Issue: Misapplication of the hiring policy and retaliation; Hearing Date: 09/22/05; Decision Issued: 09/23/05; Agency: DJJ; AHO: David J. Latham, Esq.; Case No. 8164

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8164

Hearing Date: September 22, 2005
Decision Issued: September 23, 2005

PROCEDURAL ISSUES

Grievant requested as part of his relief that an order be issued rescinding the position announcement for the correctional sergeant position. A hearing officer does not have the authority to hire, or to establish or revise procedures, or grant any other relief that is inconsistent with the grievance statute or procedure.[1] In a case such as this, the authority of the hearing officer is limited to issuing an order that the agency comply with applicable law and policy, if it is determined that there was retaliation or, unfair application or misapplication of law or policy.[2]

APPEARANCES

Grievant
Attorney for Grievant
Acting Superintendent
Representative for Agency

[1] § 5.9(b)3, 5 & 8. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, August 30, 2004.
[2] § 5.9(a)5. *Ibid.*

Three witnesses for Agency

ISSUES

Did the agency unfairly apply or misapply policy during a selection process? Did the agency retaliate against grievant?

FINDINGS OF FACT

The grievant filed a timely grievance asserting that the agency unfairly applied or misapplied policy and retaliated against him during a selection process.[3] The Department of Juvenile Justice (Hereinafter referred to as agency) has employed grievant for a total of eight years as a juvenile corrections officer.

The Commonwealth's Hiring policy sets forth guidelines for all selection processes including both new hires and those seeking to be promoted to another position.[4] Some positions, including the one for which grievant applied, require background checks to review an individual's work and personal history to determine if a candidate is suitable for certain positions. Background checks may also include such checks as employment history, criminal history, driving record, fingerprint-based criminal history report, and *any other record or information related to the candidate's suitability for the position*.[5]

During the summer of 2004 a job announcement was posted for four openings in the position of Security Officer IV (Corrections Sergeant).[6] Grievant applied for the position. Human Resources screened his application and found that he met minimum requirements, thereby making him eligible to be interviewed for the job openings. Pursuant to agency policy and practice, a three-person panel of supervisors from facilities other than grievant's facility interviewed grievant and others on October 26, 2004.[7] The panel recommended that grievant and some others be given a second interview. A different panel consisting of an assistant warden and a captain from grievant's facility conducted second interviews on December 15, 2004. The panel recommended that grievant be among those hired.

Following second interviews, the agency's policy and practice is to conduct background checks on applicants who have been recommended for hiring. The background checks include a driving record check (by the Department of Motor Vehicles)a fingerprint-based criminal history report (by the Virginia State Police), and a review of the candidate's personnel file to review

[3] Agency Exhibit 1. Grievance Form A, filed March 17, 2005.
[4] Grievant Exhibit 14. Department of Human Resource Management (DHRM) Policy 2.10, *Hiring,* revised October 10, 2003.
[5] *Ibid.*
[6] Grievant Exhibit 7. Job Announcement, closing date September 8, 2004.
[7] Grievant Exhibit 11. Interview Evaluation Worksheet, October 26, 2004.

work history within the agency. When the background checks have been completed, the facility Superintendent reviews all available information with the agency's Deputy Director. Although the facility superintendent is the putative hiring authority, the Deputy Director is the *de facto* hiring authority for all supervisory positions.[8] The Deputy Director makes the final decision on selecting applicants for all supervisory positions.

In this case, the superintendent at grievant's facility had been reassigned elsewhere in January 2005. The new acting superintendent was assigned to the facility during the first week of February 2005. After receiving the background checks for grievant and other candidates, the acting superintendent and the Deputy Director had a lengthy discussion on February 14, 2005 about grievant's disciplinary action and it was decided that grievant was not suitable for the sergeant position.[9] The primary basis for denying promotion was an incident in which grievant was found to have threatened a ward; a Group III disciplinary action was issued to grievant for that incident.[10] The Deputy Director felt that grievant's poor judgment in that case made him an unsuitable candidate for a supervisory position.

On several occasions, grievant has assisted other employees in preparing grievances. Grievant avers that it is widely known throughout the facility that he has engaged in this activity. On one occasion, the superintendent had suggested to an employee that she ask grievant for assistance in filing her grievance because grievant had good writing skills.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

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[8] Agency Exhibit 2. Memorandum from Deputy Director to superintendents, March 14, 2002.
[9] Grievant Exhibit 12. Interview Evaluation Worksheet, signed February 14, 2005.
[10] Agency Exhibit 6. Group III Written Notice, issued October 24, 2003. Grievant grieved this disciplinary action and, after the parties failed to resolve the matter during the management resolution steps, the case was adjudicated by a Hearing Officer. The Hearing Officer upheld the disciplinary action in Case # 642, issued April 19, 2004 (available at www.edr.virginia.gov).

