Issues: Misapplication of Telework Policy, Retaliation (other protected right), Discrimination (age), Hostile Work Environment; Hearing Date: 03/08/10; Decision Issued: 03/15/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9258; Outcome: Partial Relief.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9258

Hearing Date: March 8, 2010
Decision Issued: March 15, 2010

PROCEDURAL HISTORY

On July 8, 2009, Grievant filed a grievance seeking to have retaliation and unequal treatment stopped and to allow him to work a telecommuting or alternate work schedule. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 4, 2009, the EDR Director issued EDR Ruling Number 2010-2408 qualifying the grievance for hearing. On February 1, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 8, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether the Agency misapplied or unfairly applied policy?

2. Whether the Agency retaliated against Grievant?

3. Whether the Agency discriminated against Grievant based on age or disability?

BURDEN OF PROOF

The burden of proof is on Grievant to show by a preponderance of the evidence that the relief he 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 employs Grievant as a Probation Officer at one of its Facilities. He began working for the Agency in August 1998. The purpose of this position is:

> Provide day to day supervision to clients who require both intensive and regular probation/parole/post-release supervision. Assesses the criminogenic and treatment needs of the client. Actively applies evidence based practices including effective communication skills, principles, and techniques to promote internal change within the client. Collaborate with clients, district, and community resources to develop and manage individualized treatment plans. Make home and community contacts in accord with case needs and supervision plans; prepare Pre-sentence Investigations, sentencing guidelines, and other reports as assigned in a timely manner; testify and provide sentencing recommendations to the court/attorney.[1]

Grievant's duties are primarily as a pre-sentence report writer. He does not manage a caseload. He conducts investigations and writes DOC and court ordered reports. When clients need to meet with Grievant, he schedules appointments based on his availability. Grievant typically works independently; however, there are some occasions when he provides assistance to his coworkers. For example, if a male offender assigned to a female Probation Officer must have a urine screen observed, Grievant could be asked to provide assistance.

Grievant is 67 year old. He had a heart attack in March 2007.[2] He returned to work in May 2007. Grievant had a conversation with the Chief who said, "we will have to go easy on you so if you need to be off in the afternoon sometimes you can do that."

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[1] Agency Exhibit 4.

[2] No credible evidence whatsoever was presented to suggest that the Agency discriminated against Grievant because of a physical disability. Grievant's claim regarding discrimination based upon disability is without any merit. At the time of the Agency actions against Grievant, it is unclear whether Grievant had any disability remaining from his heart surgery two years earlier.

Regular work hours for the Agency are from 8:15 a.m. until 5 p.m. Monday through Friday. The Agency permits some of its employees to work an alternate schedule. For example, one employee is permitted to work 10 hours per day four days per week. This employee's travel commute lasted over an hour. To reduce the amount of time this employee spent commuting to work, the Agency permitted him to work four days per week instead of five with longer work hours per day. Other employees are permitted by the Agency to begin their work shift at 7 a.m. instead of 8:30 a.m. Agency managers attempted to permit some employees to begin their shifts prior to 7 a.m. but found that they could not properly manage those employees and were concerned about their safety. In addition, clients sometimes have difficulty meeting with probation officers whose work schedules began at 6 a.m.

Grievant did not ask for a four day work week. He did not ask to begin his work shift at 7 a.m.

Grievant asked the Chief Probation Officer to permit him to come back to work from 5 p.m. until 7:30 p.m. The Chief responded, "you can't handle that". The Chief was concerned about Grievant's ability to successfully travel back and forth between his home and the office.

The Agency's Division has a total of 48 telecommute agreements in place. Of the 43 district offices, 10 of those offices allow telecommuting. In each of those cases, the employee telecommutes for entire days not partial days.

Grievant asked the Chief if he could take annual leave on Thursday's mornings so that he could participate in a mediation program offered by a local Court. The Chief agreed that Grievant could participate in the mediation program so long as it did not interfere with the Agency's training and meetings including staff meetings. On June 11, 2009, Grievant failed to attend a staff meeting. Grievant was criticized for failing to attend the staff meeting.

CONCLUSIONS OF POLICY

Grievant alleges that the Agency retaliated against him, discriminated against him based on his age, and misapplied State policy.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[3] (2) suffered a

[3] *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

materially adverse action[4]; 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.[5]

Grievant contends that the Agency retaliated against him by denying him the opportunity to work his preferred alternate work schedule. Grievant presented evidence that he complied with subpoenas to testify in court. He argued that his actions were contrary to the preference of the Chief. He also presented evidence that he had embarrassed the Chief based on complaints from the Virginia State Police that he took a polygraph of an offender. Complying with subpoenas is a protected activity. Conducting polygraph examinations of offenders was part of Grievant's job. Grievant suffered a materially adverse action because he was denied his preferred alternate work schedule. Grievant has not established a causal link between the adverse action and the protected activity. No credible evidence was presented that the Agency's refusal to permit Grievant to work his preferred schedule had anything to do with his protected activities. The Agency denied Grievant's request based on its interpretation of State policy and its business needs. There is no reason for the Hearing Officer to believe that the Agency's stated reason was a mere pretext or excuse for retaliation. The Agency did not retaliate against Grievant.

Misapplication of Policy

Grievant seeks approval from the Agency to work one of the four following schedules. Grievant states in his request for relief:

> I want to be treated no better than any other members of the staff, but I do not want to be treated worse. I am requesting approval of any of the proposals that I set forth below:
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> 1. Work 8:15 a.m. to 2:45 p.m. and be allowed to work at home for the remainder of the workday, with the exception of required

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General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[4] 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.

[5] 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).

attendance at work for staff meetings, training or court appearances, etc. (Preferred).

2. Work 6 a.m. to 2:45 p.m., with the same exceptions.
3. Work 8 a.m. to 2:45 p.m. and be allowed to take lunch from 2:45 p.m. to 3:45 p.m. and work from 3:45 p.m. to 5 p.m. There is no policy against taking a lunch break during that time. The policy provides that the employer will offer the employee time for a lunch break after 6 hours of work. It does not state that the employee must take the lunch and in fact, it further states that if the employee eats lunch at his/her desk in less than 20 minutes, then that is still considered work time.
4. Work 7 a.m. to 2:45 p.m. and 4 p.m. to 5 p.m. with the same exceptions.

The last two options would require I make two trips to the office each day, but if that would be the decision, I am prepared to do that.

DHRM Policy 1.25, Hours of Work defines alternate work schedule as:

Schedules that differ from the standard 40-hour workweek schedule. Alternative work schedules may include, but are not limited to, four 10-hour days, rotational shifts, flexible hours, and job sharing.

Agencies are encouraged to implement schedules that differ from the standard workweek provided such schedules do not impede efficiency of agency operations or increase agency overtime liability. Agencies are encouraged to allow alternate work schedules to facilitate or reduce employees' commuting time. Agencies may contact the Department of Human Resource Management for guidance or assistance in implementing alternative work schedules. Agencies are encouraged to document alternative work schedule arrangements by developing work agreements. Agency management may terminate alternative work schedule agreements at any time.

Virginia Code § 2.2-2817.1 addresses teleworking and alternate work schedules. Section D states:

"Alternate work locations" means approved locations other than the employee's central workplace where official state business is performed. Such locations may include, but not be limited to the home of an employee and satellite offices.

"Alternative work schedule" means schedules that differ from the standard workweek, 40-hour workweek schedule, if such schedules are deemed to promote efficient agency operations. Alternative work schedules may include, but not be limited to, four 10-hour days, rotational shifts, and large-scale job sharing.

> "Central workplace" means an employer's place of work where employees normally are located.
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> "Telecommuting" means a work arrangement in which supervisors direct or permit employees to perform their usual job duties away from their central workplace at least one day per week and in accordance with work agreements.
>
> "Work agreement" means a written agreement between the employer and employee that details the terms and conditions of an employee's work away from his central workplace.

Under DHRM Policy 1.61 a teleworker is:

> An employee who, under formal agreement with his/her agency, performs his/her usual job duties in an alternate work location with or without a specific telework schedule *at least one day per week or at least 32 hours per month.* (Emphasis original.)

DHRM Policy 1.61, Telework provides:

> Telework is not intended to serve as a substitute for child or adult care. If children or adults in need of primary care are in the alternate work location during employees' work hours, some other individual must be present to provide the care.

Grievant informed Mr. B, a Step Respondent, that he wanted to change his work schedule so that he could be at home when his daughter got off the school bus to return home. Grievant informed the Agency that his other children would arrive home 15 minutes after the daughter and assume responsibility for supervising the daughter while Grievant worked from home. Mr. B's initial reaction was that the schedule was "workable". His position changed once he understood the Teleworking Policy to prohibit teleworking for the purpose of childcare. Mr. B wrote in his Step Response:

> My initial reaction was that I saw no problem and I advised [Grievant] to discuss it with [the Chief]. I then found out that [Grievant's] proposal falls under the telework policy and that it stipulates that telework is not allow for child care needs.

