Issues: Non-disciplinary transfer, medical disclosure, discrimination, retaliation; Hearing Date: 03/21/07; Decision Issued: 06/08/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8553; Outcome: Agency upheld in full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8553

Hearing Date: March 21, 2007
Decision Issued: June 8, 2007

PROCEDURAL HISTORY

On July 21, 2005, Grievant timely filed a grievance. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On January 24, 2007, the EDR Director issued Ruling Number 2007-1457 qualifying this grievance for hearing. On February 28, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 21, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUE

1. Whether Grievant's military status was a motivating factor in the Agency's decision to transfer him from Facility A to Facility B?

2. Whether the Agency discriminated against Grievant because of the disability?

3. Whether the Agency misapplied policy?

4. 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:

Grievant began working for the Department of Corrections as a Corrections Officer at Facility M on July 1, 1995. He transferred to Facility B as a Corrections Officer on May 10, 1998. He was promoted to Counselor on June 10, 1998. On May 29, 1999, Grievant was promoted to Treatment Program Supervisor. On January 10, 2001, he was transferred to Facility A. Grievant transferred as the Corrections Sergeant.

Grievant served in the United States Armed Forces and was stationed in Iraq. While Grievant was away from Facility, the Facility's Warden changed. Warden R began working at the Facility in December 2004. Warden R had been instructed by Agency executives to review the operations of Facility A and revise procedures as necessary to account for lowering of the security level at Facility A.

Grievant returned from Iraq in February 2005. He resumed working at Facility A on March 25, 2005.

Warden R made several changes in Facility A's operations while Grievant was serving in the Armed Forces. When Grievant returned to the Facility, he did not agree with you new warden's changes. Grievant expressed his concerns about several safety issues at Facility A. For example, Grievant believed inmates should be given more than 20 minutes for meals. He was concerned that inmates living in different parts of the institution of would come into contact with one another as they moved in and out of the dining area. Grievant believed that contact between inmates who were not supposed to encounter one another would result in violence. In addition, Grievant was concerned about a letter that he intercepted from an inmate. A Muslim inmate wrote a letter saying

that another inmate should be decapitated for leaving the Islam faith. Grievant showed the letter to the institutional investigator and the warden. Grievant felt the letter was not properly addressed by the institution. Furthermore, Grievant was concerned that the institution was not properly responding to his concerns about an inmate who was lending money to other inmates. Grievant told Warden R and the Major about his safety concerns.

On July 6, 2005, Warden R stopped Grievant as they were passing in a stairwell at Facility A. Warden R asked Grievant if Grievant was experiencing any problems upon his return to the Facility. Grievant told Warden R that Grievant had a diagnosis of minor Post Traumatic Stress Disorder but that he could deal with it. No one else overheard their conversation. Grievant did not tell anyone else at Facility about his diagnosis.

On July 11, 2005, Warden R spoke with the HRO and asked her to obtain the telephone number for the State Employee Assistance Program. Warden R called Grievant into his office. Also in the office were the Assistant Warden, the Major, and the Human Resource Officer. Warden R told Grievant he was being transferred to Facility B because of Grievant's own feelings that he did not fit in at Facility A.[1] Warden R mentioned that Grievant suffered from PTSD. He asked the HRO to give Grievant a card with the telephone number for the State Employee Assistance Program. Warden R indicated to Grievant that he could call that organization if he wished.[2] The meeting concluded and Grievant left Warden R's office. The Assistant Warden, Major, and HRO did not tell any other employees about Grievant having PTSD.[3]

Grievant was transferred from Facility A to Facility B effective July 12, 2005. Although Grievant was transferred to Facility B, he remained on the payroll of Facility A.

Mr. O was not employed by the Agency. He was a Muslim and was sending letters to Muslim inmates asking them to help build a case against Grievant. Mr. O's son was incarcerated at Facility B. The son resided in housing unit D. When Grievant began working at Facility B, the Watch Commander assigned Grievant to work in housing unit D.[4] On July 15, 2005, Grievant was removed from housing unit D and began working to update the policy standards for Facility B.

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[1] Warden R did not have the sole authority to transfer an employee. Warden R spoke with the Regional Director and they both agreed that Grievant should be transferred to Facility B.

[2] Grievant contends Warden R was attempting to belittle Grievant by mentioning Grievant's PTSD. Warden R mentioned PTSD not to belittle Grievant but in the context of giving Grievant information about the Employee Assistance Program which is available to State employees. Warden R's intent was to assist Grievant, not to belittle him.

[3] Grievant believed they had done so because other employees would poke fun at him. There is no reason to believe the actions of other employees resulted from information disclosed at the meeting on July 11, 2005.

[4] Warden R was not involved in determining which post Grievant would work at Facility B.

Grievant filed his grievance regarding the transfer on July 21, 2005, while he was working at Facility B.

