

Issue: Misapplication of Policy (workplace safety); Hearing Date: 08/18/04; Decision Issued: 09/10/04; Agency: VCE; AHO: Carl Wilson Schmidt, Esq.; Case No. 787



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 787**

Hearing Date: August 18, 2004  
Decision Issued: September 10, 2004

**PROCEDURAL HISTORY**

On March 14, 2003, Grievant filed a grievance alleging the Agency failed to comply with policy. The Agency denied qualification of the grievance for a hearing and Grievant asked the EDR Director to qualify the matter for hearing. On April 27, 2004, the EDR Director issued Ruling 2003-476 denying qualification for hearing. Grievant appealed the EDR Director's Ruling to the Circuit Court in his locality. On June 22, 2004, the Circuit Court reversed the EDR Director's ruling and qualified the grievance for hearing. On August 18, 2004, a hearing was held at one of the Agency's Facilities.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUE**

Whether the Agency failed to comply with policy when it materially increased the risk of injury to Grievant in the workplace.

### **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 Production Supervisor working within the Agency’s Correctional Enterprises division. He began working for the Agency approximately eight years ago. Grievant works at one of the Agency’s Level 2 facilities.<sup>1</sup> Grievant’s duties include managing a shop employing inmates to manufacture goods such as furniture. He trains inmates to use machines. He takes care of scheduling, ordering parts, checking product quality, and performs other duties. Inmates are convicted felons. When Grievant began working at the Facility, he supervised approximately 20 inmates. Currently he supervises approximately 60 to 70 inmates. Grievant is not a corrections officer and has not had all of the training required of a correctional officer.

Grievant works in a shop with two levels. The lower floor is approximately 200 feet long by 60 feet wide. The lower floor contains a maintenance department, tool office, upholstery department, and several staff offices. Scaffolding is located through out the shop and serves to obstruct one’s view inside the shop. The upper floor contains the cutting and sewing departments as well as racks for fabric supplies. Flammable and dangerous chemicals are located in spray areas of the shop. Inmates working in the shop have ready access to approximately 1500 tools. When Grievant began working at the Facility, inmates had access to approximately 300 tools.

The shop has three entrances. The main entrance is where the corrections officer’s desk is located. A corrections officer sitting at this desk has only a limited view of the shop. When looking from the corrections officer’s desk, there are at least 50 blind spots in the shop. Inmates could be standing at any of those spots and the corrections officer would not be able to observe them.

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<sup>1</sup> The most dangerous inmates are kept in Level 6 and the least dangerous are kept in Level 1 facilities.

The shop does not have an emergency telephone connecting the shop to master control. Cameras which can be monitored from a remote location are not mounted anywhere in the shop.

The Agency experienced severe budget cuts forcing it to reduce the cost of its operations at various facilities. In May 2002, the Agency eliminated one of the two correctional officer positions in the shop in order to reduce operating costs. In December 2002, the Agency issued a Security Operating Procedure setting forth additional duties for Grievant. Several major duties formerly performed by the second correctional officer were assigned to Grievant. First, Grievant became responsible for frisk searching<sup>2</sup> inmates entering and leaving the shop. Grievant conducts approximately 35 to 45 percent of all frisk searches as inmates leave the shop. He spends approximately two minutes per inmate to complete a search. Second, Grievant has keys enabling access through all three entrances to the shop. When the two corrections officers worked in the shop, Grievant did not have any keys to the entrances. Grievant also spends approximately five percent of his time for inmate movement even though he has not received any training regarding how to do so. Third, Grievant is responsible for assisting a correctional officer with intermediate counts of inmates. Inmates enter and leave the shop frequently during the day. Grievant must keep track of these inmates and must perform counts. He then informs the correctional officer of his count so that the correctional officer can update the shop log.

Approximately half of Grievant's duties are duties that were formerly performed by the second correctional officer.

On several occasions during the day, the shop has inmates but no corrections officer present. For example, the corrections officer is away from his post when he is at lunch or is outside of the shop when trucks are loading or unloading. Grievant feels uncomfortable when no corrections officer is present at the shop.

Although Facility managers have not had to file any Serious Incident Reports because of inmates working in the shop, potentially dangerous conflicts have occurred in Grievant's work area. For example, inmates have argued resulting in conflict. Two inmates, one with a hammer, started to fight. Grievant separated the inmates. Grievant has not received any training regarding how to control inmate conflicts. Grievant is not trained regarding how to protect other staff in the shop.

All correctional facilities create some level of injury risk to employees because these facilities house dangerous inmates. The Hearing Officer finds that by removing one of two correctional officers, the Agency has materially increased the risk of physical injury to Grievant<sup>3</sup> beyond what would normally exist at a correctional institution.

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<sup>2</sup> During a frisk search, the inmate is "patted down" to determine whether he is in possession of items he should not have.

<sup>3</sup> It is not necessary for Grievant to show that he has actually been injured in order to show that the risk of injury has increased. The risk of injury results from the probability of injury. The probability of injury may increase without there being an increase in the actual occurrence of injury.

Neither party presented a complete and contemporary Employee Work Profile specifying Grievant's duties. The Hearing Officer cannot compare Grievant's work responsibilities with his Employee Work Profile.

