

Issue: Misapplication of policy and retaliation; Hearing Date: 01/14/03; Decision Issued: 03/25/03; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No: 5613; **Administrative Review: DHRM Ruling requested 04/04/03; Outcome: No policy violation found. No basis to interfere with decision. DHRM Ruling dated 04/24/03**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5613

Hearing Date: January 14, 2003
Decision Issued: March 25, 2003

PROCEDURAL HISTORY

On November 7, 2001, Grievant filed a grievance against the Department of Social Services alleging misapplication of policy and retaliation. The Agency contended the grievance did not qualify for a hearing. The Director of the Department of Employment Dispute Resolution denied qualification of both issues. Grievant appealed the Director's ruling to a Circuit Court. On October 4, 2002, a Circuit Court upheld the Director on the issue of misapplication of policy but ordered qualification on the issue of retaliation. On January 14, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Supervisor
Hiring Authority
Assistant Director
Human Resource Analyst II
Employee Relations Manager
Information Technology Specialist III

ISSUE

Whether the Department of Social Services retaliated against Grievant.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency retaliated against her. 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 Social Services employs Grievant as an Exception Manager. She earned an undergraduate degree and a Masters in Business Administration. She has been employed by the Agency for approximately 12 years.

Grievant began reporting to the Supervisor in January 2001. Grievant had asked for a position upgrade before she began reporting to the Supervisor. The Supervisor did not act on Grievant's request immediately upon joining the unit because she was not fully familiar with Grievant's duties. In June 2002, the Supervisor submitted the request to have Grievant's position audited for a possible upgrade. On January 10, 2003, Grievant learned the request had been granted.¹

In March 2001, Grievant and the Supervisor had a discussion regarding whether Grievant should work on special projects with other staff. When Grievant asked why she would not be able to assist, the Supervisor said Grievant had a tendency to file lawsuits and that her presence may create tension among some of the other staff on the project. Grievant interpreted the Supervisor's reference to lawsuits to be a reference to a grievance she filed several years earlier.

Grievant and several other individuals applied for the position of Program Specialist III. Grievant was among 12 people granted interviews before a three-person panel. On September 4, 2001, Grievant interviewed for the position.

¹ The Supervisor had recommended a 2.5 percent pay increase but the Agency raised her compensation by ten percent.

Panel members included Grievant's Supervisor who served as the panel Chair. The two other panel members were Ms. CW, (White female), and Ms. SR (White female). Each panel member had a list of all of the prepared questions to be asked of each person interviewed. Panel members wrote down responses from each interviewed candidate and then scored each answer to develop a ranking among the persons interviewed.

Under the Agency's hiring policy, the Hiring Authority is the person responsible for selecting the candidate for the available position. The Hiring Authority sat in on all of the interviews and scored answers for each person interviewed. He did not ask questions of the candidates. He decided to sit in on the interviews because he believed that doing so would enable him to avoid having to go through a second interview of the top candidates. He wanted to expedite the hiring process.

The Hiring Authority selected the panel members before the Program Specialist III position was advertised in the newspaper. He sent a memorandum to the three panel members indicating the demonstrated abilities he wanted in the candidate. He expressly stated, "Panel members please refer the **TOP** candidate to me."² He included this directive to the panel because of an earlier conversation he had with someone in the Agency's Human Resource office. Based on his discussion with human resource staff, the Hiring Authority mistakenly believed that he had to take the top candidate and could not consider the second or third best candidates. The Hiring Authority did not know Grievant had filed a grievance in the past and he did not have any discussions with the Supervisor regarding Grievant's alleged tendency to file lawsuits.

On September 5, 2001, the panel Chair sent the Hiring Authority a memorandum ranking the candidates and stating, "We are recommending that the position be offered to the top candidate ... who scored highest on the overall interview questions."³ In turn, the Hiring Authority sent a memorandum, dated September 7, 2001, to the Human Resource Director asking that an offer of employment be made to the top candidate and stating that if the top candidate declined the offer, "please readvertise this position."⁴ The top applicant for the position was offered the job but declined to accept the position. Another state employee was the second ranked candidate. Grievant was the third ranked candidate. Rather than offering the position to the second or third ranked candidate, the Agency chose to re-advertise the position.

Grievant did not apply for the position the second time it was advertised. None of the candidates applying for the position following the second advertisement were interviewed because the Hiring Authority was not satisfied with the quality of the applicants. The position was advertised for a third time. Grievant did not apply for the position the third time it was advertised. Several candidates were interviewed and an

² Agency Exhibit 2.

³ Grievant Exhibit 2.

⁴ Grievant Exhibit 5.

offer was given to the top candidate who accepted the position. The Hiring Authority sat in on the candidate interviews and scored the candidates.

