

Issue: Management Actions (assignment of duties); Hearing Date: 01/06/14;
Decision Issued: 02/20/14; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10218; Outcome: No Relief – Agency Upheld; **Administrative Review**: **EDR
Ruling Request received 03/06/14; EDR Ruling No. 2014-3835 issued 03/25/14;
Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling
Request received 03/06/14; DHRM Ruling issued 03/31/14; Outcome: AHO's
decision affirmed; Judicial Review: Appealed to Henrico County Circuit Court;
Ruling Issued: 09/02/14; Outcome: AHO's decision reversed; Judicial Review:
Appealed to Court of Appeals of Virginia (09/30/14); Outcome pending.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10218

Hearing Date: January 6, 2014
Decision Issued: February 20, 2014

PROCEDURAL HISTORY

The Department of Juvenile Justice transferred Grievant from the position of Court Service Unit Director to a newly created position of Assistant Certification Manager. On July 30, 2013, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On October 22, 2013, the Office of Employment Dispute Resolution issued Ruling 2014-3721 qualifying the grievance for hearing. On November 19, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 6, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency's Counsel
Witnesses

ISSUES

1. Whether Grievant's reassignment to another position was adverse and disciplinary?

BURDEN OF PROOF

The burden of proof is on Grievant to show that his reassignment to another position by the Agency was reassignment was adverse and disciplinary. 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 employed Grievant as a Court Service Unit Director at one of its localities until he was reassigned to a newly created position of Assistant Certification Manager.

The Court Service Unit is located in the same building with the Juvenile Court. Agency employees and members of the public entering the building must pass through the same entrance and follow the same security protocols as do Juvenile Court employees. The Juvenile Court is the “primary customer” of the services rendered by the Court Service Unit staff.

The Juvenile Court consisted of five Judges and a Chief Judge.¹ Two of the Judges joined the Court in July 2012. The Chief Judge sometimes bullied other employees including Grievant. She sometimes attempted to micromanage the Court Service Unit by assuming control and making decisions over matters that would not otherwise be under her control. The Chief Judge had the reputation for running the Court and the Court Service Unit “as her own.” She sometimes was able to persuade the other Judges to go along with her view of employees including Grievant even though those Judges might not be in a position to formulate an independent assessment of particular staff.

Grievant interviewed for the position of Court Service Unit Director with the Chief Judge and the Former Deputy County Manager. He was selected for the position and began working as Court Service Unit Director in October 2011.

Grievant’s management style was to expand the number of people involved in the formulation of programs. He put the “client first” when he had the opportunity to do so. He was direct and “up front.”

¹ At the request of a party, the Hearing Officer sent the Chief Judge and five Judges orders to compel their attendance at the hearing. None of them appeared to testify and none of them responded indicating why they would not be appearing at the hearing. It is unknown what explanations, if any, the Juvenile Court Judges would have offered to rebut the evidence presented by Grievant and his witnesses.

Grievant became Director of an ineffective Court Service Unit with numerous human resource problems.² One witness described the Unit as “disjoined” before Grievant arrived. A number of employees were poor performers. Employees “did what they wanted to” according to another witness. For example, some employees would leave work at noon and not come back for the rest of the day yet remain compensated. Some employees would go to the break room and continue watching television well after their scheduled breaks were supposed to have ended. Some employees would sleep in their offices while at work. Some employees routinely arrived to work late. Grievant began requiring employees to report to work as scheduled and perform their duties as expected. He improved office morale in several ways. For example, if a Judge had concerns with a probation officer’s work performance, the Judge would use the public address system to call an employee from his or her office to come to the Judge’s court. Other people working in the Courthouse could hear the Judge’s request and would know that the employee would likely be chastised by the Judge. A Probation Supervisor testified that the practice was “humiliating” and “like a perp walk.” Grievant forced the Judges to end this practice. The Chief Judge would sometimes give assignments to Grievant’s subordinates directly and ignore Grievant’s supervisory role. Grievant attempted to minimize this practice. Grievant created a dress code for employees because he did not believe it was appropriate for employees to go into Court wearing jeans. Grievant observed that several supervisors did not like or trust each other so he worked to change their relationship.