Grievant contends that the Agency misapplied DHRM Policy 1.61 regarding telework because it denied his request, in part, because Agency managers believed they could not grant his request to telework if that request was for the purpose of childcare needs. Grievant has established that the Agency has misinterpreted DHRM Policy 1.61. The essence of Grievant's request was that either be permitted to arrange his lunch break during the time his daughter would get off the school bus. Grievant did not intend to supervise daughter while he was also working from home in the

afternoons. Grievant's desire to meet his daughter at the school bus during his lunch hour is not a violation of DHRM Policy 1.61.

Grievant contends that the Agency inconsistently applied State policy because it permitted other workers to work alternate schedules but did not permitted him to do so. Grievant presented evidence of a coworker who worked 10 hour shifts on four days in a workweek and of coworkers who began their shifts at 7 a.m. instead of 8:15 a.m. Grievant's argument fails. Grievant did not ask the Agency to permit him to work 10 hour shifts. Grievant did not ask the Agency to begin his work day at 7 a.m. Although Grievant did ask the Agency to permit him to begin his work day at 6 a.m., the Agency has established a legitimate business reason for denying a request based on the safety of its employees and the hardship on its clients. At one point, the Agency permitted employees to begin their work shifts at 6 a.m. but then stopped that practice once it realized a 6 a.m. employee start time was not feasible. The Agency granted Grievant's request number 3 to permit him to work from 8 a.m. until 2:45 p.m. with a lunch break from 2:45 p.m. until 3:45 p.m. and to return to work from 3:45 p.m. to 5 p.m. Although Grievant indicated in his Grievance Form A that proposal 3, "would require I make two trips to the office each day, but if that would be the decision, I am prepared to do that", during the hearing he indicated he wanted proposal 3 to be considered as permitting him to work from home from 3:45 to 5 p.m. Grievant has not established that the Agency has treated him differently from his coworkers.

Age Discrimination

DHRM Policy 2.05 “[p]rohibits employment discrimination on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or against otherwise qualified persons with disabilities.”

Age discrimination can be established by proof of disparate treatment. When an employee who is 40 years or older alleges disparate treatment, liability depends on whether the Agency’s action was motivated by the employee’s age. Since there is seldom eyewitness testimony as to an employer’s mental processes, age discrimination can also be established through circumstantial evidence using an analysis of the employee’s *prima facie* case and shifting burdens of production.

To establish a *prima facie* case of age discrimination, an employee must show that: (1) the employee is at least 40 years old, (2) was otherwise qualified for a benefit of employment available under State policy, (3) was denied that benefit, and (4) the denial occurred under circumstances that raise a reasonable inference of unlawful age discrimination.” If, however, the Agency provides a legitimate, nondiscriminatory business reason for its actions, the employee has the opportunity to prove by a preponderance of the evidence that the reasons offered by the Agency were not the employer’s true reason, but were a pretext for discrimination. In other words, the employee may attempt to establish that the employer’s proffered explanation is unworthy of credence. In appropriate circumstances, the Hearing Officer can

reasonably infer from the falsity of the employer's explanation that the employer is trying to cover up a discriminatory purpose.

During his discussions with the Chief, Grievant proposed working until 6:30 p.m. to cover his eight hours of work per day. According to Grievant, the Chief said that "you can't handle that" to indicate that the schedule would be too difficult for him. Grievant construes this statement as meaning the Chief considered the schedule would be too hard on him because of his age. The Chief did not recall making the statement claimed by Grievant. The Chief did express concern that it will be difficult for Grievant to work part of the day, go to his home, and then returned to the office to finish his work.

In March 2007, Grievant had a heart attack and left work. He returned to work in May 2007. When he returned, he moved more slowly. He was not restricted regarding his work duties and a working full day. The Chief said, "we will have to go easy on you so if you need to be off in the afternoon sometimes you can do that."

The statements made by the Chief are insufficient to establish age discrimination. The Chief's statement about Grievant's proposed work schedule appears to reflect her concern about Grievant meeting the logistical requirements of driving to and from his home and office. The Chief's statement in 2007 appears to be directed at Grievant's recovery from surgery, not his age.

Hostile Work Environment

Department of Human Resource Policy 2.30 prohibits Workplace Harassment. Workplace harassment is defined as:

> Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

Grievant contends he is subject to workplace harassment in the form of a hostile work environment. In order to show a hostile work environment, Grievant must show conduct based on race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability.

When Grievant was asked how the Agency created a hostile work environment for him, he testified that "they are watching me constantly to see if they can catch me making a mistake or leaving early." He said the Agency's actions were not because of race, age, nationality, etc. Grievant has not presented any credible evidence to show that the Agency acted against him based on a protected status.

On July 21, 2009 and July 23, 2009 in the afternoon, Grievant brought one of his children to work with him. On July 24, 2009, the Chief informed Grievant that "it is inappropriate to have one of your children with you in the work setting, it and thus, in the future, you should have other arrangements."[6] State employees are not authorized by State policy to bring their children to work absent an agency's preapproval. Grievant did not obtain preapproval from the Agency and, thus, the Chief was acting appropriately when she instructed Grievant not to bring his children to work.

In May 2008, Grievant was assigned responsibility for a particular sex offender. A Special Agent with the Virginia State Police expressed concerns about Grievant's conducting a polygraph of the sex offender contrary to an agreement between Grievant and the Virginia State Police. The Chief investigated the allegation. Grievant denied he had entered any agreement with the Virginia State Police. The Chief transferred the sex offender from Grievant to another Probation Officer. Grievant argued that this was further evidence of retaliation and discrimination against him. The evidence showed that the Chief transferred the sex offender because of the complaint from the Virginia State Police. The Chief believed that the Agency would be better able to provide services to the sex offender and other interested parties by having a different Probation Officer assigned to the sex offender. This decision seems appropriate and was not based on an impermissible reason to discriminate retaliate against Grievant.

Grievant's overall work performance in 2008 was rated as "contributor". This rating was lower than the rating he received in previous years. Grievant did not appeal the evaluation at that time but argues that it was evidence of the Agency creating a hostile work environment for him. The Deputy Chief who was Grievant's supervisor at the time of the 2008 evaluation testified that she considered many aspects of his work performance which he drafted the 2008 evaluation. She testified that she also discussed the evaluation with the Chief and the reach a consensus opinion regarding Grievant's performance. The Deputy Chief's testimony was credible. It appears from the evidence presented that the quality of Grievant's work performance decreased from prior years.

In February 2008, a Commonwealth's Attorney complained to the Agency that Grievant had transported an offender to court even though Grievant was no longer providing services to the offender. The Agency criticized Grievant for providing services to an offender after the relationship between Grievant and the offender had ended. On May 22, 2008, Grievant met with the Chief. After that meeting, Grievant wrote the Chief an e-mail regarding the subject, "Voluntary Demotion" stating, in part:

> As per our conversation this day, I am requesting to be voluntarily demoted from my current position of Senior Probation Officer, Sex Offender Specialist, to my former position of Pre-Sentence Investigator. As you know, when I accepted the Senior position early in 2007, my heart was in a different state. In March, I suffered a heart attack and had to

[6] Agency Exhibit 2.

> have quadruple bypass surgery. Since that time, I have been somewhat slower and I feel that I am not able to devote enough time and effort to perform the Senior Position to [Agency] standards.[7]

Grievant appears to argue that his demotion was coerced by the Agency. It is clear from Grievant's own statements that his demotion was voluntary based on his health concerns and not because of coercion or the creation of a hostile work environment by the Agency.[8]

The Agency scheduled a staff meeting for June 9, 2009, but had to reschedule that staff meeting for June 11, 2009. Grievant did not attend the Staff meeting on June 11, 2009 because he was participating in mediation in a local Court. Grievant had received prior approval to take leave on that day. Other employees who had prior approval for leave on June 11, 2009 were permitted to miss the staff meeting without sanction. Grievant however was criticized by the Agency and told that he should not have missed the staff meeting. Grievant argues that the Agency is not consistently treating its employees with preapproved leave. Grievant's argument fails. Grievant's leave request was granted so that he could participate in mediation on the condition that he attend Agency training and staff meetings. The other employees on preapproved leave did not have that condition. Grievant should have attended the staff meeting and the Agency's criticism of his failure to do so was appropriate.

DECISION

For the reasons stated herein, the Agency's is **ordered** to reconsider Grievant's request for an alternative work schedule and telecommuting without any regard to his need for child care during his lunch break. Grievant's request for relief regarding other issues 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.

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[7] Agency Exhibit 3.

[8] When Grievant was voluntarily demoted to the Pre-Sentence Investigator position, he lost access to dedicated State vehicle. He lost access, because he no longer had an active caseload of clients and no longer needed a dedicated State vehicle. The Agency's decision to change his access to a State vehicle was based on the Agency's business needs and not for an improper purpose.

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
   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.[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].

S/Carl Wilson Schmidt

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.