CONCLUSIONS OF POLICY

The Uniformed Services Employment and Reemployment Rights Act (USERRA)[5] prohibits an employer from discriminating against a member of the armed forces. A person cannot be "denied initial employment, reemployment, retention in employment, promotion, or any *benefit of employment* by an employer" based on the employee's membership in a "uniformed service."[6] A benefit of employment is defined by the Act as:

> any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or *location of employment*.[7]

Grievant argues the Agency discriminated against him because of his military status. He draws this conclusion because Warden R mentioned Grievant suffered PTSD resulting from his military service in a meeting called for the purpose of transferring Grievant to another facility. Grievant points out that Warden R said Grievant felt unsafe at Facility A but Grievant had not previously told Warden R that Grievant felt unsafe.

The Agency did not violate the USERRA when it transferred Grievant to Facility B. Grievant was transferred to Facility B because Warden R believed Grievant was having difficulty adjusting to the operational changes Warden R made to reflect the lowering of the security level at Facility A. Warden R believed Grievant would be more comfortable working at Facility B because Facility B had a higher level of security.

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[5] 38 U.S.C. §§ 4301 et seq. *See also* Executive Order 1, which "specifically prohibits discrimination against veterans," and DHRM Policy 4.50, *Military Leave*, which "[p]ermits employees to take military leave, with or without pay, for active duty in the armed services of the United States, and permits employees who are former and inactive members of the armed services, or current members of the reserve forces of any of the United States' armed services, or of the Commonwealth's militia, or the National Defense Executive Reserve to take military leave in accordance with federal [USERRA] and state law."

[6] 38 U.S.C. § 4311(a) (emphasis added). "Uniformed service" includes the Armed Forces and National Guard. 38 U.S.C. § 4303(16).

[7] 38 U.S.C. § 4303(2) (emphasis added).

Facility B's level of security was closer to Facility A's level of security prior to Warden R's arrival at Facility A.

Grievant denies telling Warden R that he felt like he did not fit in at Facility A. When Warden R said Grievant indicated he did not feel like he fit in at Facility A, Warden R was expressing his conclusion (or interpretation) about Grievant's concerns. Grievant had expressed concerns about the Facility's safety to the Warden. Warden R interpreted Grievant's comments to mean that Grievant did not feel like he fit in at Facility A because Grievant felt the Facility did not have adequate safety procedures. Once Grievant was transferred to Facility B, Warden R was no longer involved in Grievant's daily assignments. Warden R was not involved in placing Grievant on a post in housing unit D. No evidence was presented showing that the Watch Commander at Facility B knew he was assigning Grievant to work in a housing unit where Mr. O's son resided.

Disability Discrimination

DHRM Policy 2.05 "[p]rovides that all aspects of human resource management be conducted without regard to race, color, religion, gender, age, national origin, *disability*, or political affiliation . . . ." Under Policy 2.05, "'disability' is defined in accordance with the Americans with Disabilities Act," the relevant law governing disability accommodations.[8] Like Policy 2.05, the Americans with Disabilities Act (ADA) prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability. A qualified individual is defined as a person with a disability, who, with or without "reasonable accommodation," can perform the essential functions of the job.[9] An individual is "disabled" if he "(A) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment."[10] The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires."[11]

To establish a *prima facie* claim of wrongful disability discrimination under the ADA, the grievant must show that: (1) he is within the ADA's protected class (i.e., a "qualified individual with a disability"); (2) he suffered an adverse employment action; (3) his job performance met his employer's expectation when he suffered the adverse employment action; and (4) his adverse employment action occurred under circumstances that raise a reasonable inference of unlawful discrimination.[12]

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[8] 42 U.S.C. § 12101 *et seq*.

[9] 42 U.S.C. § 12111(8).

[10] 42 U.S.C. § 12102(2).

[11] 29 C.F.R. § 1630.2(n).

[12] Rohan v. Networks Presentations, LLC, 2003 U.S. Dist. LEXIS 26687, at n.5 (D. Md. Apr. 17, 2003), *aff'd*, 375 F.3d 266 (4th Cir. 2004). Once an employee establishes a *prima facie* case, an agency may

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment, such as a discharge, demotion, cut in pay or benefits, or a failure to promote.[13] A transfer or reassignment may constitute an adverse employment action if a grievant can show that the transfer/reassignment had some significant detrimental effect on the terms, conditions, or benefits of his or her employment.[14] A reassignment or transfer with significantly different responsibilities, or one providing reduced opportunities for promotion can constitute an adverse employment action, depending on all the facts and circumstances.[15]

Grievant has not met his *prima facie* case for disability discrimination. He has not shown an adverse employment action. Grievant simply was transferred from Facility A to Facility B and, thus, did not suffer an adverse employment action.