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as a claim of misapplication of policy or retaliation, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[11]

Unfair application or misapplication of policy

Grievant argued that the agency failed to follow its own procedure for completing the Interview Evaluation Worksheet. The Worksheet Instructions provide that "The Organizational Unit Head will sign the Interview Evaluation Worksheet of the selected applicant only."[12] In this case, the Organizational Unit Head (the acting superintendent) signed the Worksheet despite the fact that grievant was ultimately not selected for the position. While the instructions are somewhat ambiguous,[13] a careful reading of the entire instruction form suggests that the term "selected applicant" refers not to the person who is ultimately promoted, but rather to the applicant selected by the interview panel. However, even if grievant's interpretation is the correct one, the fact that the acting superintendent may have signed a form that he should not have signed is at most a technical or clerical mistake that has no bearing on the substance of this grievance. Thus, even if this was an administrative error, it does not constitute a misapplication of policy.

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[11] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective August 30, 2004.

[12] Grievant Exhibit 13. Attachment G, Administrative Directive 05-001, *Employee Recruitment and Selection*, revised February 2003.

[13] The testimony in this case demonstrated that the Interview Evaluation Worksheet is used for multiple purposes and that certain aspects of the form are confusing and ambiguous. For example, the form is used by the second interview panel to record its summary impressions of the applicant, and to make a hire or not hire recommendation. In addition, the form is also used by the facility superintendent to approve or disapprove the selection, and to indicate whether the Deputy Director has reviewed the selection. The Deputy Director's portion *appears* to be intended to indicate whether or not he reviewed the case. In actual practice, superintendents have been using this section to indicate whether the Deputy Director approved or disapproved the selection.

Since the Deputy Director has been the de facto hiring authority for several years, it would appear appropriate for the form to be revised to provide for a signature block for the Deputy Director to sign and to indicate approval or disapproval of the applicant, as well as the date of his action. This would provide a more understandable audit trail in future cases.

Grievant also argues that, if the agency has established a criterion that any employee with an active disciplinary action cannot be promoted, that criterion should be considered a Bona Fide Occupational Qualification (BFOQ). The Hiring policy provides that BFOQs must be included on all job announcements.[14] The policy defines BFOQ as, "A job qualification or requirement that is not necessarily based on merit, education, or experience, but that is necessary to the operation of a particular business and reasonably related to the performance of a particular job."[15] This definition suggests that a BFOQ is intended to mean an attribute, extra knowledge, or extra achievement that candidates must possess in order to perform a particular job. An active disciplinary action is not an attribute but rather a potential detriment to successfully performing a particular job. The definition of BFOQ focuses on positive attributes that would *qualify* an applicant for a job. A disciplinary action, on the other hand, is a negative factor that may act as a *dis*qualifying determinant in the selection process. Accordingly, it is concluded that an active disciplinary action is not a BFOQ.

Nonetheless, grievant's point is well taken. If an agency intends to automatically eliminate from consideration all applicants with active disciplinary actions, it would be appropriate that the job announcement state words to the effect that applicants with active disciplinary actions need not apply. This would save applicants from the useless act of applying for a position when the agency would automatically disqualify them. However, the evidence in this case does not support grievant's premise.[16] If the agency's intent had been to automatically disqualify all applicants who have active disciplinary actions, it could have done so in the screening process. Human Resources screens all applications and eliminates those who do not meet the minimum requirements. In this case, Human Resources found that grievant met the minimum requirements and allowed his application to move forward through the interview process.

The Deputy Director testified that an active disciplinary action does not automatically result in an otherwise qualified applicant being denied consideration. Rather, he looks at each case on its own merits. If, for example, an otherwise qualified applicant had an active Group I Written Notice for a minor infraction such as poor attendance, he might still be promoted if the applicant had improved his attendance record since the disciplinary action. In the instant case, however, the disciplinary action was one of the most severe infractions (Group III). Moreover, the agency considered that the nature of the offense was sufficiently severe and so directly antithetical to the behavior expected of a supervisor that it had to be given considerable weight in the promotion decision. Accordingly, the agency's decision to evaluate each case on its own merits rather than automatically screening out applicants with active disciplinary actions is not an unfair application or misapplication of policy.

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[14] Grievant Exhibit 14. DHRM Policy 2.10, *Hiring*, revised October 10, 2003.

[15] *Ibid.*

[16] Interestingly, grievant offered testimony that supports the agency's position. He asserted that he knew of two employees who were promoted notwithstanding the fact that they had been "written up" for offenses.

