

Issues: Misapplication of policy and retaliation for engaging in protected activity; Hearing Date: 03/16/05; Decision Issued: 04/11/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 7991, 7992, 7993; Outcome: Employee granted full relief; **Judicial Appeal: Appealed to the Circuit Court in Botetourt County (05/05); Circuit Court Ruling issued 10/18/05 [CH05/76]; Outcome: HO's decision reversed; Judicial Appeal: Appealed to the Court of Appeals; Court of Appeals Ruling issued 10/17/06 [Record No. 2868-05-3]; Outcome: Appeal dismissed, Trial Court's ruling affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7991 / 7992 / 7993

Hearing Date: March 16, 2005
Decision Issued: April 11, 2005

PROCEDURAL HISTORY

Grievant filed grievances on March 8, 2004, May 15, 2004, and July 16, 2004. The outcomes of the Third Resolution Step for these grievances was not satisfactory to Grievant and he requested a hearing. On January 31, 2005, the EDR Director issued Compliance and Qualification Ruling 2004-761, 2004-917, and 2004-918 to consolidate the hearings and set forth the issues to be heard. On February 7, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 16, 2005, a hearing was held at the Agency's regional office. To avoid conflicting results in a companion grievance filed by another employee, the Hearing Officer delayed issuance of a decision pending completion of the companion case.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether the Agency misapplied State policy?
2. Whether the Agency retaliated against Grievant for engaging in protected activity?

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:

The Department of Corrections employs Grievant as a Corrections Officer at one of its Facilities. Grievant's duties include daily supervision of inmates. One way for Grievant to control an inmate's behavior is to file disciplinary charges against an inmate behaving improperly. Division Operating Procedure (DOP) 861 sets forth the Agency's procedure for disciplining inmates. If an inmate disputes a charge issued against him by a Corrections Officer, that inmate may seek a hearing before an Institutional Hearings Officer (IHO). The IHO may uphold, reduce, or dismiss the charges filed against an inmate.

On October 20, 2003, this Hearing Officer issued Decision Number 5813 ordering the Agency to require the Facility where Grievant worked to comply with IOP 861 and thereby protect Grievant from workplace violence as defined by DHRM Policy 1.80, *Workplace Violence*. This Hearing Officer found that the Institutional Hearings Officer was shredding charges filed by Corrections Officers against inmates who were misbehaving.

On March 3, 2004, Grievant filed a grievance alleging Agency harassment and hostile work environment. On May 15, 2004, Grievant filed a grievance alleging unprofessional management by the Chief of Security and retaliation. On July 16, 2004, Grievant filed a grievance alleging the Agency's Facility endangered security officers by failing to comply with IOP 861 and alleging retaliation.

On June 17, 2004, the Agency removed Grievant from the Facility and temporarily transferred him to another institution located approximately 54 miles away. The Agency removed Grievant in order to conduct an investigation into Grievant's allegations about whether the Facility was unsafe.

A Special Agent from the Office of Inspector General within the Department of Corrections began an investigation at the Facility at the request of the Regional Director. All available security personnel working at the Facility were interviewed. Interview questions included:

Do you feel you are in an unsafe working environment at [Facility] while working with inmates? If yes, please explain.

Do you believe the Hearings Officers and Administration are adhering to DOP #861 (Inmate Discipline)? If not, please explain and give examples.¹

The Special Agent drafted a report finding, "The majority of employees expressed that they felt safe working with the inmates. No credible evidence was presented that supports that [the Facility] is or has been an unsafe working environment."²

Although the Agency's transfer of Grievant was temporary, it made the transfer permanent in November 2004. When asked why Grievant was not returned to the Facility after the Agency's investigation was completed, the Warden testified at the hearing that the Agency felt it was in the best interest of the Agency and Grievant that Grievant not be returned to the Facility.

CONCLUSIONS OF POLICY

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 retaliation, Grievant must show he or she (1) engaged in a protected activity;³ (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.

On September 4, 2002, Grievant filed a grievance alleging the Agency misapplied IOP 861 thereby placing his safety at risk. In Hearing Decision 5813, this Hearing Officer affirmed Grievant's allegation. On July 16, 2004, Grievant filed another

¹ Agency Exhibit 7.

² Agency Exhibit 7.

³ 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.

grievance alleging the Agency was not complied with IOP 861. In particular, Grievant alleged the Facility “endangers enforcement officers by its policy of negating a significant number of charges (citations) written by enforcement officers against inmates, thereby diminishing both ... the officer’s authority and ... the control of inmates.

The Agency contends it transferred Grievant because he felt unsafe at the Facility. After it completed its investigation, the Agency knew the Facility was not unsafe and knew that Grievant’s contention was unfounded. The Agency also knew that the primary source of Grievant’s concern was the IHO who had resigned in August 2004.⁴ Rather than returning Grievant to the Facility, the Agency made Grievant’s temporary transfer permanent in November 2004.

