

Issues: Management Actions (assignment of duties) and Retaliation; Hearing Date: 04/02/08; Decision Issued: 04/15/08; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 8811; Outcome: No Relief – Agency Upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8811

Hearing Date: April 2, 2008
Decision Issued: April 15, 2008

PROCEDURAL HISTORY

On March 27, 2007, Grievant timely filed a grievance to challenge the Agency's decision to alter his work duties and responsibilities. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 27, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 2, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

1. Whether the Agency failed to comply with State compensation policy?
2. Whether 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 seek 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 University of Virginia has employed Grievant for approximately 17 years. In 2005, Grievant, acting in his capacity as a private citizen, requested information regarding the salaries of certain employees from the Agency pursuant to the Virginia Freedom of Information Act. Grievant made his request to the University President. The Agency refused to provide the information and Grievant initiated legal proceedings in a Circuit Court. Grievant appealed the Circuit Court's ruling to the Virginia Supreme Court which issued its opinion in April 2006. In January 2007, Grievant approached elected officials and asked them to initiate changes in Virginia law in furtherance of his objective of obtaining salary information from the Agency. On March 22, 2007, an article appeared in a local newspaper about Grievant and his objective of changing Virginia law.

In 2005 or 2006, Grievant had two positions he wished to fill. To fill the positions he needed the approval of his supervisor. Grievant had completed the selection process and was ready to make offers of employment to two individuals. Before the offers of employment could be made, Grievant's supervisor changed.¹ The new supervisor did not wish to fill the positions because he believed the Agency lacked sufficient funds to pay for the positions. Grievant believed the Supervisor refused to fill the positions because of the race and gender of the employees selected for the positions. After several months passed and the new supervisor refused to fill the positions, Grievant decided to file a grievance against that supervisor. On February 16, 2007, Grievant filed a grievance against the supervisor, Mr. R. At some point, Grievant determined that the new supervisor was not refusing to fill the two vacant positions because of the race and gender of the individuals Grievant selected. Grievant ended his grievance against the new supervisor.

The Agency's Facilities Management department employs about 900 people and has an annual budget in excess of \$300 million. The department had five divisions in March 2007: (1) Health Systems Physical Plant, (2) Facilities Planning and

¹ Grievant began reporting to the new supervisor in January 2006.

Construction, (3) Energy and Utilities, (4) Facilities Operations, and (5) Business Management Services.

The Facilities Management department is headed by the Chief Facilities Officer. He joined the Agency in July 2006. The Agency was undergoing an unprecedented level of new facility construction. The CFO examined the organization of the Facilities Management department and concluded that many positions needed to be changed and that the department needed to add to its middle management levels.

On January 22, 2007, the CFO sent an email to all Facilities Management personnel regarding this subject, "Facilities Planning and Construction (FP&C) Reorganization Announcement". The email stated, in part:

To better position ourselves to serve our University community, and as previously announced ... we are reorganizing the Academic Division of FP&C around three teams in two working groups. We expect this will provide a structure in which the valuable experience of our project and construction managers will be better leveraged and appropriate focus will continue to be placed on the Wise and historic preservation projects. A similar organization has been in place for some time in the Health System Division and has enjoyed very good success. ***

Grievant's position was not affected by the changes announced in the January 22, 2007 email from the CFO.

On March 19, 2007, the CFO sent an email to Facility Management staff stating in part:

Earlier this year I shared with you our plans to reorganize Facilities Planning and Construction to better meet the needs of our University Community. Our leadership team has continued its examination of the needs of our customers and changing workload demands. Today I am announcing changes to three of our business units, Health System Physical Plant (HSPP), Facilities Operations and Business Management Services (BMS). The focus of this initiative is to meet the needs of the University's Health System. Over one half million square feet of new space will be added to the Health System during the next few years, including the [Nursing Education Building], [Medical Education Building], [Clinical Cancer Center], [Research Building], Hospital Bed Expansion, and the Advance Research & Technology Building with Life Sciences annex. At the same time these new facilities are coming online, increased maintenance and repair funds are being invested by the State, the Board of Visitors and the Medical Center to improve the condition and serviceability of the existing buildings. As this will significantly increase the complexity and scope of the HSPP area of responsibility, we are

taking several steps to improve responsiveness and delivery of services by:

(Health System Physical Plant)

