

Issue: Misapplication of policy and retaliation; Hearing Date: 04/08/05; Decision Issued: 04/13/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8018; 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: 8018

Hearing Date: April 8, 2005
Decision Issued: April 13, 2005

PROCEDURAL HISTORY

On June 21, 2004, Grievant filed a grievance alleging the Agency failed to comply with an institutional operating procedure and retaliated against him. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 18, 2005, the EDR Director issued Qualification Ruling 2004-919 and 921 qualifying the grievance for hearing. On March 3, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 8, 2005, a hearing was held at the Agency's regional office. The Hearing Officer found just cause to extend the 35 day time frame based on a death in the family of an individual involved in the hearing.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether the Agency failed to comply with State policy.
2. Whether the Agency 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:

Prior to being transferred, the Department of Corrections employed Grievant as a Corrections Officer at a Level I Facility. Facilities are assigned a level number from one to six. Level I facilities house inmates with the lowest or lower security threat. Level VI facilities house inmates with a high or highest security threat. Grievant's duties included daily supervision of inmates. One way for Grievant to control an inmate's behavior was 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 June 9, 2004, Grievant and three other corrections officers sent the Agency's Regional Director a letter entitled "Work Place Violence / Hostile Work Environment." The letter states, in part,

The safety of security staff has been compromised at [Facility] because the administration at [the Facility] continue to support the habits of [the Institutional Hearings Officer], reducing or dismissing perfectly legitimate inmate charges, an ongoing situation that was to have been eliminated by [the Warden] according to a statement from [the Regional Director]. ***

An Incident Report was filed prior to this complaint by [Officer N] addressing the safety issue of officers to the [Facility managers] about [the IHO] dismissing charges at will. A Workplace Violence grievance for this very issue was awarded to [Officer N] last year. ABSOLUTELY NO ACTION WAS EVER TAKEN. The only result was retaliation by the [Facility managers] and [the IHO] on [Officer N]. ***

In summary, [the IHO] and [Facility managers have] created an ongoing 'Hostile Work Environment' and a "Workplace Violence" situation for security staff at [the Facility] by selectively eliminating inmate charges at will for their own agenda.¹

A copy of the letter was sent to the Virginia Attorney General and the Virginia Secretary of Public Safety.

On June 17, 2004, the Warden sent Grievant a letter stating:

You are being temporarily assigned to [another Facility]. *** The Inspector General's Office, Special Investigations Unit, has been contacted. You will be seen by a Special Agent in the near future to review your issues and concerns regarding [the current Facility].²

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.³

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."⁴ The Special Agent completed his report in October 2004.

Grievant was notified by the Agency that his temporary transfer would become permanent. During the hearing, the Warden testified that the decision to make Grievant's transfer permanent was because the Agency believed it was in Grievant's best interests.

CONCLUSIONS OF POLICY

¹ Grievant Exhibit 10.

² Grievant Exhibit 26.

³ Agency Exhibit 6.

⁴ Agency Exhibit 7.

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')."

Grievant reported a possible violation of law to a proper authority. Under the Occupational Safety and Health Act of 1970 (OSHA), an employer must establish "place[s] of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."⁵ Grievant's June 9, 2004 letter to the Regional Director starts with the phrase, "The safety of security staff has been compromised at [the Facility]" Grievant reported his concerns about workplace safety and those concerns amounted to an allegation that the Agency was not in compliance with law.

Because Grievant reported his concerns about safety, the Agency took the action of transferring him to another Facility. Although the temporary transfer pending the Agency's investigation was appropriate, the Agency's permanent transfer was retaliatory.

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. Rather than returning Grievant to the Facility, the Agency made Grievant's temporary transfer permanent.

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 reported what he believed was an unsafe workplace. Based on the credibility of witness testimony, it is clear the Agency felt that both Grievant and the Facility managers would be better off if Grievant were moved to another location because Grievant had complained and Grievant was affiliated with another employee who frequently complained. 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. Furthermore, Grievant was transferred from a Level I facility to a Level III facility thereby exposing him to more dangerous inmates. All other things being equal, Grievant's risk of injury would be greater at a Level III facility than at a Level I facility.

⁵ 29 U.S.C. 654(a)(1).

Grievant argues the Agency has endangered security officers by failing to comply with IOP 861. Grievant has not presented sufficient evidence for the Hearing Officer to conclude that the Agency has continued a previous pattern of failing to prosecute charges issued by corrections officers against inmates. After investigating the IHO and confirming that the IHO intentionally was not prosecuting charges against inmates, the Agency disciplined the IHO. The Major continued to counsel the IHO as problems arose with the IHO's performance. Although inmate charges were dismissed by the IHO prior to his resignation in August 2004, the Agency has presented sufficient reasons why those charges were dismissed. These reasons include that some charges were not timely served on the inmates by security staff. Accordingly, the Hearing Officer finds that the Agency has not misapplied IOP 861 or State policies relating to IOP 861.

Grievant asks the Hearing Officer to order that an unbiased external agency conduct an investigation of the Facility. He also asks that certain other officers be transferred back to the Facility. The Hearing Officer lacks the authority to order an investigation. Grievant lacks standing to request reversal of transfers of other employees.

DECISION

For the reasons stated herein, the Agency is ordered to refrain from retaliating against Grievant for engaging in protected activities. Since Grievant no longer seeks return to his prior Facility, the Hearing Officer will not order the Agency to return Grievant to his former position.

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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.