The Agency’s assertion that it transferred Grievant because he felt unsafe and it was in Grievant’s best interest is a pretext in response to Grievant having filed grievances. Based on the credibility of witness testimony, it is clear that the Agency felt Grievant was a nuisance because of his frequent complaints and that both he and the Facility managers would be better off if Grievant was moved to another location.⁵ Once Grievant placed his complaints in the form of a grievance, his actions became protected activity.⁶ The Agency cannot retaliate against Grievant for engaging in a protected activity. Additional evidence of this pretext is that only Grievant and another employee were transferred for claiming the Facility was unsafe even though approximately six Facility employees reported to the Agency’s Investigator that they felt unsafe. If the Agency had adopted an informal policy of transferring employees who felt unsafe, then all six of the employees would have been transferred, not just Grievant and another employee.

Grievant contends that on February 6, 2004, he received a threatening, harassing and intimidating phone call at his home by the Institutional Hearing Officer. He contends that the Agency did not take his complaint seriously. On February 8, 2004, Grievant made an oral complaint to Lt. H about the IHO’s telephone call. Lt. H reported the complaint to the Warden. On February 9th and 10th, the Warden and Major talked to the IHO. On February 11, 2004, Lt. H talked to the IHO about the telephone call. Based on the evidence presented, Grievant may have found the IHO’s telephone call to be annoying, but Grievant has not proved the call was harassing, threatening, or intimidating. The Agency investigated the matter and reached the same conclusion.

⁴ The Agency had independently determined that Grievant’s complaints about the IHO were founded. The IHO was not applying IOP 861 as required.

⁵ The Hearing Officer does not express an opinion regarding whether the Agency’s opinion is correct. It may or may not be true that both Grievant and the Agency would benefit from having Grievant work at another facility.

⁶ *Va. Code § 2.2-3000(B)(6)* provides that each Executive Branch agency shall “[r]ecognize the right of employees to fully participate in the grievance process without retaliation.

There is no basis to grant relief to Grievant. The Agency acted appropriately in response to the IHO's telephone call.

Grievant contends that the Agency discriminated against him because a Lt. H required Grievant to obtain permission prior to using a computer at the Facility. Although the Hearing Officer finds that Lt. H required Grievant to obtain his permission prior to using the computer, no evidence was presented suggesting that Facility or Agency managers were aware of Lt. H's instruction to Grievant. The evidence is insufficient for the Hearing Officer to conclude that Lt. H's order was retaliatory.

Grievant contends the Agency acted improperly after the IHO filed a grievance against Grievant. This argument fails because the IHO is free to file a grievance just as would any other employee. The Agency is obligated to investigate and process the IHO's grievance. Interviewing Grievant was an appropriate part of that grievance. The Agency was under no obligation to express to Grievant the outcome of the IHO's grievance. There is no evidence to suggest that the Agency asked the IHO to initiate the grievance. Based on the evidence presented, there is no reason to believe the Agency has acted improperly with respect to the grievance filed by the IHO against Grievant.

Grievant asserts the Major engaged in unprofessional management that was belittling, offending, and embarrassing to Grievant. The evidence is insufficient for the Hearing Officer to conclude that the alleged actions by the Major were contrary to policy or inconsistent with what would be expected at most correctional facilities. Accordingly, there is no basis to grant Grievant the relief based on this allegation.

Grievant argues the Agency has not complied with the Hearing Officer's Decision 5813 requiring the Agency to comply with IOP 861. Following the decision, the Agency initiated an investigation by the Agency's Office of Inspector General. The IHO admitted to a Special Agent that he "was destroying institutional charges that officers placed against inmates. [IHO] admitted to [the Special Agent] that he has intentionally delayed processing active charges against inmates that were working as informants for him allowing the hearing time limit to expire."⁷ The Agency took disciplinary action against the IHO based on the Special Agent's findings. As other issues arose regarding the IHO's work performance, the Major counseled the IHO and took appropriate disciplinary action. The Agency presented a sufficient explanation as to why certain charges against inmates were dismissed. Based on the evidence presented, the Agency has taken appropriate and commendable action to investigate the work performance of the IHO and to comply with the Hearing Officer's Decision 5813.

DECISION

⁷ Agency Exhibit 7.

For the reasons stated herein, the Agency is ordered to refrain from retaliating against Grievant for engaging in protected activities. Because the Agency retaliated against Grievant by transferring him to another Facility, that transfer must be reversed. The Agency is ordered to return Grievant to his prior Facility under the same terms and conditions as existed prior to the transfer.

APPEAL RIGHTS

You may file an administrative review request within **15 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 15 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 15-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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.