Neither Grievant nor the Agency has sought a position audit to determine whether a Role Change or an In-Band Pay Adjustment (Change in Duties) is appropriate under DHRM Policy 3.05.

### **CONCLUSIONS OF POLICY**

The Hearing Officer's authority is limited under the Grievance Procedure Manual. Examples of relief the Hearing Officer cannot grant include:

- Hiring, promotion, transfer, assignment or retention of any employee;
- Establishing or revising compensation, classification or benefits;
- Establishing or revising policies, procedures, rules, or regulations;
- Directing the methods, means or personnel by which work activities are to be carried out;

In order to grant the relief Grievant seeks, the Hearing Officer would have to be given the authority to grant that relief. A Hearing Officer may order an agency to comply with applicable policy.<sup>4</sup> Since the Hearing Officer is obligated to apply Agency policy, the first question to address is "What is the Agency's policy?"

The Facility's Security Operating Procedure ("SOP") is the policy governing the Agency's obligations regarding Grievant's employment. The SOP supersedes Institutional Operation Procedures ("IOP") 403, 410, 412, and 452.<sup>5</sup> To the extent the SOP conflicts with these IOPs, the SOP controls.

Grievant is responsible for performing frisk searches of inmates. The SOP provides that the "security officer shall assist the foreman in frisk searching the inmates and retrieving the inmate institutional ID Card." It also states, "[u]pon entry [into the shop] the inmate shall be frisk searched by either the shop foreman or a certified Correctional Officer." Grievant has not established that the Agency has acted contrary to policy by requiring him to conduct frisk searches of inmates.

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<sup>4</sup> Grievance Procedure Manual § 5.9.

<sup>5</sup> The Deputy Director testified that an SOP has the same force and effect as does an IOP. In this case, the SOP is more recent than the IOPs listed and, thus, the SOP controls.

Grievant is responsible for conducting intermediate counts<sup>6</sup> of inmates. IOP 410.2(A) provides that “[i]ntermediate counts should be made between formal counts to verify that all Inmates under an officer’s supervision are present.” The SOP states the “foreman shall ensure all inmates are present after returning inside the shop by conducting a head [count] of the inmate workers.” Since the SOP authorized Grievant to conduct intermediate counts, the Agency’s actions are consistent with policy.

Grievant has been issued security keys enabling him to control the movement of inmates. IOP 452-7.2 provides that “[k]eys defined as security keys should not be issued to ... non-certified Correctional Officers.” The SOP states:

A key ring will be assigned to SMU Control for accessibility for Security Staff to enter VCE shop. The Security Officer assigned to Post #40 and the SMU Supervisor shall chit the key ring when needed. Additional keys shall be added to Post #18<sup>7</sup> key ring so that he/she may have access into the shop.

Neither IOP 452, nor the SOP authorizes Grievant to have access to keys to enter the VCE shop. Accordingly, the Agency has acted contrary to written policy by requiring Grievant to have keys enabling him to control access to the VCE shop.

When a VCE trailer is being unloaded by inmates inside the compound, Grievant must provide direct supervision of the loading process. The SOP states that the “foreman shall maintain direct supervision of the unloading process.” The Agency did not act contrary to policy by requiring Grievant to directly supervise inmates loading trailers.

The Agency has materially increased the risk of injury to Grievant when it removed the second correctional officer from the shop. Grievant has not presented any policy requiring the Agency to maintain a second correctional officer in the shop. Grievant has not presented any policy setting forth a basis to determine when the risk of injury to an employee exceeds acceptable levels. Accordingly, the Agency did not act contrary to policy when it removed the second correctional officer from the shop.

The Hearing Officer recommends that the Agency re-evaluate its security measures applying to Grievant’s work area. The Agency should restore a second correctional officer inside the shop. Although the Agency has indicated it agrees with Grievant’s suggestion for the installation of security cameras inside the shop (in lieu of a second correctional officer), the Agency did not present any documents suggesting it has initiated the purchase of security cameras. Given the length of time that has passed (over 14 months) since the Agency indicated its agreement to install cameras, it

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<sup>6</sup> Grievant does not participate in formal counts. Formal counts are conducted by two corrections officers at set times during the day.

<sup>7</sup> No evidence was presented explaining the location of Posts 18 and 40 and who filled these posts.

appears unlikely the Agency will actually install such cameras. In addition, the Hearing Officer recommends that as long as Grievant continues to perform duties traditionally associated with a correctional officer, the Agency provide Grievant with the necessary training to enable him to do so.

Grievant is not “a duly sworn employee of the Department of Corrections whose normal duties relate to maintaining immediate control, supervision and custody of prisoners confined in any state correctional facility.”<sup>8</sup> Thus, he is not eligible for benefits under the Virginia Law Officer’s Retirement System.<sup>9</sup>

Grievant has not alleged the Agency is acting contrary to OSHA standards. The Agency presented evidence showing the Facility had been recognized by OSHA as a safe workplace.

### **DECISION**

For the reasons stated herein, Grievant’s request for relief is denied except that the Agency is ordered to comply with the Security Operating Procedure regarding Grievant’s access to keys.

### **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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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<sup>8</sup> Va. Code § 53.1-1.

<sup>9</sup> Va. Code § 51.1-211 et seq.

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.<sup>10</sup>

[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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>10</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.