Grievant was involved in developing a new program to reduce youth truancy. The Commonwealth’s Attorney also was involved in developing the new program and supported Grievant’s ideas and desire to develop an innovative approach to reduce truancy. Several pilot programs had been implemented in 2010 and 2011 to address truancy. Grievant wanted to try implementing a new diversion program to reduce truancy. The Commonwealth’s Attorney agreed with Grievant’s approach. One effect of the program preferred by Grievant was that it would reduce the role of the Court in addressing truancy. Although the Juvenile Court was not primarily responsible for developing a truancy program, it retained control of the program and disregarded the wishes of Grievant and the Commonwealth’s Attorney.

The Chief Judge expressed concern to the Agency that Grievant may have been taking illegal drugs. Grievant was not taking drugs illegally and was not under the influence of illegal drugs at any time during his tenure as Court Service Unit Director. Because of the Chief Judge’s allegation, the Agency forced Grievant to take a drug test which showed he was not taking illegal drugs.

In March 2012, Grievant attended a meeting that included the Chief Judge, two Judges, and the Former Deputy County Manager. Ms. N worked for the Former Deputy County Manager and she would enter the Court Service Unit and give employees

² Grievant’s May 2012 Interim Evaluation states, “[Grievant] has been in this position since October 2011. He ‘inherited’ [a] very difficult situation and has made significant accomplishments in addressing various problems.” See, Grievant Exhibit 1.

instructions and make comments about the Unit's operations. She had no authority to engage in this behavior³ and the effect of her behavior was to create discord among Court Service Unit staff. Grievant wanted to stop Ms. N from creating controversy and confusion among his staff. He said that several staff referred to Ms. N as being "crazy." The Former Deputy County Manager began defending Ms. N and his discussion with Grievant became heated. The Former Deputy County Manager was angry and told Grievant to "sit down and zip it." Grievant said he "doesn't do aggression" and left the meeting.⁴ Two days later the Chief Judge blocked Grievant's access to the judge's chambers. Grievant learned that the Chief Judge had blocked access to the judge's chambers in order to protect the Judges from Grievant.

Sometime in 2013, the Chief Judge met with the Commonwealth's Attorney and said, "I think something is wrong with [Grievant]. I think he is bipolar or has mental illness or something like that." Grievant had no mental illness and had never displayed symptoms of mental illness. The Commonwealth's Attorney was shocked to hear the Chief Judge's comment. She interpreted the Chief Judge's statement to show that the Chief Judge did not like Grievant and her comment helped facilitate her plan to get rid of Grievant.

On March 21, 2013, the Chief Judge and five other Judges of the Juvenile Court sent the Agency Head a letter stating:

Information has been brought to the attention of the current and former Judges of the [Juvenile Court], unsolicited, from more than a dozen current, retired and former court services unit staff members regarding [Grievant]. The Judges were not seeking any such information, nor have we requested it. There are alleged significant and repeated issues regarding [Grievant's] management style, his continuing refusal to condense directives to writing, reported lack of training, personal intimidation and other potential discrimination. This information has been conveyed to multiple judges, from a wide variety of personnel of varying experience levels. There are also allegations of retaliation.

It is with great sadness that based on these allegations and the strong perceptions of the staff, the Judges reluctantly inform you that we have lost confidence in [Grievant's] ability to lead, supervise and manage the Court Services staff. We are concerned about the stability of the unit and the wholesale departure of personnel. Collectively, we felt it imperative these issues be brought to your immediate attention for investigation. Please do not hesitate to contact us if you have need of further information.⁵

³ The current Deputy County Manager ended Ms. N's behavior of disrupting the Court Service Unit.

⁴ The Chief Judge told the Investigators that Grievant's behavior was "unprofessional and intimidating." See, Agency Exhibit 3.

⁵ Agency Exhibit 2.

Grievant was escorted out of the Courthouse by a Deputy Sheriff. Grievant was instructed that he could not return to the Courthouse. The Chief Judge issued an order prohibiting Grievant from entering the Courthouse.

The Agency conducted an investigation of the Juvenile Court's allegations against Grievant.⁶ Two investigators interviewed Agency staff in the Court Service Unit and all six Judges. The investigators asked the Judges about Grievant's abilities, management style, communication style, effectiveness, positive attributes, and areas needing improvement.

The evidence before the Hearing Officer showed that Grievant was brought into a highly dysfunctional Court Service Unit and began to make numerous improvements that were met with resistance from poorly performing employees.⁷ This would explain the investigators' conclusion⁸ that:

The staff members of the ... CSU appear deeply divided over the leadership and effectiveness of [Grievant]. While one would expect to see some level of dissatisfaction with management in any organization, fully one-third of ... employees viewed [Grievant's] leadership and personal management style in a negative way. That is a higher percentage of negative opinions than we would expect to see in a well-functioning Court Service Unit.

