

Issue: Misapplication of policy and retaliation; Hearing Date: 12/18/03; Decision Issued: 12/31/03; Agency: NVCC; AHO: Carl Wilson Schmidt, Esq.; Case No. 454;
Administrative Review: HO Reconsideration Request received 01/10/04;
Reconsideration Decision issued: 01/22/04; Outcome: No newly discovered evidence or incorrect legal conclusions. Request to reconsider denied.
Administrative Review: DHRM Ruling Request received 01/07/04; DHRM Ruling issued 02/25/04; Outcome: HO's decision comports with provisions of DHRM Policy 3.05. No reason to interfere with decision.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 454

Hearing Date: December 18, 2003
Decision Issued: December 31, 2003

PROCEDURAL HISTORY

On September 8, 2003, Grievant timely filed a grievance to challenge the Agency's action denying him an opportunity to be considered for a supervisory position. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On November 20, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 18, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Representative
Witnesses

ISSUE

Whether the Agency misapplied policy and retaliated against Grievant?

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 was hired December 2000 into position number 567 as a Grounds Worker at a campus of the Northern Virginia Community College. Seven months later, Mr. GM was hired into position 477 as a Grounds Worker. Both of these positions reported to a Grounds Worker Supervisor, position 476. The Ground Worker Supervisor was one of seven positions reporting to the Facility Manager.¹

Mr. AA served in the capacity of Grounds Worker Supervisor when he worked for the Agency. Several of Mr. AA's co-workers found him to be offensive and abrasive. Grievant and the Facility Manager found Mr. AA problematic to work with. On June 24, 2002, Mr. AA informed the Facility Manager that he would not be able to work for 12 weeks due to a medical problem. The Facility Manager asked Grievant to assume temporarily Mr. AA's supervisory duties and on July 3, 2002 requested temporary pay for Grievant.

In September 2002, Mr. AA left the Agency permanently and his position became vacant. The Agency had imposed a hiring freeze and chose not to fill the Grounds Worker Supervisor position immediately.

On Mr. AA's last day of employment with the Agency, it was necessary to remove his extensive amount of personal belongings kept in his office. The Facility Manager wanted to have all of Mr. AA's belongings removed at one time in order to avoid having Mr. AA return to the campus after his last day of employment. The Facility Manager instructed Grievant to use a State truck and help Mr. AA load his belongings into that truck and then transport Mr. AA² and his belonging to Mr. AA's residence. Grievant refused to carry out the Facility Manager's instruction because Grievant knew that doing so would result in the use of State property for personal benefit expressly prohibited by State policy. The Facility Manager then asked Mr. GM to transport the former Supervisor. Mr. GM complied with the Facility Manager's instruction. During the trip to

¹ The Facility Manager position is also called a Buildings and Grounds Supervisor B, Trades Technician IV.

² Mr. AA also had a friend with him who was also transported in the State vehicle.

Mr. AA's home, Mr. AA complained of being thirsty and instructed Mr. GM to stop at a store. Mr. AA purchased alcoholic beverages at the store and brought them into the State vehicle.

On October 17, 2002, the Facility Manager asked that Grievant's temporary pay continue until December 24, 2002 and then have the supervisory duties rotate to Mr. GM for six months beginning December 25, 2002.³ Grievant objected to having the supervisory duties removed from him. An Agency manager informed Grievant that the Agency intended to rotate the supervisory duties between Grievant and Mr. GM while the Grounds Worker Supervisor position remained unfilled.

On June 9, 2003, the Facility Manager issued a memorandum to Grievant and Mr. GM indicating that "Effective on June 25, 2003, [Grievant] is assigned the additional responsibility of supervising the grounds crew activities at the [campus]."⁴ Less than two weeks later, the Facility Manager learned that the Agency did not intend to fill the Grounds Worker Supervisor position and that the position and its funding would be moved to another division within the Agency.⁵ The Facility Manager decided to assign permanently the supervisory duties of the former Grounds Worker Supervisor position to Grievant or to Mr. GM. He compared Grievant's work history and experience as a supervisor with Mr. GM's work history and experience as a supervisor. The Facility Manager felt that the additional supervisory duties should be given to Mr. GM and not to Grievant. He assigned the supervisory duties to Mr. GM's position but did not tell Mr. GM of the assignment. On June 23, 2003, the Facility Manager sent a memorandum to the HR Director asking that position 477 be "upgraded from Grounds Worker to Grounds Supervisor."⁶ The Facility Director did not advise Mr. GM that he would be seeking a role change for position 477 due to the additional duties.

