

Issue: Retaliaton (other protected right); Hearing Date: 10/02/09; Decision Issued: 10/13/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9147; 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: 9147**

Hearing Date: October 2, 2009  
Decision Issued: October 13, 2009

**PROCEDURAL HISTORY**

On December 13, 2007, Grievant timely filed grievances to challenge the Agency's alleged harassment and retaliation. The outcome of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On July 16, 2008, the EDR Director issued Rulings 2008-1964, 2008-1970 qualifying only the retaliation claim. The Grievant appealed to the local Circuit Court, who subsequently affirmed the EDR Director's ruling. On August 3, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 2, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representatives  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUES**

1. 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 she 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 employed Grievant has a Probation Officer at one of its facilities. The purpose of Grievant's position was:

To protect public safety and help adult offenders lead self-sufficient, crime free lives by providing professional, investigative and case management services.<sup>1</sup>

Grievant was serving as an intake officer. She was responsible for obtaining information from probationers. The Agency wanted to identify gang members. Members of the same gang often had similar tattoos. One of Grievant's responsibilities was to photograph the tattoos of probationers. She and the probationer would enter a room she considered to be small. She would ask a male probationer to take off his shirt and, if necessary, to pull up his pant legs so she could take pictures of his tattoos. Grievant sometimes received comments from male probationers about her removing her shirt as well. Grievant believed it was inappropriate for a female Probation Officer to take pictures of a male probationer without his shirt on. Grievant complained to several Agency staff. On October 31, 2007, the Deputy Chief sent Grievant an email advising her to continue taking the pictures as she had been instructed.

On October 23, 2007, Grievant received an evaluation from the Deputy Chief. The Deputy Chief gave Grievant an overall rating of Contributor but was critical of Grievant's ability to communicate with offenders. Grievant strongly disagreed with this assessment. Grievant told the Deputy Chief that she would appeal the evaluation to the reviewer and attempt to have the evaluation changed. The Deputy Chief met with the Chief regarding Grievant's evaluation. The Deputy Chief decided to amend the wording of the evaluation but it continued to indicate that Grievant had some difficulty communicating with offenders. Grievant disagreed with the revised evaluation as well.

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

On November 14, 2007, a conflict arose between Grievant and the Deputy Chief regarding whether Grievant had obtained the agreement of another employee to cover Grievant's case load during Grievant's planned absence. On November 30, 2007, the Deputy Chief met with Grievant to verbally counsel her regarding the incident on November 14, 2007.

Grievant resigned from the Agency on November 30, 2007.

### **CONCLUSIONS OF POLICY**

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>2</sup> (2) suffered a materially adverse action<sup>3</sup>; 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.<sup>4</sup>

Grievant engaged in protected activity. She exercised her right to appeal her annual performance evaluation to the reviewer. Grievant complained about the Agency's practice of taking photographs of offenders.

Grievant contends that the Agency retaliated against her in part because the Deputy Chief yelled at Grievant on several occasions. The evidence is insufficient to support this allegation. The Agency's practice was that if a probationer came to the office and that probationer's Probation Officer was present, the probationer would be referred directly to the Probation Officer instead of filling out forms with the intake staff. On November 14, 2007, a probationer arrived at the office when his Probation Officer was present. Grievant contacted the Probation Officer and informed him that a probationer was present to see him. He did not wish to see the probationer and asked

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<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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).

Grievant to see him. Grievant referred the probationer to the Probation Officer anyway consistent with the Agency's practice. The Probation Officer complained to the Deputy Chief. The Deputy Chief was in her office and called Grievant on the telephone. Grievant contends the Deputy Chief yelled at Grievant. The Deputy Chief denied yelling at Grievant. Her testimony was credible. Mr. R was also in the Deputy Chief's office when she made the telephone call to Grievant. He testified that the Deputy Chief did not yell during the telephone call. On November 30, 2007, the Deputy Chief met with Grievant to conduct a verbal counseling. Grievant contends the Deputy Chief screamed at Grievant during this meeting. The Deputy Chief denied yelling at Grievant and her testimony was credible. The Chief's office was next to the conference room where Grievant and the Deputy Chief met. The Chief did not hear any yelling coming from the conference room.<sup>5</sup> Other than Grievant, none of the witnesses testified they had ever heard the Deputy Chief yell.

Grievant contends the Agency retaliated against her in part because the Deputy Chief called her a liar. There is sufficient evidence to support the allegation that the Deputy Chief called Grievant a liar<sup>6</sup>, but merely calling Grievant a liar does not resolve the issue.

The Agency had policy that if a Probation Officer was to be absent from work, he or she had to obtain agreement from another Probation Officer to cover for the absent employee. Grievant told the Deputy Chief that an employee who was pregnant was covering for Grievant. The Deputy Chief went to the pregnant employee and asked if she was covering for Grievant and she denied she had agreed to cover for Grievant. Grievant testified that because the employee was pregnant, Grievant had obtained a second backup employee in the event the pregnant employee was unable to cover for Grievant as agreed. The Deputy Chief was not aware of that second employee. When the Deputy Chief said Grievant as lying, the Deputy Chief actually believed Grievant had lied. The Deputy Chief did not claim Grievant was lying as a form of retaliation for Grievant's protected activities, the Deputy Chief claimed Grievant was lying because the Deputy Chief had spoken only with the pregnant employee and concluded Grievant was not telling the truth.

Grievant contends the Agency retaliated against her in part because the Deputy Chief threatened to "write her up" in the future. The Deputy Chief admits that during the counseling session with Grievant the Deputy Chief indicated disciplinary action would follow if Grievant engaged in behavior giving rise to disciplinary action. This admission, however, does not establish retaliation. It is not unusual for a supervisor to inform a subordinate during a counseling session that if an employee engages in certain behavior in the future that the employee may receive disciplinary action. In this case, the Deputy Director believed Grievant had lied and it would have been appropriate for

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<sup>5</sup> The Deputy Chief spoke with the Chief right after the meeting between the Deputy Chief and Grievant.

<sup>6</sup> The Deputy Chief admitted telling Grievant that she believed Grievant had lied.

the Deputy Director to warn Grievant that the Deputy Director would take disciplinary action in the future if the Deputy Director perceived that Grievant was lying.

Grievant did not establish that she was yelled at by the Deputy Chief. She did establish that she was called a liar and threatened with future disciplinary action. Being called a liar and threatened with future disciplinary action are materially adverse actions because those actions might dissuade a reasonable worker from engaging in protected activity.

Grievant has not established a connection between her protected behavior of appealing her evaluation and the materially adverse actions she claims. Grievant was called a liar by the Deputy Chief because that was the conclusion the Deputy Chief formed based on the information before her. Grievant was threatened with future disciplinary action as part of a verbal counseling. Grievant's appeal of her evaluation and complaints about photographing offenders did not cause the Deputy Chief's actions against her. 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 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  
600 East Main St. STE 301  
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.