

Issue: Retaliation; Hearing Date: 11/28/06; Decision Issued: 12/21/06; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 8460; Outcome: Employee granted full relief; **Administrative Review: EDR Ruling Request received 01/05/07; EDR Ruling No. 2007-1530 issued 02/02/07; Outcome: AHO's decision affirmed; Judicial Appeal; Permission granted to appeal to the Circuit Court, Powhatan County (EDR Ruling No. 2007-1546); Circuit Court Final Order issued 05/04/07; Outcome: HO's decision reversed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8460**

Hearing Date: November 28, 2006  
Decision Issued: December 21, 2006

**PROCEDURAL HISTORY**

On March 15, 2006, Grievant filed a grievance to challenge the Agency's decision to transfer him from a favorable post to an undesirable post. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On November 2, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 28, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Representative  
Witnesses

**ISSUE**

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:

The Department of Juvenile Justice employs Grievant as Juvenile Corrections Officer at one of its Facilities. The purpose of his position is to, “ensure the protection of the citizens of the Commonwealth by providing supervision and security to juvenile offenders and implement treatment programs that offer opportunities for reform.”<sup>1</sup> He has been employed by the Agency for several years and has worked at the Facility longer than approximately 95% of other security staff. The Facility employs at least 200 security staff.

Grievant filed grievances with the Agency in November 2003 and March 2005.

The Agency’s practice is to staff posts based on staff seniority. In other words, the longer an employee has worked at the Facility, the greater discretion that employee is given to select among security posts. Facility Security staff perceived some posts as being significantly more appealing than other posts. For example, security staff working in the Behavior Management Unit have to work with the most difficult wards in the Facility. Many of these wards have a propensity towards violence and security staff must sometimes use force to control them. Security staff working at the sally port do not have to work with wards and are not often at risk of physical injury. Most security staff perceive the sally port as being a much better post to work than the Behavior Management Unit post.

For over two years, Grievant was working the sally port post. He worked eight hours per day from approximately 5 a.m. until 2 p.m., Monday through Friday. On January 17, 2006, Captain M informed Grievant that security staff working Mondays through Fridays would have to work one weekend per month and one weekday Holiday per year. On January 25, 2006, Captain M informed Grievant that the weekend and holiday coverage had been change from every month to every other month with discretion to staff regarding how to cover the weekends.

On January 26, 2006, Captain M informed Grievant that Grievant would be reassigned from the sally port post to work inside the facility in a “floater” position.

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<sup>1</sup> Grievant Exhibit 7.

On February 1, 2006, Grievant wrote a memorandum to the Major describing some security breaches at the sally port post.

On February 2, 2006, the Major wrote a memo to his immediate subordinates informing them that effective February 6, 2006 the sally port post would no longer be a Monday through Friday post, but that it would change to a 12 hour day shift post. He indicated the day shift Watch Commander would be responsible for staffing the post. The Major instructed Captain M or Lieutenant S to inform Grievant on February 3, 2006 of the change and to report to work on the following Monday at 6:45 a.m.<sup>2</sup>

On Friday, February 3, 2006, Lieutenant S informed Grievant that he would begin 12 hours shifts instead of eight hour shifts effective Monday, February 6, 2006.

On February 6, 2006, the sally port post was changed from eight hours per day to a twelve hour shift. Grievant remained at the sally port post but had to adjust his work hours. The Agency changed the hours of the post based on the needs of the Facility.

On February 7, 2006, Grievant asked to speak with the Major concerning how the change in schedule affected Grievant financially. Grievant had not scheduled an appointment with the Major. The Major told Grievant he was busy and would meet with Grievant at a later time. The Major never met with Grievant regarding Grievant's concerns.

On February 10, 2006, Grievant met with the Assistant Superintendent regarding the schedule change and the financial hardship the change caused Grievant.

Grievant worked the sally port post for the last time on March 1, 2006.

