

Issues: Disciplinary Transfer and Inaccurate Investigative Report; Hearing Date: 05/18/07; Decision Issued: 05/30/07; Agency: DOC; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 8595/8596; Outcome: Transfer – Full Relief; Investigative Report – Partial Relief.

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Numbers 8595 and 8596

Hearing Date: May 18, 2007

Decision Issued: May 30, 2007

APPEARANCES

Grievant
Grievant's Advocate
Agency Representative
2 Witnesses for Agency
3 Witnesses for Grievant

DISCLOSURE

In the pre-hearing telephone conference between the Agency Representative, the Grievant and the Hearings Officer, the Grievant asked if it made any difference that his wife had worked for the Hearings Officer's Law Firm in the early 1970's. The Hearings Officer stated it would not influence his decision, but offered to withdraw. Both the Agency Representative and the Grievant did not object to the Hearings Officer continuing in the matter.

ISSUES

1. "Were policies and procedures misapplied when Grievant's post assignment was changed or alternatively did Grievant's reassignment constitute harassment and was there an unfair application or misapplication of state and agency personnel policies, procedures, rules and regulations?"; and

2. "Was the investigation report true and accurate and did its use in the change of job assignment and filing of the report in Grievant's personnel file constitute an unfair application of policy?"

FINDINGS OF FACTS

The agency employs the Grievant as a Senior Correctional Officer. On August 23, 2006, Grievant was removed from the Transportation and Clothing Officer position, for which Grievant had been selected after application and interview five years previously. Allegations were made that Grievant had advised an inmate in advance of a medical appointment, in order for the inmate's girlfriend, a convicted felon, to be at the Doctor's Office. An internal investigation was done. The Grievant alleges that the report from this internal investigation contains a number of inaccurate and false statements. On September 19, 2006, the Grievant initiated a grievance challenging his reassignment from the Transportation and Clothing officer position as a misapplication of policy, harassment, and informal discipline. Subsequently, on September 28, 2006, the Grievant initiated a second grievance challenging the "[u]nfair application" and falsification of the internal investigation report.

After the parties failed to resolve the grievances during the management resolution steps, the Grievant asked the agency head to qualify both grievances for hearing. The agency head denied the Grievant's requests and he appealed to the Department of Employment Dispute Resolution which qualified both grievances for a hearing and consolidated the grievances for one hearing.

The Grievant was selected for the Transportation and Clothing Officer position after an application and interview process.

The Transportation and Clothing Officer position does not generally rotate. Grievant had held the position for 5 years.

Due to Grievant's reassignment, Grievant is required to work 12 hour days and weekends as opposed to the 8-1/2 to 9 hour days required in the Transportation and Clothing Officer position, which also allowed him to take Inmates out of the prison facility.

The reassignment has also interfered with Grievant's participation in the County youth recreation programs as a soccer and basketball coach and resulted in Grievant having less time with his family during waking hours.

On the day of Inmate C's doctor's office visit, Grievant was on sick leave.

Another Correction's Officer took Inmate C to a doctor's office for removal of stitches from a previous operation. The Corrections Officer upon arrival at the doctor's office recognized Inmate C's girlfriend in the waiting room from having seen her at the prison facility visiting Inmate C.

Because of the allegation of a security breach, before thorough investigation, Grievant was removed from his position and publicly escorted to his vehicle.

Inmate C testified that he learned of his medical appointment while recovering from his operation at the hospital when the doctor said he would remove some stitches in 2 or 3 days and a nurse asked, "at 1:30?" When Inmate C was not called for a medical visit on the 5th of April which would be day two from the operation, he reasoned he would see the doctor on day 3, April 6, at 1:30 p.m.

Inmate C denied learning of his date and time of appointment from Grievant, and claims it was his deduction from the conversation he heard in the recovery room.

Transportation sheets telling the Transportation Officer who, when and to where to transport inmates were generally issued the day before transport. Grievant and other witnesses testified that he placed his copy on a clip board face up in the clothing office. Inmates worked in the clothing office and could have seen the transportation sheets.

The Grievant admitted that he coached in the Pulaski County Recreation soccer and basketball programs. He also testified that players (children) were assigned to his team, he did not pick them. When asked about the inmate's girlfriend's child, he testified that the inmate could have recommended the child, which the inmate said he did, but didn't know the mother because the grandmother transported the child to practice.

Testimony by the agency facility's Chief of Security was that there was no policy on where and how to keep transportation sheets and that the transfer of the Grievant to a new job was made to correct the [security] situation.