On July 29, 2003, the HR Team Leader sent the Facility Manager a memorandum indicating that the Agency had approved his request for a role change for position 477. Effective July 25, 2003, the Agency changed position 477 to a Grounds Worker Supervisor, Trade Technician III with a pay band increase from 1F to 3F. During the first week of August 2003, the Facility Manager informed Grievant and other

³ Agency Exhibit 5.

⁴ Grievant Exhibit 1.

⁵ Position 476 was removed from Grievant's campus on May 5, 2003 and the position was assigned to another campus. Position 476 was formally abolished from Grievant's campus on August 18, 2003.

⁶ The Facility Manager sought a role change for position 477. "A Role Change is a non-competitive change where a position is changed to a different Role in a higher, lower or same pay band – Upward Role Change, Downward Role Change or Lateral Role Change respectively. (Role Change was formerly referred to as position reallocation.) The agency's Human Resource Department is responsible for approving and monitoring Role Changes, and may delegate this authority to management within the agency." *DHRM Human Resource Manual*, Chapter 8, page 9.

staff that Mr. GM would serve as Grounds Worker Supervisor and that Grievant would report to Mr. GM.⁷

CONCLUSIONS OF POLICY

Grievant has not been able to identify any policies violated by the Agency. A Hearing Officer is not authorized to reverse an Agency action unless that action is inconsistent with some applicable policy. Since the Agency has not acted contrary to policy, there is no basis to grant Grievant any relief.

The Agency took two steps. First, it assigned additional duties to position 477. Agency managers are authorized to assign additional duties to employees. The Agency did not act contrary to policy when it assigned additional duties to position 477. Second, the Agency sought a role change for position 477 to reflect the newly assigned duties. Nothing in DHRM policy prohibits an Agency from seeking a role change for a position with additional duties. Nothing in DHRM policy requires the person (Mr. GM) holding a position to initiate the request for a role change of that position. Although it may not be common to have one person supervising only one position, nothing in DHRM policy prohibits this practice. By following a two-step procedure, the Agency has circumvented the DHRM hiring policy. In essence, the Facility Manager appointed Mr. GM to be the Grounds Worker Supervisor.

The Department of Human Resource Management policies govern hiring practices. DHRM hiring policies establish procedures designed to attract and employ a highly qualified and diverse workforce to provide quality services to the citizens of Virginia. An employee is to be selected for a position after considering each applicant's knowledge, skill, and ability in accordance with equal employment opportunity.

There is no way to know whether the Facility Manager selected the best suited person for the Grounds Supervisor position since the Agency did not make the position available to anyone other than one person. Grievant has been denied the opportunity to present his achievements and be fully considered for a position he would have little difficulty performing. Grievant perceives the Agency's action as being unfair to him. The Agency's action is contrary to the spirit of DHRM hiring policies, but it was not contrary to any identified policy. Achieving the spirit of DHRM hiring policies is an admirable goal of well-managed agencies. An agency may disregard that goal so long as it complies with DHRM policies. The Agency has complied with DHRM policies in this case.

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual 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 (e.g. 'whistleblowing')." To establish

⁷ Agency Exhibit 10.

retaliation, Grievant must show he or she (1) engaged in a protected activity;⁸ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity.