On March 2, 2006, Grievant received in the mail a notification from the Department of Human Resource Management ruling on a prior grievance and conclusion of the grievance. DHRM mailed the ruling on February 28, 2006. A copy of the ruling was sent to the Facility Superintendent.

On March, 2, 2006, Captain P assigned Grievant to work in the Behavior Management Unit.

Grievant asked Captain P why he could not work the sally port post. Captain P responded that Grievant should "take that up with administration" because the decision to move Grievant was made by employees higher in Captain P's chain of command.

Grievant attempted to ask the Major why he was moved from the sally port post, but the Major was too busy to meet with him.

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<sup>2</sup> Grievant Exhibit 10.

## 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;<sup>3</sup> (2) suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence raises a sufficient question as to whether the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

The Agency did not retaliate against Grievant by changing the work hours of the sally port position from eight hours per day to 12 hours per day. Agency managers made this decision based on the legitimate needs of the Agency. Grievant expressed concern that the sally port post was being changed to 12 hour shifts but other eight hour shift posts remained unchanged. The Agency established that those other posts were appropriately eight hour shifts. For example, security staff transporting inmates to other facilities or to hospitals typically did so during normal business hours. It made sense to keep those positions as eight hour shifts. Whether the Agency retaliated against Grievant by moving him from the sally port position to the housing unit position, however, bears closer scrutiny.

Grievant has established that he engaged in protected activity such as filing grievances with the Agency. Grievant suffered a materially adverse action because the Agency moved him from the sally port post to the Behavior Management Unit post. Working on the sally port post was more desirable to Grievant and to other security staff than working in the Behavior Management Unit because of the significant increase in stress caused by having to work directly with dangerous and disruptive wards. Moving an employee from a low stress post to an extremely stressful post is an action that would "be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."<sup>4</sup> In light of the close proximity in time between Grievant and Agency being notified of the outcome of a grievance<sup>5</sup> and the

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<sup>3</sup> 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.

<sup>4</sup> Burlington Northern v. White, 126 S. Ct. 2405, 2409 (2006).

<sup>5</sup> DHRM mailed a ruling on February 28, 2006 which Grievant received a few days later.

Agency's action to move Grievant from the sally port post, Grievant has presented sufficient facts to establish a causal link between his protected activity and the materially adverse action. Accordingly, Grievant has established his prima facie case.

The Agency contends it moved Grievant from the sally port post to the Behavior Management Unit post as a result of legitimate business needs of the Agency. The Agency has not proven this allegation. For example, Captain P testified that several of the Captains had discussed moving Grievant from the sally port post to the Behavior Management Unit but they decided against it and did not make a recommendation to the Major about moving Grievant. At the time of the move, Captain P knew Grievant had filed a grievance that was pending. In contrast, the Major testified that he did not instruct Captain P to move Grievant from the sally port post to the Behavior Management Unit. He left it to the discretion of the Watch Commander to decide who would work on the sally port post. The Major never instructed that Grievant should not work the sally port post.

The testimony of the Major and Captain P cannot be reconciled. Because the Agency has presented directly conflicting accounts of the reason why Grievant was moved from a favorable to an unfavorable post, the Hearing Officer concludes that the Agency's decision was a pretext or excuse for retaliation. Accordingly, Grievant has established that the Agency retaliated against him by moving him from the sally port post to the Behavior Management Unit post. In order to restore Grievant to the circumstance he was in prior to the Agency's retaliation, the Agency must return Grievant to the sally port post.<sup>6</sup>

## **DECISION**

The Agency is ordered to refrain from retaliating against Grievant. The Agency is ordered to return Grievant to his former post at the sally port at his Facility. The Agency may move Grievant from the sally port post only for legitimate business needs with due regard given to his seniority.

## **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.

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<sup>6</sup> This decision does not affect the hours of work per day Grievant must work once returned to the sally port post.

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

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 all of your appeals to the other party and to the EDR Director. 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.<sup>7</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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.