

Issues: Misapplication of Policy (recruitment/selection), and Retaliation (previous grievance activity); Hearing Date: 02/07/08; Decision Issued: 03/21/08; Agency: VDACS; AHO: Carl Wilson Schmidt, Esq; Case No. 8767, 8778, 8785; Outcome: No Relief – Agency Upheld In Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8767 / 8778 / 8785

Hearing Date: February 7, 2008
Decision Issued: March 21, 2008

PROCEDURAL HISTORY

Grievant T filed grievances on March 27, 2007 and April 23, 2007. The EDR Director issued Ruling Numbers 2007-1649, 1689, and 1726 on November 28, 2007. On March 28, 2007, Grievant T filed a grievance. The EDR Director issued Ruling Number 2007-1710 on December 14, 2007 qualifying the grievance for hearing and consolidating Grievant T's grievance with Grievant W's grievance.

On January 8, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 7, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant T
Grievant W
Grievant Representatives
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether the Agency complied with DHRM hiring policies?

2. Whether the Agency retaliated against either Grievant?

BURDEN OF PROOF

The burden of proof is on the Grievants to show by a preponderance of the evidence that the relief they seek 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:

Grievant T works as a Meteorologist with the Agency. He has been employed by the Agency for more than 15 years.

Grievant W worked as a Compliance Officer until he resigned from the Agency in 2007. He began working for the Agency in December 2003.

On September 27, 2001, Grievant T filed a grievance challenging disciplinary action resulting in his removal from employment as an Agricultural Inspector with the Agency. The Hearing Officer reinstated Grievant to his former position or, if occupied, to an objectively similar position. Mr. R was a manager with the Agency at the time and was especially hostile to Grievant T. Mr. R stated that Grievant T would never work for the Agency again. Following a series of court appeals, Grievant T was ultimately reinstated however not to an objectively similar position.¹ His new position required extensive travel.

Grievant T complained to the Division Director regarding the treatment he had been receiving from Mr. R and Mr. D. A lab manager approached the Division Director and asked to re-designate a person in the lab to assist in metrology. To address Grievant T's concern, the Division Director obtained approval to move Grievant T to the lab. Grievant T requested a transfer to the position of Meteorologist. Grievant T was transferred to that position.

Grievant W raised several concerns about the use of Agency resources with respect to a non-profit professional organization. Several Agency managers and employees were members of the organization. On June 12, 2006, The Director of Internal Audit sent a memorandum to the Deputy Commissioner, Division Director, and

¹ Grievant T's former position had remained open for two years while his grievance was being appealed in the courts. As the Agency lost on appeal and it became clear that Grievant T would be reinstated, the Agency selected another person to fill Grievant's former position.

Weights and Measures Program Manager expressing an opinion that the organization's "operations, as structured, pose an unnecessary level of operation risk to the agency." He stated his belief that "the risk basically derives from not having enough separation between the operations of [the organization], from VDACS, a state agency." The Director of Internal Audit made several recommendations to restructure that relationship. Several Agency managers did not look favorably on Grievant W's interference in the organization's operations.

On July 31, 2006, the Division Director requested approval to fill the position of the Compliance Manager, #00350. The Commissioner approved filling the position on August 4, 2006. The Secretary approved the request on August 11, 2006.

On August 31, 2006, the position was advertised in RECRUIT and was open to the general public. September 15, 2006 was the cutoff date for applications. Mr. D2, the Program Manager at the time, sent an email to all employees in the Division notifying them of the Compliance Manager position and position #00864.

The advertisement for position 350 stated, in part:

The Virginia Department of Agriculture and Consumer Services, [Division], seeks an individual to provide technical guidance and oversight to program staff and regulated industries in the area of weight and measurement standards. This position oversees and evaluates the Programs' regulatory field inspection and sampling activities; informs the program manager of field activities; plans, schedules and implements technical training for staff and regulated industries; interprets and communicates regulations and technical requirements to vendors, staff and the general public; establishes priorities and procedures for field inspection activity; reviews investigative reports, assesses civil penalties as necessary; and participates in industry and government-related activities and meetings related to program work.

Qualifications: Demonstrated ability to analyze and interpret complex policies and statutes; demonstrated knowledge of laws, regulations, specifications and tolerances for regulated products; compose written documents/reports; negotiate or discuss complex policy and regulatory issues; and effectively communicate (verbal/written) with individuals and groups. Proven ability to supervise and train staff. Experience with quality standards programs, application of tolerances and specifications for regulated weighing and measuring devices preferred. Experience as a regulatory field inspector and/or managerial-experience in a regulated business is helpful. Experience in a supervisory capacity is preferred but not required. Requires proficient PC skills, Microsoft Office software preferred. A Bachelor's degree in Business Management, Law Enforcement, Biological Sciences, or a related field is preferred; however, an equivalent amount of practical experience is acceptable. A Virginia

Driver's License is required. Final candidate must successfully complete a fingerprint-based criminal background check.²

The Agency had received 29 applications for the position by the close of business on September 15, 2006. Five candidates were existing Agency employees. Grievant T and Grievant W were among those five applicants.

The Compliance Manager position reported to the Program Manager position. Mr. D2 formally held position 00864 until he was promoted to the Program Manager position. Due to health concerns, Mr. D2 wanted to take a demotion and return to his previous position 00864. The Agency allowed Mr. D2 to do so and canceled the recruitment for position 00864. Mr. D2 left the Program Manager position October 10, 2006 and the position became open.

The Division Director reviewed the applications for position 350 and concluded the number of applications was inadequate. He wanted to obtain additional applications and wished to delay filling position 350 until the Agency could hire a new Program Manager.

On October 31, 2006, the Agency notified all of the applicants for position 00350 that the Agency intended to re-advertise³ the position in order to increase the applicant pool. The applicants were advised that their original applications would remain current and that they did not need to reapply. The new closing date was November 17, 2006.

The Division Director spoke to many employees and encouraged them to submit applications for position 350. For example, the Division Director spoke with Mr. M and asked Mr. M why he had not submitted an application for the position. The Division Director encouraged Mr. M to submit an application and also asked for recommendations regarding who should be in the applicant pool. Mr. M made several recommendations including his subordinate, Mr. S. Mr. M chose to apply as part of the second advertisement of the position. During a training meeting, the Division Director encouraged employees to apply for position 350.

An additional 18 applicants were received in response to the re-opening of the position. All of the applicants were screened and six individuals were referred for interviews. All of those individuals were candidates already working for the Agency. Four of the candidates had filed their applications with respect to the original advertisement. Two of the candidates had filed their applications in response to the second advertisement. These two candidates were Mr. MH, a regional supervisor, and Mr. S, an inspector.

² Agency Exhibit 2.

³ The HR Analyst II testified that the position was not actually re-advertised but rather that the date for submitting applications was delayed. Under either scenario, the Agency opened the position in order to receive additional applicants.

On December 1, 2006, Mr. S spoke with Grievant T and another employee. Grievant T wrote notes of his conversation with Mr. S. Those notes are as follows:

[Division Director] had said to [Mr. S] that he did not want any of the people that had applied previously to get the job.

[Division Director] asked him personally to apply for the position since it was a re--advertise.

[Mr. S] stated that he didn't have the qualifications or the technical knowledge for the position.

[Mr. S] stated [Division Director] told him that not to worry about the knowledge, that there were people that could help them. Also he would work out the commute so it would be work time and in a State vehicle.

[Mr. S] stated [Division Director] said that he really wanted him "up there" and that the job was his.⁴

On December 15, 2006, Mr. M had lunch with the Division Director. Mr. M asked the Division Director about the statements made by Mr. S to Grievant T and Mr. L. The Division Director became visibly upset and stated that he was actively recruiting for the position and that he would deny promotional opportunities to anyone who had made his job more difficult. The Division Director went on to say that he would not promote or afford anyone a promotional opportunity to anyone who made his job more difficult.

The new Program Manager headed the hiring panel.⁵ He had served on many hiring panels before. He had been employed by the Agency for 36 years and served as the first Compliance Manager in the Office of Pesticide Services. He did not know candidates prior to the selection process although the Division Director had introduced Mr. S one day when they passed in the hallway.

The Program Manager selected the Environmental Program Manager and the GM Program Coordinator to serve on the panel with him. He selected these two people because of their experience.

On February 20-22, 2007, the original four internal applicants including Grievant T and Grievant W and the two additional internal applicants from the second advertisement, Mr. T and Mr. S, interviewed for position 350. Grievant T had not met any of the panel members prior to his interview.

Following the interviews, the hiring panel discussed the interviewed applicants and determined the top candidates. Each panel member formed an opinion regarding the best suited person for the position. Based on their discussions and considerations

⁴ Grievant Exhibit 3.

⁵ After Mr. D2 resigned from the position of Program Manager, the Agency advertised the position and an Agency panel hired Mr. B as the new Program Manager. The Division Director was on the panel that hired the new Program Manager.

of each applicant, each panel member concluded Mr. S was the best suited applicant for the position 350.

On February 28, 2007, the Program Manager sent an email to several staff stating:

I am pleased to announce that [Mr. S] has been selected to be the new Compliance Program Supervisor for the Weights & Measures program.⁶

On March 27, 2007, Grievant W filed his grievance challenging the Agency's selection process regarding position 350. On March 28, 2007, Grievant T filed his grievance challenging the Agency's hiring process for position 350.

On April 20, 2007, Grievant W called the HR Analyst II and told her that he was going to stop by and drop-off his grievance information. He did not mention to her that he needed to make copies of the materials or use the office equipment in the building. Access to the building is controlled by a security guard at the entrance. The HR Analyst II notified the Security Guard that Grievant W would be delivering a package for the Deputy Commissioner and that the Security Guard should notify the HR Analyst II or Ms. B when Grievant W arrived. Grievant W spoke with the Security Guard and asked to gain entry to the interior of the building. The Security Guard denied Grievant W entry. Grievant W used his cell phone to call Ms. B and told her he had been denied entry to the building. Grievant handed his cell phone to the Security Guard and Ms. B told the Security Guard to allow Grievant W to enter the building. Grievant entered the building, made photocopies, and delivered his grievance package.

CONCLUSIONS OF POLICY

Grievant T and Grievant W contend the Agency failed to follow policy regarding the hiring for position 350. Each grievant believes the Agency retaliated against him.

Position 350

Department of Human Resource Management Policy 2.10 sets forth the Commonwealth's procedures for hiring employees. Under this policy, "[a]gencies may

⁶ As part of the grievance Step Process, the Deputy Commissioner summarized Mr. S's qualifications as follows:

The individual selected for the Compliance Manager I position has over 25 years of experience with the U. S. Coast Guard enforcing laws and treaties, supervising both large and small groups of individuals, and serving as a Command Enlisted Officer, Executive Officer and Training Officer. In his position with the Coast Guard he also served as a federal law-enforcement officer, conducting searches, investigations, making arrests and testifying in court on behalf of the US government. This individual also has several years of experience as a Compliance Safety Officer III and exhibited strong leadership and management abilities during the interview.

either interview all applicants for a position or reduce the applicant pool by screening applications/resumes. The agency must screen positions according to the qualifications established for the position and must apply these criteria consistently to all applicants. No person may be hired into a classified position without having been interviewed for the position.”⁷

“If initial recruitment does not result in an adequate applicant pool, agencies may reopen recruitment as necessary.” DHRM Policy 2.10 does not define what constitutes an inadequate applicant pool. In this case, the Agency reviewed the applications it received from the first applicant pool and concluded that that pool was inadequate. No credible evidence has been presented to suggest that the Agency’s decision to reopen the recruitment was for any reason other than the Agency’s opinion that the original applicant pool was inadequate.⁸ In the absence of credible evidence of an improper motive, agencies are authorized to reopen recruitments as necessary based on the inadequacy of an applicant pool. The Agency’s decision to reopen the initial applicant pool for position 350 must be upheld.⁹

Grievants argue that the Agency's Policy and Procedure 5.3 limits the Agency's ability to reopen recruitment. Section IV (F) (1) states:

Reposting may be required when the Human Resource Office reviews the applicant pool and determines that the pool is inadequate in terms of the number of qualified females and/or minorities in relation to the labor market availability.

Grievants' argument fails. The Agency's Policy and Procedure 5.3 and DHRM Policy 2.10 must be construed together in a manner that does not defeat the intent of both policies. Agency Policy and Procedure 5.3 authorizes reposting when an applicant pool is inadequate in terms of the number of females and minorities in relation to the labor market. The Agency policy does not prohibit the Agency from reposting the position under other circumstances authorized by DHRM policy 2.10. Since DHRM policy 2.10 authorizes agencies to reopen positions for reasons in addition to the number of qualified females and minorities, the Agency was authorized to reopen the application process to receive additional applications for position 350.

⁷ See various provisions of DHRM Policy 2.10.

⁸ Grievant T presented evidence that the Division Director told Mr. S that he "did not want any of the people that had applied previously to get this position." Twenty-nine individuals had applied for the position as part of the initial recruitment. The Division Director's statement that he did not want any of the applicants to get the position does not suggest that the Division Director had singled out either Grievant as a reason to re-open the position. It may have represented his dissatisfaction with the quality of the applicant pool.

⁹ Grievants argued that the Agency considered applications received after the closing date contrary to DHRM Policy 2.10. After the recruitment was reopened, the new closing date was November 17, 2006. The Agency did not consider any applications received after November 17, 2006 and thus did not act contrary to DHRM Policy 2.10.

Screening is the “process of evaluating the qualifications of individuals in an applicant pool against established position qualifications to determine:

- which applicants in the pool meet minimum qualifications; and
- which of the qualified applicants an agency wishes to interview.”

The Agency screened applicants for position 350 and offered interviews to Grievant T and Grievant W.

DHRM Policy 2.10 provides that, interviews may be conducted by:

- the hiring authority, or
- a person or panel of individuals designated by the hiring authority.

The Agency chose to use a three person panel to select an individual to fill position 350.

A selection panel is a “group of individuals (two or more) that interviews job applicants for selection or for referral to the hiring authority for selection.” When a selection panel is used, panel members should:

- represent a diverse population;
- become familiar with the basic responsibilities of the position for which they will interview applicants;
- normally (if classified employees), be in the same or a higher Role than the position being filled (unless they are participating as human resource professionals or individuals with a particular expertise required for the position);
- receive appropriate training, instruction or guidance on lawful selection before participation in the interview and selection process; and
- hold confidential all information related to the interviewed applicants and the selection or recommendation.

The hiring panel was chaired by the Program Manager. He selected the Environmental Program Manager and GM Program Coordinator.

No credible evidence has been presented to show that the three panel members did not meet the criteria expected under DHRM policy 2.10. The Grievants argued that none of the panel members had the technical skills necessary to perform position 350. While this may be true, DHRM policy 2.10 does not require that panel members have the technical skills necessary to perform the position for which they are interviewing. DHRM policy 2.10 only requires that the panel members become familiar with the basic responsibilities of the position. The evidence is clear that all three panel members were familiar with the basic responsibilities of position 350 and were capable of developing an informed position regarding the relative merits of the applicants before them.

Selection is the “result of the hiring process that identifies the applicant best suited for a specific position.” