

Issues: Misapplication of Policy (recruitment/selection), Discrimination and Retaliation;
Hearing Date: 01/15/08; Decision Issued: 01/22/08; Agency: DOC; AHO: Thomas
P. Walk, Esq.; Case No. 8761; Outcome: Partial Relief; **Administrative Review:**
DHRM Ruling Request received 02/05/08; Outcome pending.

**IN THE VIRGINIA DEPARTMENT OF EMPLOYMENT DISPUTE
RESOLUTION**

DECISION OF HEARING OFFICER

IN RE: CASE NO. 8761 (DEPARTMENT OF CORRECTIONS)

HEARING DATE: JANUARY 15, 2008

DECISION ISSUED: JANUARY 22, 2008

PROCEDURAL HISTORY

The grievant initiated this proceeding by the filing of his Form A on May 22, 2007. It was qualified for a hearing by the Director of the Department of Employment Dispute Resolution on October 25, 2007. I was appointed as hearing officer on December 13, 2007 and received official notice of the appointment on December 19, 2007. The hearing was conducted on January 15, 2008.

APPEARANCES

Grievant and his counsel

Agency Representative (Superintendent)

Four witnesses for the agency, including the agency representative

Agency Advocate

ISSUES

1. Whether the agency failed to follow established law and policy by failing to consider the status of the grievant as a veteran during his being considered for a position as a Corrections Lieutenant on April 24, 2007?

2. Whether the actions of the agency in failing to hire the grievant for the position

as Corrections Lieutenant was the result of discrimination against him or in retaliation for his having filed prior grievances?

FINDINGS OF FACT

The grievant is a veteran of the Armed Forces of the United States. He served in the military from February, 1978 through August, 1983. He received an honorable discharge. At the time of his discharge his rank was E-5 (Sergeant). His duties included supervision of a telecommunications center at which he supervised from four to nine employees at any given time. He held a top secret security clearance while in the military.

The grievant began his employment with the Virginia Department of Corrections in September 1990. Since that time he has continued employment with the agency as a Corrections Officer at two different facilities. While serving at this most recent post, the grievant has acted as Officer In Charge on a regular basis. On or about April 5, 2007 he applied for a position with the agency as a Corrections Lieutenant at the facility where he was assigned as a Corrections Officer. On April 24, 2007 he was interviewed for that position by a Captain and a Major. The Major was acquainted with the grievant from having worked with him at another facility as well as the facility at which the grievant was then working. The interview consisted of a standard set of questions which were asked of all candidates for the position who were given interviews. A total of eight applicants had been prescreened and were approved for an interview by the Superintendent of the facility. Six of the applicants held the rank of Sergeant. Only one

other candidate was merely a Corrections Officer.

The Major made a finding that the grievant could be recommended for the position with reservations. He believed that the grievant, in his interview, showed a lack of knowledge of agency policies and of the Strategic Plan of the agency. The Captain made a finding that he could not recommend the grievant for the position. He believed that the grievant was unprepared for the interview and not knowledgeable regarding certain duties of the Lieutenant's position.

The interviewers noted the military experience of the grievant on the evaluation forms prepared by them. At no time during the interview, however, did either of them ask additional questions of the grievant to investigate what experiences in his military background, if any, would be relevant to the position for which he was being evaluated.

DISCUSSION AND ANALYSIS

This grievance is governed by the Virginia Personnel Act (Chapter 29 of Title 2.2 of the Code of Virginia of 1950, as amended), a set of comprehensive statutes which provides to State employees the right to challenge agency decisions in disciplinary actions and other limited circumstances. One of those situations is where an agency is alleged to have violated or misapplied a State law or policy. Other situations would be where the agency has been alleged to have discriminated against any employee or engaged in retaliatory action against an employee. The grievant attempts to avail himself of protections under each of these three theories.

Section 2.2-2903 (B) of the Code of Virginia a 1950, as amended requires an

agency to take into consideration the status of a job applicant as a veteran, provided that he otherwise meets the knowledge, skill and ability requirements for the position. This protection is further carried forward by policy 2.10 of the Virginia Department of Human Resource Management (DHRM). Neither the statute nor the DHRM policy provides any further guidance as to what constitutes a proper consideration of the status of an applicant as a veteran.

