

Issue: Refusal to accommodate disability; Hearing Date: 07/11/19; Decision Issued: 07/31/19; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case No. 2020-11358; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling Request received 08/14/19; EDR Ruling No. 2020-4971 issued 09/06/19; Outcome: AHO’s decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11358

Hearing Date: July 11, 2019

Decision Issued: July 31, 2019

PROCEDURAL HISTORY

On January 30, 2019, Grievant timely filed a grievance to address the Agency's alleged problems with handicapped parking and its refusal to accommodate. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. The Agency qualified Grievant's request for a hearing. On May 14, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 11, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Counsel
Witnesses

ISSUES

1. Whether the Agency failed to comply with State or Federal policy or law?

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:

Old Dominion University employs Grievant as a BI Analyst. Grievant utilized handicapped parking at the University. She has a telework agreement with the University allowing her to work from her home two days per week. Her work performance has been satisfactory to the University.

Faculty, staff, and students parking in the University's parking lots must have ODU issued parking permits. Drivers wishing to use handicapped parking spaces on University lots must have handicapped parking stickers displayed.

The University determined the number of handicapped parking spaces in a parking lot based on a formula provided by the Federal government. The Transportation Parking Services (TPS) Director described to process as a "math formula based on the size of the parking lot." None of the University's parking lots failed to satisfy the Federal guidelines.

There are handicapped parking spaces in front and on the side of the Building where Grievant worked. The University authorized Grievant to begin her shift at 6:30 a.m. to allow her to arrive at work before most other employees arrived in order to obtain a handicapped parking space. Student classes started after 8 a.m.

When the University opened a new building, TPS sometimes had to move handicapped parking spaces to accommodate the new building. This sometimes affected the number of handicapped spaces near adjoining buildings. When Lot 23 closed, Grievant asked the TPS Director on December 8, 2018:

Where will the other 5 handicapped spots go to? They are used almost all, and that's with me and others parking up at the building. There are at least 2 people who park there continuously. I've seen both back spots near Webb Center billed and I and possibly one other person park in front of the building.

The TPS Director replied on December 10, 2018:

When a capital building projects takes ADA parking away, the spaces must be added back to the campus inventory in addition to the new spaces required based on the square footage of the new building. In the case of the New Chemistry Building, there will be additional ADA spaces

marked in Lot 38 (south of Oceanography Building) and in Lot 10 (between Tennis Center and Jim Jarrett Athletic Administration Building.)¹

University TPS employees began patrolling University parking lots at 7 a.m. Approximately eight or nine employees would go to University parking lots to determine if vehicles are improperly parked. If a vehicle was parked in a handicapped space without displaying a handicapped parking tag, the employee wrote a citation. Parking enforcement ended at 10 p.m. After 10 p.m., the ODU Police responded to parking enforcement problems.

Grievant regularly notified the University's parking enforcement section when she observed vehicles improperly parked. For example, on January 29, 2019, Grievant sent an email to several people including the ODU Police and the TPS Director stating:

I have someone parked in the handicapped spots that is over the blue line into my area. If I didn't have my vehicle on the white lines, I'd have trouble getting in the car. Can someone have the person parked in the 2nd space next to [license plate] move their car into the parking space appropriately please?

Also, I keep getting vans parked illegally on the white line next to the first space. That is usually me. This makes it hard to get out and see but it is not patrolled. I have had it most days. In addition, that means I have trouble getting into my car on the right hand side. Why aren't we ticketing vans that park on the white lines? ***

There was already all the handicapped parking spaces filled. This means we do not have enough (as I indicated) for the people working in this area unless we still have people parking here that need to move to other areas because ODU refuses to match people to spaces.²

Grievant sought enforcement by the ODU Police, TPS Director, and others in an email dated February 9, 2018:

On 2/8/18 at approx. 8 pm, I had a car blocking multiple handicapped spaces on the side of the Rec Center. I honked several times, so I could park, and no response. I had to make an oddball way in to park astride multiple spaces to park. Then the person got out. I reported the license plates, and the car drove out and circled back, at which time the driver, a female and a passenger male got out. During the time I was on the phone with the dispatcher, I was cursed at. It is obviously that those behaviors were intimidating and threatening.

¹ Grievant Exhibit 2.

² Grievant Exhibit 2.

NO OFFICER was dispatched. I told them EXACTLY where I would be.

On February 9, 2018, the Police Captain responded:

Thank you for taking the time to contact the ODU Police Department with your concerns. Part of my duties as the Captain of the ODU Police Department is to conduct administrative investigations into the conduct of ODU Police Department personnel when complaints are received by the community. As such, I am considering your email as a complaint regarding the reported lack of service provided to you when you contacted our office. This issue will be formally investigated and a written response will be provided to you upon completion.

