs Grievant as a Corrections Officer at one of its facilities. The Institution has approximately 1200 inmates and 505 employees. Grievant is able to handle many posts and is frequently called upon to accomplish tasks quickly and efficiently.

On March 11, 2004, Grievant, along with another corrections officer, was assigned to escort an inmate from segregation to the Watch Office area. While in the Watch Office, the second correctional officer was reassigned to perform another tasks and left the area. Grievant remained as the single correctional officer to observe an inmate while the inmate spoke with his attorney.¹ Once Grievant brought this matter to the attention of the Institution’s managers, the employees responsible for leaving Grievant alone were disciplined under the Standards of Conduct.

Corrections officers regularly enter inmate cells and check the bars and windows within the cells. They do so in order to make sure that the windows are secure. On Grievant’s shift, female corrections officers were not being asked to conduct window cell checks. On other shifts, female officers were being asked to conduct these checks. Upon learning of Grievant’s allegation, the Warden reviewed the responsibilities of female officers at the Institution. He instructed supervisors to make sure that female officers were conducting window cell checks on all shifts including Grievant’s shift. For the period beginning March 1, 2004 to May 18, 2004, female corrections officers conducted window cell checks on at least 75 occasions. From June 23, 2004 to September 24, 2004, female corrections officers conducted window cell checks on at least 94 occasions.²

¹ Grievant was not in danger at any time since the inmate was in full hand and leg restraints.

² Agency Exhibit 3.

The Institution houses male inmates. For some posts, being a male corrections officer is a bona fide occupational qualification (BFOQ). For example, Agency policy permits only male corrections officers to conduct strip searches of inmates. Only male corrections officers may work on the approximately 24 posts designated by the Agency as bona fide occupational qualification posts.³ Male corrections officers push food carts to the segregation unit because those posts are BFOQ posts and only male officers may hold those posts.

Several posts at the Institution require specialized training. For example, corrections officers working in the armory and in the tool room must have specialized knowledge of how to perform the duties of their posts. As a result, the Agency rotates new employees into those positions on a less frequent basis than other positions within the Institution.

CONCLUSIONS OF POLICY

Institutional Operating Procedure 822-B provides that two correctional officers should accompany an inmate and remain with the inmate while the he meets with his lawyer. The Institution failed to comply with this procedure because Grievant was left as the only correctional officer observing an inmate meeting with his lawyer. The Institution remedied this breach of procedure by determining whether disciplinary action should be taken against employees involved in the breach of procedure and then issuing disciplinary action. The Institution's actions show its managers have the present intent to apply and enforce IOP 822-B. The Institution is no longer in violation of IOP 822-B and the issue is now moot.

Grievant contends he has been discriminated against on the basis of gender because female correctional officers have not been utilized in the same capacity as have been male officers. Grievant contends female officers are not required to perform "in cell" window checks or to push food carts on his shift. Upon learning of the allegation, the Warden investigated Grievant's assertion and then took action to correct the oversight. The evidence showed that female corrections officers performed at least 75 window checks from March 1, 2004 to May 18, 2004 and at least 94 window checks from June 23, 2004 to September 24, 2004. Based on this evidence, Grievant's assertion that women do not currently perform window checks is unsubstantiated and there is no reason to believe the Agency has a separate practice for women than it does for men regarding window cell checks.

Grievant contends women are not assigned to all of the posts in the special management unit, also known as a segregation unit. Grievant is correct that woman are not assigned to several posts within the segregation unit, but those posts are BFOQ posts and women cannot be assigned to those posts. Woman are assigned to those posts in the SMU which are not BFOQ posts.

³ Agency Exhibit 4.

Grievant contends the Agency is improperly placing certain correctional officers on the same post and sometimes for up to 5 years. The evidence showed, however, that these posts included employees with specialized training enabling them to work in the armory or on inmate transportation. Corrections officers working at the front entry of the Institution have received customer service training in order to make a good first impression with visitors.⁴ No evidence was presented suggesting the officers working these posts were selected to do so for any reason other than the training they had received.

Grievant contends the Agency improperly retains certain employees in specific posts. The evidence showed that corrections officers in the armory and in the tool room often work the same post for several months and years. No policy was presented suggesting this procedure was improper. The evidence showed that officers were utilized in these positions because of their specialized training. An Agency may assign employees based on their specialized training.

Grievant contends he was retaliated against by the Agency because after he filed his grievance, the number of times he was called on the radio to perform tasks changed. Some witnesses testified that they did not notice any change in the number of times Grievant was called over the radio. Another witness indicate the Grievant was not called as much after he filed his grievance. Staff in the master control office (where radio calls would be initiated) changed over time and it is unclear what effect this had on radio calls to Grievant. The evidence, as it stands, is insufficient for the Hearing Officer to conclude that radio calls regarding Grievant changed materially and that any such change was the direct result of his filing a grievance and not for some other reason.

DECISION

For the reasons stated herein, 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.

⁴ The Warden personally selected 25 to 30 corrections officers to receive customer service training and then serve in the front entry. No evidence was presented suggesting his selected those employees based on any impermissible factor.

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 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. 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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