The internal affairs investigator testified that he listened to tapes of Inmate C's calls to his girlfriend. One call in which he told her that Grievant would not be the Transportation Correction Officer, was made on the day of transport and one call the day before when he thought Grievant would be the Transportation Correction Officer. The investigator felt Inmate C and his girlfriend were using code to communicate. No code words or phrases were pointed out in testimony.

The investigator testified that Inmate C on the day before his appointment in a telephone conversation told his girlfriend his appointment would be the next day at 1:30 p.m. She asked if Grievant was working that week. The investigator stated that the recording of the call revealed wording out of place which he testified could be code. No wording was identified as code. When the Inmate was questioned, he explained he knew of the time and date of the medical appointment from overhearing the doctor and nurse talking about it in the recovery room, after his operation. When 1:30 p.m. on day 2 passed, he knew his appointment would be the next day. The investigator did not interview either the doctor or the nurse involved to confirm or disprove the Inmate's story.

The Investigator when asked why he did not pursue the Inmate's testimony about how he learned of the medical appointment by interviewing the Doctor and nurses about the recovery room conversation replied, "I didn't need to. It was a judgment call."

The Investigator's statement from the inmate's girlfriend refers to "information coming from Corrections Officer T. [The Inmate] did not come straight out and tell me he [Grievant] told him but I know." She told the Investigator she had never "officially" met the Grievant before April 6 [the date of the incident]. She met him at her son's last three soccer games which occurred after the incident.

The Inmate's testimony was adamant that Grievant had not told him about the time for his medical appointment. The Inmate further testified that the reason for his wanting Grievant as the Transportation Officer was that he had never supervised visitation before the girlfriend was banned from the prison and would therefore not recognize her if she appeared at the medical facility.

Grievant's testimony parallels the Inmate's girlfriend's testimony that they did not "officially" meet until after the incident.

Volunteer coaches in the County Recreation Program draw or are assigned their team members.

There was no policy about the keeping of transportation sheets out of view of Inmates. Before the incident, they were not shielded from inmates and appeared throughout the facility. Subsequent to the incident, all clip boards with transportation sheets were to be "flipped" and transportation sheets were to be in drawers, not outside.

In denying relief on the September 19th grievance, the second step respondent stated, in part, "The information provided in the Internal Affairs Report is such that I would be remiss to assign you to either the clothing room management or a post involving inmate transportation.

The Internal Affairs report was not placed in Grievant's personnel file, he was not demoted and his pay was not changed.

APPLICABLE LAW AND OPINION

For state employees subject to the Virginia Personnel act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the policies and procedures promulgated by DHRM. [DHRM Policy No. 1.60, "Standards of Conduct" (effective 9/16/93)]. Section VI of DHRM Policy No. 1.60 deals with corrective action.

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [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))].

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

DECISION

The evidence presented clearly showed that the removal of Grievant from the Transportation and Clothing Officer position was an adverse employment action. The Grievant asserted without contradiction, "...that he was selected for the Transportation and Clothing Officer position after an application and interview process; that this position did not generally rotate; that as a result of his reassignment, he now is required to work 12-hour days (as opposed to 8½ or 9-hour days) and weekends; and that the Transportation and Clothing Officer position is viewed as being desirable not only because of the schedule, but also because it allows an employee to travel out of the prison facilities, rather than being in "smoke-filled" buildings all day.

The investigative report was based on supposition and not a thorough investigation. Due to the limited nature of the investigation and its "judgment call" bias, it was subject to inaccuracies and its use in the change of Grievant's job assignment and as reason for denial of second stage relief and was an unfair application of policy.

The evidence from the Grievant and from the Agency clearly showed Grievant's removal from the Transportation and Clothing Officer position to be a "corrective or disciplinary action", and that state policy was misapplied. Standards of Conduct were not followed. The Grievant did not receive notice of his alleged offending conduct. His being escorted to his vehicle was harassment.

There was no believable evidence that Grievant provided Inmate C with the date and time of his medical appointment to facilitate a meeting between the Inmate and his girlfriend.

Based on a questionable investigation, Grievant was removed from his post as Clothing Officer and Transportation Officer. State and Agency personnel policies, procedures, rules and regulations were not followed. Standards of Conduct were not followed. Grievant was unfairly removed from his position. He should be reinstated to this post.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review

This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia, 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia, 23219 or faxes to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and **received** by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Thomas J. McCarthy, Jr.
Hearing Officer