

Issue: Involuntary transfer; Hearing Date: 08/30/02; Decision Date: 09/13/02;
Agency: Department of Juvenile Justice; AHO: Carl Wilson Schmidt, Esq.; Case No.
5456



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5456

Hearing Date: August 30, 2002
Decision Issued: September 13, 2002

PROCEDURAL HISTORY

On October 30, 2000, Grievant was notified that she was being transferred involuntarily to a new position in a new facility within the Agency. On November 15, 2000, Grievant timely filed a grievance to challenge the transfer. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. The Agency Head denied Grievant's request for a hearing and Grievant challenged that denial. On May 14, 2002, the Director of the Department of Employment Dispute Resolution qualified several issues for hearing.¹ Grievant appealed the EDR Director's partial disqualification to the Circuit Court. On July 12, 2002, the Circuit Court upheld the EDR Director's ruling on the qualified issues and the matter was assigned to the Hearing Officer. On August 30, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel

¹ Although the EDR Director relies on DHRM § 3.05 in effect March 1, 2001 (i.e. after the transfer) rather than the policy in effect as of September 25, 2000, the nature of the qualification before the Hearing Officer is not affected. The March 1st amendments do not materially alter the policy and even if they did so, the issues as framed by the EDR Director would bind the Hearing Officer.

Agency Party Designee
Legal Assistant Advocate
Therapist
Clinical Social Worker
Deputy Director
Superintendent

ISSUE

Whether Grievant's transfer was an unwarranted, adverse employment action that was disciplinary in nature and in accordance with State policy? Whether Grievant was transferred because of gender discrimination against her?

BURDEN OF PROOF

The burden of proof is on Grievant to show by a preponderance of the evidence that the Agency transferred her contrary to State policy. 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:

A Treatment Program Supervisor position became available at one of the Agency's juvenile centers ("First Facility"). Several employees in positions reporting to the Treatment Program Supervisor position applied for the supervisor's position. Grievant also applied for the position. She had been working as a substance abuse counselor with the Department of Corrections. Grievant was selected for the supervisor's position and began working for the Agency in December 1999.

Grievant's subordinates were immediately hostile to Grievant. Many of them had applied for Grievant's position and they felt they were more deserving and more qualified for the Treatment Program Supervisor position than was Grievant. Grievant also began requiring her subordinates to meet certain standards for which they had been unable to do in the past.² She required subordinates to "tow the line" regarding attendance. Grievant caught one of her subordinates golfing on a day the employee called into the Agency saying he was sick.

² Grievant Exhibits J and K.

Because of Grievant's ongoing concerns about how her co-workers were behaving, she sought meetings with the Deputy Director. During these meetings, Grievant expressed her displeasure with her co-workers including those working outside of her unit. For example, she complained about how some of the juvenile correctional officers performed and used her experience at the Department of Correction to illustrate how she felt they should perform.

In June 2000 the Assistant Superintendent Programs began working at First Facility. She supervised Grievant. Grievant perceived the Assistant Superintendent Programs as being critical of everything done by Grievant. Grievant perceived her supervisor as taking the side of Grievant's subordinates when those subordinates were in the wrong.

In July 2000, the Superintendent began working at First Facility. The Assistant Superintendent Programs reported to him.

In September 2000, the Commonwealth of Virginia implemented compensation reform under DHRM § 3.05. This policy revision eliminated pay grades and classification of positions. Positions were reassigned to broader "Roles" with each Role being assigned to one of nine broad "Pay Bands." Grievant's TPS position was assigned to the Role of Counselor II within Pay Band 4.

On November 1, 2000, Grievant was involuntarily transferred from First Facility to Second Facility to work in another Counselor II Role as a Clinical Social Worker.³ Her compensation and Pay Band remained the same following the transfer.

The Deputy Director made the decision to transfer Grievant. He continued informally meeting with Grievant at her request. During those meetings she expressed displeasure about her co-workers including the Assistant Superintendent Programs and the Superintendent who had recently joined First Facility. The Deputy Director concluded that Grievant was not able to separate personality conflicts with co-workers and the professional judgment a manager needs to be able to resolve those personality conflicts. In other words, the Deputy Director concluded that Grievant lacked the ability to resolve conflicts she had with her co-workers regardless of which person's position on an issue was correct. He concluded he had to remove Grievant from First Facility because she could not function as a manager within that unit. He learned that a counselor position was available in Second Facility. After reviewing Grievant's work experience, he decided to transfer Grievant to Second Facility.⁴

³ Grievant's written statement states that she met with the Deputy Director on September 26, 2000 and during that meeting he informed her that she would be transferred to Second Facility.