Finally, grievant argues that the denial of promotion was itself a form of disciplinary action. He further argues that the Standards of Conduct policy does not provide for a denial of promotion to be used as form of disciplinary action. Grievant's argument is not persuasive because he has not shown that the denial of promotion was a disciplinary action. Disciplinary actions are designated as "active" for a period of time depending upon the severity of the offense. In effect, the "active" life of a disciplinary action is a probationary period. During this time, the offender is expected to eliminate or curtail the offensive behavior that resulted in disciplinary action. During this period, it is entirely appropriate that agency management should monitor the offender's behavior and consider the nature of the offense when assigning responsibilities or, when considering an application for promotion. This is not an unfair application or misapplication of policy. In fact, if an agency were to ignore recent behavior, the agency would be derelict in its responsibility to effectively manage the workforce.

Retaliation

Retaliation is defined 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.[17] To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Generally, protected activities include use of or participation in the grievance procedure, complying with or reporting a violation of law to authorities, seeking to change a law before the General Assembly or Congress, reporting a violation of fraud, waste or abuse to the state hotline, or exercising any other right protected by law. In this case, grievant met the first prong of the test because he had filed a grievance following issuance of the October 2003 disciplinary action.

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment, such as a cut in pay.[18] A transfer may constitute an adverse employment action if a grievant can show that the transfer had some significant detrimental effect on the terms, conditions, or benefits of his employment.[19] A transfer with dramatic shift in working hours, appreciably different responsibilities, or a transfer providing reduced opportunities for promotion can constitute an adverse employment action, depending on the facts and circumstances.[20] To constitute an adverse employment action, there must be some change in employment status, such as a loss in pay or benefits, demotion, change in responsibilities, formal discipline, or

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[17] EDR *Grievance Procedure Manual*, p.24

[18] *Von Gunten v. Maryland Department of Employment*, 2001 U.S. App. LEXIS 4149 (4th Cir. 2001) (citing *Munday v. Waste Mgmt. of North America, Inc*., 126 F.3d 239, 243 (4th Cir. 1997).

[19] *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999)

[20] See *Boone v. Goldin*, Ibid.; *Webster v. Henderson*, 2000 U.S. Dist LEXIS 5777 (D. Md 2000) aff'd 2002 U.S. App. LEXIS 287 (unpublished opinion). See also *Garrison v. R.H. Barringer Distributing Co*., 152 F. Supp. 2d 856 (MD N.C. 2001).

any other tangible detriment to the terms and conditions of employment.[21] Normally, the failure to achieve a promotion is not an adverse employment action because there is no change in employment status and no detrimental effect on the terms of employment. However, denial of a promotion might be an adverse employment action if the employee can demonstrate that he should have been promoted and, that the reason for denial was his participation in the protected activity.

In the instant case, grievant has shown that he met the minimum qualifications for the position, that he successfully survived the interview process, and that the final interview panel recommended he be promoted. However, grievant has not demonstrated that he met the criteria for promotion as determined by the hiring authority. The interview panels' recommendation was based on how grievant presented himself during the interview, and how he responded to prepared questions asked of all applicants. The panelists did not consider the effect of grievant's active disciplinary action in making their recommendations because their responsibility was only to rate the applicants' performance during the interview.[22] The hiring authority evaluated not only the applicants' interview performance but also their background checks and, their work and disciplinary record. It was at this final level of evaluation that grievant was determined to be unsuitable for the position. Moreover, grievant has not demonstrated that his filing of a previous grievance was connected to the hiring authority's decision not to promote. Other than his own speculation, grievant offered no evidence in the form of witnesses or documentation that would show a nexus between the two events.

Grievant questions the credibility of the Deputy Director's testimony in a number of respects. Grievant finds incredible the Deputy Director's denial of knowledge about grievant's relationship with a former agency director, about grievant's request to be switched from night to day shift, or about grievant's assistance to other employees in filing grievances. However, the first two events occurred several years ago and grievant did not provide any evidence that contradicts the Deputy Director's denial of knowledge. The Deputy Director testified credibly and forthrightly.

Finally, grievant argues that his active disciplinary action is merely a pretextual reason for denying promotion. The preponderance of evidence indicates otherwise. When the management of any agency promotes an individual into a supervisory position, one factor to be considered is whether that person will be a role model and set an appropriate example for subordinates. Therefore, it is not only reasonable but appropriate that agency management examine the work history and disciplinary history of job applicants. One of the best indicators of how a supervisor will comport himself is how he has behaved during the course of his employment. In this case, even if grievant were able to

[21] *Reinhold v. Commonwealth*, 135 F.3d 920 (4th Cir. 1998).

[22] The panelists on the first interview panel were from other facilities; the preponderance of evidence is that these panelists were not aware of applicants' work or disciplinary history.

demonstrate some retaliatory motive, the fact remains that the agency properly considered his active disciplinary action and, given the nature of the offense, grievant would not have been promoted even in the absence of the alleged retaliation.

DECISION

Grievant has not borne the burden of proof to show either retaliation or unfair application or misapplication of policy during a selection process. Grievant's requests for relief are 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.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
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 your appeal to the other party. 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.[23] 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.[24]

[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]

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David J. Latham, Esq.
Hearing Officer

[23] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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