I have been referred to only one case decided by a Virginia court applying and interpreting the statute. That case is Hudson v. Virginia Employment Commission, 69 Va. Circ. 318 (2005). In that case Randall G. Johnson of the Richmond Circuit Court Judge held that the proper consideration of a veterans status required something more than giving “lip service” to the requirements of the statute but that the statute did not require an agency to give any particular weight to the status. Although this decision is not a controlling precedent, I am persuaded by it.

The reasoning is similar to that used by the Virginia Court of Appeals in clarifying what consideration must be given to certain factors in a case involving Virginia’s Equitable Distribution Statute, §20-107.3. In the case of Alphin v. Alphin, 15 Va. App. 395, 424 SE2D. 572 (1992) the Court of Appeals held that consideration means more than a mere recitation that all factors were considered. Also, a trial court was held not to have the obligation to quantify or elaborate on the weight given any particular factor under that statute.

This analysis is grounded in logic and equity. Therefore, I have adopted it for use

in this proceeding in the absence of any additional guidance. I find that the agency hiring authority has the same duties, and discretion, as a trial court judge in terms of what is a proper “consideration.”

Under that standard, the agency has failed to apply the clearly established State policy. The experiences of the grievant while in the military, to the extent that they are relevant to a consideration of the requirements of the Lieutenant’s position, were not considered at all. As argued by the grievant, additional follow-up questions should have been asked of the grievant to determine if any of his experiences in the military would buttress the knowledge, skills and abilities otherwise exhibited by him during his employment with the agency. I am not willing to go as far as Judge Johnson did in his decision in Hudson to say that the statute provides a practical advantage to a veteran automatically. I do believe, however, that the applicable statute and policy do require an agency to fully evaluate an applicant’s military service experience when that experience is brought to the attention of the agency.

This grievance is governed by the law in effect as of the time of the alleged wrong doing by the agency. Effective July 1, 2008 §2.2-2903 of the Code was amended to provide that a veteran be given a “preference” in hiring decisions. That amendment highlights the fact that the statute which I am applying gives a veteran something less than a trump card. On the other hand, it gives a veteran something more than a card to be played in the event of a Hiring Authority finding that two applicants are equally qualified. That is the approach which apparently this agency had adopted as an informal policy.

That policy was erroneous.

I find no compelling evidence that the grievant has been discriminated against because of any prior grievances filed by him or as a result of his status as a veteran. I find no evidence that the decision to not hire the grievant for the position sought here was in retaliation for any prior actions by him.

DECISION

For the reasons stated above, I hereby uphold the grievance filed on May 22, 2007. I order the agency to apply the applicable law and policy by repeating the selection process for the subject position. I am not ordering the agency to repeat the process from the beginning, but only requiring that it re-interview the grievant and reconsider the hiring decision after the grievant has had the benefit of an appropriate interview. I recommend that the agency re-interview any other applicant for this position who is also a veteran. I recommend that the agency use the same interviewers as the Selection Panel in this matter. I believe this is appropriate, in the same manner as a Trial Court Judge is often called upon to re-hear a case after he has been reversed on an appeal. I further recommend that the agency view this re-opened selection process as though it is governed by the current version of §2.2-2903, giving veterans a preference in hiring. Nothing herein requires the agency to hire the grievant or should be construed as a finding by me that his military experience should be viewed as a factor in his favor. After due consideration, the agency is entitled to give it whatever weight it deems appropriate.

APPEAL RIGHTS

As the Grievant Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director=s authority is limited to ordering the hearing officer to review the decision to conform it to written policy. Requests should be sent to the Director of Human Resources Management, 101 N. 14th St., 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director=s authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capital Square, 830 E. Main St., Suite 400, Richmond, VA 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days

of the **date of the original hearing decision**. A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The court shall award reasonable attorneys' fees and costs to the employee if the employee substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code ' 17.1-405.

DECIDED this September 22, 2008.

/s/ Thomas P. Walk
Thomas P. Walk, Hearing Officer