⁴ Grievant contends the counselor position she assumed requires licensure that she does not have. The Deputy Director testified that a license was not necessary for that position when Grievant was transferred. An Agency may waive certain licensure requirements for its positions, it chooses to do so. Thus, whether Grievant was transferred into a position requiring a license that she lacked is not relevant to the outcome of this grievance.

Grievant has performed well at Second Facility. She has received a Certificate of Appreciation for her meritorious service in 2001. Few problems exist between her and her co-workers and managers at Second Facility.

CONCLUSIONS OF LAW AND POLICY

A State agency may move an employee from one position to another within the agency and may adjust that employee's compensation.⁵ Which human resource policy governs the transfer depends, in part, on why the agency moved the employee. For example, if an agency involuntarily transfers an employee to another position in order to discipline that employee, then the *Standards of Conduct*, DHRM § 1.60, would govern that transfer. If the Hearing Officer were to find that an agency improperly disciplined an employee and then transferred that employee, the Hearing Officer would have the authority to order the agency to reverse its transfer. This would be true, even in situations where an agency transfers an employee without giving the employee a written notice required by DHRM § 1.60. An agency cannot escape the procedural due process requirements of DHRM § 1.60 simply by omitting issuance of a written notice.

Grievant's transfer amounted to an adverse employment action even though she did not suffer any decrease in compensation. She lost her supervisory duties and the prestige of being a supervisor. Her career path at Second Facility was more restricted making it more difficult for her to rise within the organization.

Grievant was not transferred for disciplinary reasons. Grievant was transferred based on the legitimate needs of agency operations to ensure its managers can manage difficult employment situations. She was not transferred in order to punish her.⁶ Provisions of the *Standards of Conduct*⁷ affecting Grievant's procedural due process rights do not govern the transfer.

⁵ Grievant was transferred on November 1, 2000. DHRM § 3.05 effective September 16, 1993 would define Grievant's transfer as a lateral transfer, namely "An employee's reassignment to a position in the same salary grade." DHRM § 3.05 as revised on March 1, 2001 would define Grievant's transfer as a reassignment within the pay band, namely "Action of agency management to move an employee from one position to a different position in the same Role or Pay Band (formerly Lateral Transfer). DHRM § 3.05 effective September 25, 2000 before the March 1, 2001 revision is silent regarding how to describe Grievant's transfer. From this silence, the Hearing Officer does not conclude that an agency lacks the authority to transfer an employee for its business reasons. The Hearing Officer concludes that DHRM intended to retain an agency's right to transfer employees but omitted that right from the initial draft of DHRM § 3.05 effective September 25, 2000.

⁶ Grievant testified that during a September 26, 2000 meeting she had with the Deputy Director, the Deputy Director said if he received one more complaint about Grievant, he would transfer her. The Deputy Director denied making such a statement. It is clear from the testimony, however, that even if the Deputy Director made the statement claimed by Grievant, his primary motivation to transfer Grievant was not to discipline Grievant but because he did not believe she was capable of determining how to resolve the conflict she had with her co-workers.

⁷ DHRM § 1.60.

The essence of Grievant's argument is that she was not the source of the problem and, thus, there was no basis to transfer her to a position with a more limited career path. It may very well be the case that Grievant was not the source of the problems within the unit and that her subordinates and supervisor intended to cause problems for her. If the Hearing Officer assumes for the sake of argument that Grievant's contention is true, all it means is that the Agency made a poor management decision and not that the Agency failed to follow policy. A Hearing Officer lacks the authority to correct poor management decisions unless those decisions are contrary to policy.⁸

Grievant contends the transfer was performance and disciplinary based because the decision to transfer her was made by the Assistant Superintendent Programs and the First Facility Superintendent. The evidence, however, showed that neither of these two people participated in the decision-making to transfer Grievant. Grievant was transferred based on the independent decision of the Deputy Director.

Grievant contends she was discriminated against because of her gender. No credible evidence was presented supporting this conclusion. Grievant was not transferred because of her gender.

Grievant does not seek reinstatement to her former position. She asks that the Hearing Officer order the Agency to provide her with a mentor, reimburse her for costs associated with her having to move her home because of the transfer, attorney's fees, and other similar relief. The Hearing Officer does not have the authority to grant such relief even if such relief may be otherwise appropriate.

DECISION

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

APPEAL RIGHTS

You may file an administrative review request within **10 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.

⁸ It may very well be the case that it was unfair to transfer Grievant rather than correcting the source of the problem, namely Grievant's co-workers. When an agency unfairly treats its employees, the agency may suffer a reduction in employee morale. A Hearing Officer lacks the authority to rectify unfairness existing within any agency as long as the agency has not violated any policies.

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.
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.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-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.⁹

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.