Grievant contends the Agency retaliated against him when the Facility Manager selected Mr. GM to assume the duties of a Grounds Worker Supervisor. There is not sufficient evidence to suggest that the Facility Manager made his decision to exclude Grievant from receiving permanent supervisory duties because Grievant refused to use State property and transport the former Supervisor away from the Agency's property. The Facility Manager denies taking any action against Grievant because of Grievant's refusal to improperly use State property.⁹ The Facility Manager did not make any adverse comments to Grievant or anyone else that would suggest Grievant's refusal to transport the former Supervisor would cause the Facility Manager to exclude Grievant from receiving permanent supervisory duties. In addition, Grievant's evaluations remained consistent and reflected his performance.¹⁰ The evidence showed that the Facility Manager made some comparison of Grievant's and Mr. GM's experience before making his decision.¹¹ There is sufficient evidence to show that Mr. GM is capable of performing the supervisory duties although it is not clear whether his abilities exceed those of Grievant's.

DHRM Policy 3.05, *Compensation*, governs temporary pay and provides:

Agencies may provide temporary pay to an employee who is assigned different duties on an interim basis or because of the need for additional assignments associated with a special time-limited project, in the same or different Role in the same or a higher Pay Band.

When temporary pay is granted for assuming the duties of a different Role in a higher Pay Band, agency management may grant 0-15% above the

⁸ See Va. Code § 2.2-3004(A)(v). Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

⁹ The Facility Manager and Mr. GM were later reprimanded for transporting Mr. AA and his personal belongings using State property. This reprimand was not a factor in the Facility Manager's decision since it occurred after the Facility Manager had selected the person to whom the supervisory duties should go.

¹⁰ On May 5, 2003, the Facility Manager signed an Acknowledgement of Extraordinary Contributor describing Grievant's specific extraordinary contribution during snow removal during the snow season of 2002-2003. Agency Exhibit 7.

¹¹ Grievant has been employee by the Agency six months longer than Mr. GM has been employed by the Agency. This seniority is not significant.

employee's current salary as long as the offer does not exceed the maximum of the higher Pay Band.

Grievant assumed additional supervisory duties on June 25, 2003 but was not given temporary pay as promised by the Agency and as he had been paid in the past. Since neither Grievant nor Mr. GM were notified that Mr. GM had become the supervisor prior to August 3, 2003, Grievant is entitled to temporary pay for the period of time he was carrying out the additional supervisory duties. Accordingly, the Agency must compensation Grievant with temporary pay.

DECISION

For the reasons stated herein, the Agency is Ordered to comply with policy requiring Grievant to be compensated with temporary pay. With the exception of receiving temporary pay, 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. 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.¹²

[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

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 454-R

Reconsideration Decision Issued: January 22, 2004

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant contends that the Vice President was lied to when she asked if there was anyone else qualified for the upgrade. The Vice President’s testimony, however, was that she asked if anyone would be upset if the position was filled by Mr. GM and was told incorrectly that no one would be upset. If the Vice President was misled regarding the consequences of selecting Mr. GM, that is a matter for the Agency to review internally. There is no policy prohibiting the Agency’s actions unless all employees agree with those actions.

Grievant restates his allegation that the Agency retaliated against him. Although it is possible that the Facility Manager intended to retaliate against Grievant, the evidence presented was insufficient to establish the necessary causation. The Facility Manager made no comment and took no action that would disclose his intention to retaliate against Grievant. Grievant’s assertion of retaliation remains merely an opinion.

Grievant presented substantial evidence of inappropriate behavior by Mr. AA while he was employed by the Agency. Many employees were eager to see Mr. AA leave the Agency. The evidence showed that the Facility Manager also was anxious to see Mr. AA leave employment with the Agency. What the evidence did not show is Grievant’s assertion that the Facility Manager punished anyone who complained about Mr. AA.

The Hearing Officer lacks the authority to reverse an Agency action simply because it is poorly executed and treats an employee unfairly. The Hearing Officer may only reverse an Agency action when an Agency acts contrary to policy. Grievant has not established any policy violated by the Agency. It may be the case that State and Agency policy is lacking, but re-writing policy to accommodate a specific set of facts is not within the scope of the Hearing Officer's authority.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant's request for reconsideration is **denied**.

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 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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of
Northern Virginia Community College
February 25, 2004

The grievant has requested an administrative review of the hearing officer's October 22, 2003, decision in Case No. 454. The grievant objects to the hearing officer's decision on the basis that the hearing officer "...discounted and omitted evidence that I presented at the hearing in the form witness testimony." The grievant also believed that DHRM policies 2.5, 2.10, and 3.05 were violated when another employee was promoted. He also requested that the hearing officer reconsider his decision. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this administrative review request.