CONCLUSIONS OF POLICY

In order to prove a claim of retaliation,⁵ Grievant must show (1) she engaged in a protected activity;⁶ (2) she suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity.

When Grievant filed a grievance, she engaged in a protected activity. She suffered an adverse employment action when she was not chosen for a position for which she was qualified. The more difficult element for Grievant to establish is the connection between her protected activity and the adverse employment action taken against her.

After the top candidate declined the position, the decision not to select the second or third ranked candidate was made solely by the Hiring Authority. Since the Hiring Authority was the person taking the action which Grievant contends was retaliatory, Grievant must show that the Hiring Authority's action resulted from Grievant having filed a prior grievance. Based on the credibility of the Hiring Authority, it is clear he did not know Grievant had filed a prior grievance and, thus, could not have acted because Grievant had filed a prior grievance. His instructions to the panel to select only the top candidate were given before he knew how the candidates would rank and how close Grievant would be to the top of the list. He did not select the second or third candidates because of incorrect conclusions drawn from his discussion with human resource staff. None of those discussions mentioned Grievant.

Grievant contends the Agency somehow engaged in inappropriate or retaliatory behavior by having Grievant's Supervisor as a panel member. The Supervisor ranked Grievant third which is consistent with the two other panel members but is higher than the fourth place ranking given by the Hiring Authority. The Hearing Officer has no reason to believe the Supervisor's knowledge of Grievant having filed a grievance affected how she rated Grievant in the interview. No evidence was presented suggesting the Supervisor informed other panel members or the Hiring Authority that Grievant had previously filed a grievance.

⁵ Retaliation is defined by Section 9 of the Grievance Procedure Manual as: "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')."

⁶ See the *Grievance Procedure Manual* §4.1(b)(4), page 10. Only 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 a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law."

Grievant argues that the Agency's failure to follow its hiring policies is evidence of its retaliation against her. The EDR Director ruled that the Agency had complied with State hiring practices and this ruling was upheld by a Circuit Court. Even if the Hearing Officer believed the Agency failed to comply with all of the hiring policies, the Hearing Officer is bound by the EDR Director's conclusion that the Agency complied with all hiring policies. Thus, the Agency did not retaliate against Grievant by failing to follow hiring policies.

Grievant points out that if the Hiring Authority's scoring is excluded from the panel's scoring, Grievant would have tied for second with another applicant. This information is insufficient to show that the Hiring Authority or others in the Agency retaliated against her.

DECISION

For the reasons stated herein, Grievant's 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.
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.⁷

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of the
Department of Social Services
April 24, 2003

The grievant has appealed the hearing officer's March 26, 2003, decision in Grievance No. 5613. The grievant is challenging the decision because she contends that it is inconsistent with state and agency policy as it relates to hiring processes and retaliation for filing two grievances. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this appeal.

FACTS

The Department of Social Services employs the grievant as an Exception Manager. On September 4, 2001, the grievant interviewed for a vacant Program Specialist III position. The interview panel, based on the hiring supervisor's instructions, referred only the top candidate for hire. When that individual did not accept the job offer, the agency advertised the position a second time. Neither the second ranked candidate nor the third ranked candidate (grievant) was offered the position. No acceptable applicants were found during the second advertisement, so the agency advertised a third time. The grievant did not apply the second and the third times the position was advertised. The grievant contends that the hiring authority retaliated against her when she was not selected for the position. She believed this because she had filed several grievances and she believed the hiring authority had knowledge that she had done so. Thus, she filed a grievance contesting her no-selection based on the agency not following the selection policy and retaliation for filing several grievances.

In the instant case, the agency contended that the grievance did not qualify for a hearing. The grievant appealed to the Director of the Department of Employment Dispute Resolution, which denied qualification on both issues. The grievant appealed to the Circuit Court, which denied the issue of misapplication of policy but ordered qualification on the issue of retaliation. Based on the fact that the issue of misapplication of policy was not an issue to be heard at the hearing step of the grievance procedure, DHRM's ruling will not address that part of the appeal.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. The challenges must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review

the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

Concerning the issue of retaliation, the hearing officer determined that the evidence supports that the grievant (1) engaged in a protected activity and she suffered an adverse employment action. However, the evidence did not support that a causal link exists between the adverse employment action and the protected activity. Therefore, he concluded that agency officials did not retaliate against the grievant when she was not selected for the position. In light of this, there is no basis for this agency to interfere with the hearing officer's decision.

If you have any questions regarding this correspondence, please call me at (804) 225-2136.

Sincerely,

Ernest G. Spratley, Manager
Employment Equity