Medical Privacy

Grievant contends the Agency violated DHRM Policy 6.05 governing Personnel Records Disclosure. Personal Information is defined to include an employee's "medical history". "[M]ental and medical records" may not be disclosed to third parties "without the written consent of the subject employee." Third parties are defined as, "[i]ndividuals other than the subjects of the records, including other state agencies, who request information from the records maintained by agencies."

The Agency did not violate DHRM Policy 6.05 for two reasons. First, the policy addresses the disclosure of records. Warden R disclosed information orally but did not disclose records relating to Grievant. Second, the information was not disclosed to a third party. The Assistant Warden, Major, and HRO did not request information from the Agency. They were not third parties.

Va. Code § 32.1-127.1:03 addresses the confidentiality of medical records. This section provides:

> There is hereby recognized an individual's right of privacy in the content of his health records. Health records are the property of the health care entity maintaining them, and, except when permitted or required by this section or by other provisions of state law, no health care entity, or other

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nevertheless prevail if it can establish one of the defenses enumerated in 29 C.F.R. § 1630.15. *See generally* Peter A. Susser, *Disability Discrimination and the Workplace* 1014-26 (BNA Books 2005).

[13] Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 761 (1998).

[14] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d, 239, 243 (4th Cir. 1997)).

[15] *See* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371 (4th Cir. 2004); Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999); *see also* Edmonson v. Potter, 118 Fed. Appx. 726 (4th Cir. 2004) (unpublished opinion).

> person working in a health care setting, may disclose an individual's health records.

The Agency did not violate *Va. Code § 32.1-127.1:03* because Warden R is not a person working in a heath care setting.

Grievant contends the Agency acted contrary to Federal law when Warden R mentioned his medical history. Grievant did not cite a specific Federal Statute in support of his assertion. Nevertheless, the Hearing Officer will address several Federal Statutes that may apply.

FMLA. If the Hearing Officer assumes for the sake of argument that the Family Medical Leave Act applies to Grievant's case, the Code of Federal Regulations sets forth some confidentiality requirements that may be relevant. 29 CFR § 825.500 provides:

> (g) Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (see 29 CFR Sec. 1630.14(c)(1)), except that:
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> (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
> (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
> (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

This provision of the Code of Federal Regulations makes records and documents confidential. Warden R was not in possession of medical records or documents related to Grievant's diagnosis. Warden R did not disclose medical records or documents and, thus, did not act contrary to 29 CFR § 825.500.

Americans with Disabilities Act. Under 42 U.S.C. § 12112(d)(4)(B) provides that an employer "may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at the work site. [An employer] may make inquiries into the ability of an employee to perform job related functions." Such information obtained "is treated as a confidential medical record …."[16] In Wiggins v. DaVita Tidewater, 451 F. Supp. 2d 789 (E.D. Va. 2006), an

[16] 42 U.S.C. § 12112(d)(3).

employee suffered a panic attack at work in front of numerous co-workers and patients. The employee sought medical treatment and was diagnosed with bipolar disorder. The employee authorized her medical provider to speak with her supervisor about her medical condition. The medical provider informed the supervisor that the employee was diagnosed with bipolar disorder. The employee alleged that the supervisor disclosed confidential medical information by telling other employees about the diagnosis. The court held, "[e]ven assuming that [the supervisor] told [another employee], co-workers, and patients that [the employee] was diagnosed with bipolar disorder, this communication was not an unlawful disclosure of confidential medical information under the ADA, because [the supervisor] did not obtain the information from an employee health program or employer-mandated medical examination.

Warden R did not learn of Grievant's diagnosis from employee health program or employer-mandated medical examination. Accordingly, Warden R did not act contrary to the Americans with Disabilities Act.

Inappropriate Disclosure. Within the context of courtesy and consideration of co-workers, it was inappropriate for Warden R to mention Grievant's diagnosis of PTSD in front of the Assistant Warden, Major, and HRO. By doing so, Warden R disclosed personal information about the medical health of an employee to other employees who did not need to know the nature of Grievant's medical concerns. Grievant had not shared the information with any other employee and only shared it with Warden R because Warden R specifically asked Grievant how he was doing. Warden R caused Grievant unnecessary embarrassment and frustration. Warden R's comments appeared inadvertent. He did not intend to embarrass Grievant. The Hearing Officer does not have the authority to address instances of inappropriate behavior unless that inappropriate behavior is contrary to policy or law. Grievant has not presented evidence that Warden R's disclosure was contrary to policy or law. Accordingly, the Hearing Officer cannot grant relief to Grievant.

Retaliation

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;[17] (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

[17] *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.

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.

Grievant engaged in a protected activity when he reported his concerns regarding safety at Facility A. He suffered a materially adverse action because he was transferred from Facility A to Facility B. Grievant's transfer, however, was not because he engaged in protected activity. Grievant was transferred because Warden R believed Grievant would experience a less stressful working environment and one with which he was more familiar. The Agency did not retaliate against Grievant.

DECISION

For the reasons stated herein, the Grievant's request for relief is **denied**.

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 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.[18]

[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

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