FACTS

The Woodbridge campus of the Northern Virginia Community College (NVCC) employs the grievant as a Grounds Worker. The grievant was hired as a Grounds Worker in December 2000. Due to leave of absence of his supervisor, a Grounds Worker Supervisor, he became the Acting Grounds Worker Supervisor and on July 3, 2002, was given temporary pay. In October 2002, the grievant refused to use a state vehicle to move the property from the office of the recently resigned Grounds Worker Supervisor to that employee's residence. After the grievant refused to do so, another employee was asked to use the state vehicle to remove the employee's property and carried out that assignment. The grievant, who was acting as the Grounds Worker Supervisor at the time, was reassigned to his original role on December 24, 2002, and the other employee was made Acting Grounds Worker Supervisor. The grievant was told that the reassignment was executed with the intention of rotating the acting duty every six months between him and the other employee. Approximately five and one-half months later, as a Grounds Worker, the grievant was given the additional responsibility of supervising the grounds crew activities at the campus. He received no additional pay for this added responsibility. However, at the end of the six-month term during which the other employee was acting, agency officials decided not to fill the Grounds Worker Supervisor position but would transfer it to another division. Through some selection process, the agency decided to choose one of the employees to which to assign the duties of the Grounds Worker Supervisor. The other employee was assigned the duties of the vacant Grounds Worker Supervisor position and had his role redefined and his pay adjusted accordingly. The grievant filed a grievance in which he listed the following issues: "unfair hiring practices, retaliation for declining to abuse state vehicle and state time, retaliation for supporting anti-fraud, waste, and abuse policies, retaliation for requesting supervision and or management in our shop to prevent abuse of state time."

In a decision dated December 31, 2003, the hearing officer upheld the agency's personnel actions regarding redefining the other employee's role and granting him additional pay. In addition, the hearing officer did not find that the agency's actions constituted retaliation. The hearing officer directed that the agency compensate the grievant for the period of time during which he was assigned additional responsibilities through the time when he and the other employee were notified that the other employee had become the supervisor. The grievant asked the hearing officer to reconsider his decision but the hearing officer refused to reconsider.

The relevant policy, the Department of Human Resource Management's Policy No.3.05, Compensation, governs temporary pay and provides;

Agencies may provide temporary pay to an employee who is assigned different duties on an interim basis or because of the need for additional assignments associated with a special time-limited project, in the same or different Role in the same or higher Pay Band.

When temporary pay is granted for assuming the duties of a different Role in a higher Pay Band, agency management may grant 0-10% above the employee's current salary as long as the offer does not exceed the maximum of the higher Pay Band.

Policy 3.05 also defines a Role Change as the following:

A non-competitive action in which a position is changed to a different Role in a higher, lower, or same Pay Band. Salary changes for upward, downward or lateral Role changes consider the Pay Factors and provisions of the Agency's Salary Administration Plan.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In the case where there is an allegation of a policy violation, the hearing officer reviews the facts to determine whether the personnel management action constitutes a policy violation. If a policy violation is found, the hearing officer directs that corrective action be taken. Corrective action may be inclusive of a number of actions, ranging from redoing the personnel action starting at the point where the error was introduced to adjusting salaries, such as in the instant case. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on

the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the present case, the hearing officer determined that there was sufficient evidence to support the grievant was due compensation for the time during which he was assigned extra responsibility. He also determined that the personnel actions the agency took regarding the role change for the other employee and subsequent pay actions were appropriate. This Agency has determined that the hearing officer's decision comports with the provisions DHRM Policy 3.05 and will not interfere with the decision. In addition, because the NVCC did not advertise the position, nor were they required to do so under the existing circumstances, there were no policy violations for Policy Nos. 2.10 and 2.50.

If you have any questions regarding this correspondence, please call me at (804) 225-2136.

Sincerely,

Ernest G. Spratley
Manager, Employment
Equity Services