In order to conduct the investigation, I will need to make arrangements to meet with you and interview you regarding the incident. I will also interview the employees involved, review the calls to our communication center, and review any video footage that may be available. Please provide me with a number I may contact you at so we can make arrangements to meet.

On February 9, 2018, Grievant replied to the Police Captain:

Sorry too many problems with you all, all of this is in writing. You will be sent a bill for private protection once that is in the works. I have it down to expect potential threatening harassing, being cursed at and blocking of my rights to parking spaces as being something I am required to live with.³

Grievant advocated for the handicapped at the University. For example, Grievant sent an email on August 24, 2018 to the Office of Institutional Equity and Diversity asking:

Why is there nothing for the handicapped people on campus, especially a group for the F/S handicapped? I was told yesterday that the ok was given to block/make it harder to get out of certain handicapped spaces by the lady in the parking kiosk near Lot 23. I have gotten an answer almost promptly in regards to the F/S decal purchase, but not even an acknowledgement to handicapped parking concerns or statements.

The Office of Institutional Equity and Diversity replied:

Currently, there is no ODU employee group for just individuals with disabilities. If you are interested in leading the formation of this type of

³ Grievant Exhibit 5.

organization, the Office of Institutional Equity and Diversity can assist you. One option is to connect you with the President's Task Force on Inclusive Excellence to identify other employees with an interest in forming a resource group for employees with disabilities. Please let us know, and we can certainly explore ways for you to become involved.⁴

CONCLUSIONS OF POLICY

Section 5.9 of the Grievance Procedure Manual provides:

Hearing officers may order appropriate remedies but may not grant relief that is inconsistent with law, policy, or the grievance procedure. In granting relief, the hearing officer should consider the relief requested in the written grievance.

Section VI of the Rules for Conducting Grievance Hearing Provides:

Under the grievance statutes, management is reserved the exclusive right to manage the affairs and operations of state government. In addition, challenges to the content of state or agency human resource policies and procedures are not permitted to advance to a hearing. Thus, in fashioning relief, the reasonableness of an established policy or procedure itself is presumed, and the hearing officer has no authority to change the policy, no matter how unclear, imprudent or ineffective he believes it may be. However, the hearing officer may order relief to remedy the application of a policy when policy was misapplied, unfairly applied, or when that application is inconsistent with law or with another controlling policy.

Further, a hearing officer is not a "super-personnel officer." Therefore, in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy. In general, the hearing officer is not limited to the specific relief requested by the employee on the Form A, as long as the relief granted is consistent with law, policy, and the grievance procedure. When the grievance involves a disciplinary matter, the hearing officer may uphold or reverse the disciplinary action challenged by the grievance, or, in appropriate circumstances, modify the action; the hearing officer may also order the reinstatement of a grievant with backpay for the appropriate period. The awardable period may not extend back beyond the 30 calendar day statutory period preceding the initiation of the grievance. All remedies provided by a hearing officer in his/her decision must conform to law, policy, and the grievance procedure.

⁴ Grievant Exhibit 4.

Grievant sought improved communication between campus operational units including Transportation and Parking Services, ODU Public Safety and other groups. Grievant sought improved communication to faculty, staff, and students regarding the importance of respecting the appropriate use of handicapped parking spaces and restrooms. Grievant sought to improve enforcement of policies governing handicapped parking.

Grievant has offered numerous suggestions for improvement. It is clear to the Hearing Officer that the University has listened to Grievant's suggestions and attempted to implement those suggestions when University managers believed they could do so and that doing so was in the best interests of University's faculty, staff, and students. It is also clear that Grievant has been frustrated with the University's failure to fully implement her suggestions.

The Hearing Officer has no authority to compel the University to implement Grievant's suggestions unless Grievant can show that the University failed to comply with policy or law. If Grievant cannot show the University violated policy or law, then the decision to implement Grievant's suggests falls within the University's exclusive right to manage its affairs and operations.

Grievant asserted the University should add additional handicapped parking spaces and locate them so as to better serve handicapped drivers. Grievant did not identify any policy or law violated by the University. There is no basis to conclude the University must change its practices governing handicapped parking spaces.

Grievant asserted the University should better enforce parking regulations and better respond to her requests once she identified parking violators. Grievant did not identify any policy or law violated by the University. The University enforces its parking regulations through TPS employees and ODU Police. There is no basis to conclude the University must change its practices governing parking enforcement.

Grievant asserted that the University should have a group devoted to disability rights. The Agency countered that it works with private disability rights groups and attempts to implement reasonable and logical proposals to help its disability community at the University. Whether the University should develop its own disability advocate group or rely on groups outside of the University is solely a management decision for which the Hearing Officer cannot interfere.

Grievant has not identified any law or policy violated by the University. The Hearing Officer cannot grant Grievant's request for relief.

DECISION

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

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.