The investigative report also confirmed several of Grievant's assertions about the Juvenile Court:

A sizeable majority of employees interviewed perceived the relationship between the CSU and the judiciary as less than satisfactory. Various employees described the relationship as "dysfunctional", "horrible", "very strained", "tumultuous", and "difficult". Chief among the concerns of the Probation Officers was what they perceived as micromanagement and interference in individual cases by the judges, and the belief that the judges often make decisions about cases that could best be made by the Probation Officer. Several Probation Officers reported that they do not

⁶ Grievant received a copy of the Investigation on July 15, 2013.

⁷ Grievant objected to the Agency failing to interview him as part of its investigation. Although interviewing him may have been a better practice, it does not affect the outcome of this case. Grievant was able to present to the Hearing Officer any defenses he might have presented to the Investigators.

⁸ Grievant asserted that the Investigators should have interviewed the Commonwealth's Attorney and several other key staff. This was harmless error. The Agency Head knew the opinion of the Commonwealth's Attorney. A key question in this grievance was whether all of the Judges had lost confidence in Grievant's leadership. The Investigators confirmed that all of the Judges had lost confidence in Grievance.

feel respected by the judges, and that they speak to professionals in the CSU in the same manner that they speak to juveniles in the courtroom.

As a result of the Juvenile Court's action, the Agency created the position of Assistant Certification Manager and transferred Grievant into that position. His transfer was temporary initially but became final on July 12, 2013.⁹ The purpose of the position as stated in Grievant's July 2013 Employee Work Profile was:

To [assist] with the management and supervision of the certification and monitoring process to ensure that programs operate in compliance with regulations that lead to effective programs which:

- Safe and secure residential facilities.
- Compliance with community operations standards
- Reduced recidivism
- Provide for public safety
- Improve successful functioning of youth in the community
- Build effective partnerships between DJJ and community based programs

In addition, to conduct certification audits of regulated programs and conduct monitoring visits to assess ongoing compliance with standards. Provide technical assistance to programs to improve successfully functioning programs serving court referred youth.¹⁰

Grievant's salary and benefits remained the same following the transfer. Although Grievant's EWP initially indicated his position was in Pay Band 5, the Agency clarified that the position was actually in Pay Band 6.¹¹ Instead of having approximately 50 employees in his chain of command as Court Service Unit Director, Grievant supervised four employees as Assistant Certification Manager. Grievant perceived the transfer as being disciplinary in nature.

CONCLUSIONS OF POLICY

The issues before the Hearing Officer were defined by the Office of Employment Dispute Resolution in Ruling 2014-3721 as follows:

⁹ In a letter to Grievant, the Agency Head wrote, "It is my hope that you view this transfer as an opportunity to expand and broaden your career, as I am confident that you can be a valuable member of the Department's team in this new position." See, Agency Exhibit 4.

¹⁰ Grievant Exhibit 16.

¹¹ Grievant Exhibit 17.

Whether the grievant's reassignment was primarily to punish or correct the grievant's behavior or performance is a factual determination that a hearing officer, not this Office, should make. **At the hearing, the grievant will have the burden of proving that the reassignment was adverse and disciplinary.** If the hearing officer finds that it was, the agency will have the burden of proving that the action was nevertheless warranted and appropriate. Should the hearing officer find that the reassignment was adverse, disciplinary and unwarranted and/or inappropriate, he or she may rescind the reassignment, just as he or she may rescind any formal disciplinary action.¹² This qualification ruling in no way determines that the grievant's reassignment constituted unwarranted informal discipline or was otherwise improper, but only that further exploration of the facts by a hearing officer is warranted. The grievance is qualified as to the grievant's challenge to his reassignment.¹³ (Emphasis added).

Was Grievant's Reassignment Adverse?

An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."¹⁴ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.¹⁵ Merely because a new job assignment is less appealing to the employee, does not constitute an adverse employment action.

Depending on all the facts and circumstances, a reassignment or transfer with significantly different responsibilities can constitute an adverse employment action. In this case, Grievant's former position as Court Service Unit Director and his current assignment as Assistant Certification Manager have significantly different Employee Work Profiles. Approximately 80% of his core responsibilities have changed; the only two similar areas are supervisory and operational administrative duties. As Court Service Unit Director, Grievant's position objective was to direct the work and manage the resources of the Court Service Unit consistent with applicable policies and procedures. In his current role as Assistant Certification Manager, Grievant's objective is to "[assist] with the management and supervision of the certification and monitoring process," "conduct certification audits of regulated programs[,] and conduct monitoring visits to assess ongoing compliance with standards." In addition, Grievant's current

¹² See, e.g., EDR Ruling No. 2002-127.

¹³ See Va. Code § 2.2-3004(A) (stating that grievances involving "transfers and assignments . . . resulting from formal discipline or unsatisfactory job performance" may qualify for a hearing).

¹⁴ Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

¹⁵ See, e.g., Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

Employee Work Profile indicates that he now works in a different setting and as part of a different chain of command. The number of employees within his chain of command has decreased dramatically.

The Hearing Officer finds that Grievant has established that his reassignment to a new role was an adverse employment action. The change in his responsibilities was so significant as to constitute an adverse employment action.

Was Grievant's Reassignment Disciplinary?

Grievant has not established that his reassignment was disciplinary in nature by the Agency. The Juvenile Court's action was disciplinary in nature. The Juvenile Court was not a party to the grievance and the Hearing Officer does not have the authority to review the disciplinary action taken by the Juvenile Court. The Agency's decision to reassign Grievant was a reaction to the Juvenile Court's disciplinary action.

Grievant did not engage in any behavior that would support disciplinary action by the Agency. Grievant did not engage in any behavior that would support disciplinary action by the Juvenile Court if Grievant had been an employee of the Juvenile Court instead of the Agency. Grievant was attentive to his duties. He was passionate about improving a poorly performing Court Service Unit. He was capable of making the necessary changes. Grievant materially improved the operations of the Court Service Unit while he was its Director.

The relationship between Grievant and the Chief Judge essentially evolved into a "power struggle". The Chief Judge did not like the changes Grievant was proposing and considered the gossip and rumors spread about Grievant from disgruntled and former staff. She falsely accused Grievant of taking illegal drugs. She falsely questioned Grievant's mental health. She permanently banned Grievant from re-entering the Courthouse, a public building, even though Grievant posed no threat and had engaged in no action that anyone should have considered as warranting such an extraordinary action. The Chief Judge utilized her position of authority to eliminate Grievant's ability to perform his job.

Va. Code § 16.1-236.1 governs the Court Service unit directors. This section provides:

The transfer, demotion, or separation of a court services unit director, appointed pursuant to this subsection shall be under the authority of the Director and shall be only for good cause shown, after consulting with the judge or judges of that juvenile and domestic relations district court, and in accordance with the Virginia Personnel Act (§ [2.2-2900](#) et seq.).

The Agency was authorized to transfer Grievant for good cause shown after having consulted with the Judges of the Juvenile Court. The evidence showed that a functioning working relationship between Grievant and the Juvenile Court ended.

Although Grievant was not at fault for ending the relationship, it is clear that that relationship ended. Upon learning of the Judge's loss of confidence in Grievant, the Agency investigated the matter and spoke directly with each Judge of the Juvenile Court. All of the Judges confirmed that they had lost confidence in Grievant's ability to lead the Court Service Unit. The Agency had no authority to compel the Juvenile Court to reconsider its decisions about Grievant. The Agency could not force the Chief Judge to reverse her order preventing Grievant from re-entering the Courthouse where the Court Service Unit was located. When faced with these obstacles the Agency had no choice but to transfer Grievant into another position. The Agency has shown good cause for transferring Grievant to the Assistant Certification Manager.

Grievant was poorly and unfairly treated by the Juvenile Court. The Chief Judge's actions towards him were sometimes unprofessional, mean-spirited, and possibly defamatory. He was not given notice by the Juvenile Court of the Court's concerns with his work performance. He was not given an opportunity to alter or improve his work performance based on the Juvenile Court's concerns. Once he learned of the Juvenile Court's decision to remove him from his position, he was not given an opportunity to present any defenses to the Juvenile Court regarding the Court's allegations against him. The Juvenile Court's actions raise concern about whether Grievant was afforded procedural due process by the Juvenile Court. The Hearing Officer does not have jurisdiction over the Juvenile Court. The Juvenile Court is not a party to the grievance before the Hearing Officer. To the extent the Juvenile Court denied Grievant procedural due process or otherwise undermined his rights arising from his employment, the Hearing Officer is without any authority over the Juvenile Court to address his legitimate concerns.

DECISION

For the reasons stated herein, 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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.¹⁶

[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 W. Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.