- Establishing a new engineering position to serve as Deputy Director for Operations in HSPP. All zone superintendents will report to the new Deputy Director for Operations. We will be recruiting for this position in the near future, and in the interim, [Mr. U] Health Systems Engineer, will provide leadership in this area as well and continue his present duties.
- To meet the immediate need to plan for the acceptance, operation and maintenance of many new facilities, we are establishing a new superintendent level position, with the emphasis on commissioning new space and preparing the appropriate maintenance programs. [Mr. O], who has over 20 years experience within the Health System and is currently the HSPP Renovations Superintendent, will take on this important assignment.
- The HSPP Renovation team will become a center of excellence for the care of patient facilities, with a primary focus on supporting the Medical Center's initiative to improve patient rooms and patient related spaces. This unit will report to the new HSPP Deputy for Operations.

(Business Management Services/Health System Physical Plant)

The University has made a commitment to a ten-year plan reducing the amount of deferred maintenance deficiencies in the University's facilities and infrastructure. The success of the plan requires an enhanced emphasis on quality inspection data, identification of maintenance requirements, prioritization of deferred maintenance projects, and coordination of project execution. In addition, the budget administration for routine facilities maintenance is best conducted in closer coordination with major maintenance initiatives. In order to strengthen our management of these efforts we are making the following organizational changes to our Work Management Divisions:

- [Grievant] will join Work Management to improve inspection, identification, budgeting and accomplishment of maintenance projects in Health System facilities and infrastructure. [Grievant], who has been serving as Associate Director in HSPP, bring extensive Health System experience and expertise in program management and customer service. He will work with [Mr. W] and

[Mr. P] in administering the maintenance budgets and developing long-term major maintenance programs in the Health Systems E&G facilities, and work similarly with the Medical Center facilities team.

- A new inspector position will be created in Work Management to meet the additional inspection load for the Health System and infrastructure inventories. We will be recruiting for this position in the near future.
- A new systems engineer position is being created to meet increased demands in managing maintenance programs associated with Preventive Maintenance, commissioning new Academic facilities, budget and data analysis, and for managing the deferred maintenance program. We will be recruiting for this position soon.²

As stated in the CFO's March 19, 2007 email, the University of Virginia moved Grievant from the position of Associate Director³ in Health System Physical Plant to the position of Maintenance Programs Manager in Business Management Services effective March 26, 2007. Several of Grievant's major work duties changed. For example, as Associate Director there were approximately 200 people within his chain of command. As Maintenance Programs Manager, he no longer supervises staff. As Associate Director, Grievant was responsible for planning and spending a budget of over twenty million dollars. As Maintenance Programs Manager, Grievant merely recommends spending. When Grievant was moved from the position of Associate Director to the position of Maintenance Programs Manager his position number, role title, and salary did not change. Grievant was moved to a new office in a new work unit and reported to a different supervisor.

The purpose of Grievant's position when he was an Associate Director was:

The Associate Director shall ensure that the Health System Physical Plant services provided are of good quality, reasonable cost, with very positive customer satisfaction while in continue support of the missions and values of the University Health System.

The organizational objective of the Associate Director position was:

The Associate Director oversees the daily performance of Health System Physical Plant services in maintaining and operating the facilities that provide Hospital, Clinical, Research, Academic, Retail, and Auxiliary space for the University Health System.

² Agency Exhibit 4.

³ Grievant began working as the Associate Director on September 15, 1998.

The purpose of Grievant's current position as a Maintenance Programs Manager is:

The most important service is creating, and adapting an intelligent, systematic process to identify and prioritize facility needs & then plan the expenditures of funds to meet facility needs. This must be done in conformance with state requirements.

The organizational objective of his current position is:

The chief objective of this position is to utilize the Facility Inspection Program and to convert the inspection findings, along with input from many other sources, into Maintenance Reserve, Major Maintenance, Preventive Maintenance and Corrective Maintenance plans & actions, with an expenditure of plan, prioritize, orderly, predictable expenditures of funds that meets State & University requirements & policies.

Grievant is hard-working, dedicated to his work duties, intelligent, and capable. He has a demonstrated history of good work performance. In short, Grievant is driven to excel at his job. When the Agency removed his supervisory and budget duties, Grievant's burdens and responsibilities diminished dramatically. As a high achiever, Grievant viewed this change negatively and considered it to be the equivalent of a demotion. Grievant believes the Agency changed his job duties in order to retaliate against him for engaging in protective activities.

After Grievant's change in position, the Agency continued with its reorganization. On December 14, 2007, the CFO sent an email to all Facilities Management staff with the subject "Reorganization". The CFO stated, in part:

Earlier this year I shared with you our plans to reorganize elements of Facilities Management to better meet the needs of our University community. Our dialogue with customers and our continuing assessments of the effectiveness of the delivery of our services indicate that we can benefit from further organizational improvements.

Today I am announcing changes which primarily impact Facilities Operations and Business Management Services (BMS). To meet increasing demand for renovation services, increasing funding for maintenance, and continuing growth in the physical plant, Facilities Operations will be organized in five major "product" lines: Work Management, Facilities Management, Project Services, Landscape, and Building Services. [Mr. K] has agreed to head up his organization, and his title will be Director of Operations and Maintenance. This reorganization will enable the transfer of Work Management from BMS to Operations and

Maintenance, with [Mr. W] maintaining his position as the Associate Director for Work Management.

We will establish positions and recruit for:

- Assistant Director for Facilities Maintenance who will manage the delivery of facilities maintenance services provided by our current maintenance forces and the maintenance zones. In the next year or so we plan to establish additional zones as appropriate to improve response and accountability.
- Assistant Director for Project Services who will manage the current renovation group, the production engineering unit, and the BMS contract management unit which will transfer from BMS/Work Management.

As part of his email, the CFO attached a partial organizational chart governing the changes. The CFO's December 14, 2007 email did not alter Grievant's position.

CONCLUSIONS OF POLICY

Department of Human Resource Management Policy 3.05 authorizes reassignment of employees within their pay band. This policy provides:

From time-to-time agency business (staffing or operational) needs may require the movement of staff. Reassignment Within the Pay Band is the management-initiated action that is used for this purpose. Under Reassignment Within the Pay Band:

- Employees may be moved (reassigned) to different positions within the same assigned Salary Range.
- The position to which an employee is reassigned may be in the same or a different Role within the same Salary Range.
- The employee's base salary is not changed as a result of the reassignment.

The Agency moved Grievant from the position of Associate Director to the position of Maintenance Programs Manager based on the Agency's business needs. Grievant's new position remained within the role of Trades Manager I. His salary remained the same. The Agency's decision to move Grievant was consistent with DHRM Policy 3.05.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁴ (2) suffered a materially adverse action⁵; 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 shows by a preponderance of the evidence that 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.⁶

Protected activity. Grievant engaged in protected activities. Grievant sought to change a Virginia statute. He was involved in pursuing that change when the General Assembly met in January and February of 2007. Grievant filed a grievance against his supervisor on February 16, 2007.

Materially adverse action. Grievant suffered a materially adverse action because in March 2007 his supervisory duties and budget responsibilities were removed. Although his role did not change, Grievant began performing a different job.

Causal link. Grievant has not established a connection between his protected activities and the materially adverse action he suffered. For example, Grievant has not presented any evidence that Agency managers discussed or considered his protected activities when deciding whether to change his work duties and reporting relationships. Simply because Agency managers knew of Grievant's protective activities does not mean they acted as the result of those activities.

Non-retaliatory business reason. If the Hearing Officer assumes for the sake of argument that Grievant has met his prima facie case to establish a causal link because of the close time proximity between his protected activities and the materially adverse action he suffered, the Agency has presented a non-retaliatory business reason for its actions towards Grievant. At a time when the Agency was experiencing significant growth in its facilities and increased funding, the CFO and Agency managers decided to

⁴ See Va. Code § 2.2-3004(A)(v) and (vi). 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.

⁵ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

⁶ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

re-organize the Facilities Management department to enable the department to provide better services to its customers.

Pretext. The Agency's reorganization was not a pretext for retaliation against Grievant. Grievant was one of many employees affected by the reorganization. No credible evidence was presented to show that Grievant was singled out by the Agency.⁷ Although the consequences to Grievant were significant, that fact alone is not sufficient to show a pretext for retaliation.

DECISION

For the reasons stated herein, the Grievant's request for relief must be **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

⁷ Grievant's supervisor, Mr. R, participated in the discussions with the CFO regarding the reorganization. The CFO testified that although he knew Grievant and Mr. R did not have a positive working relationship, he did not recall Mr. R asking that Grievant be removed from his supervision.

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.⁸

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.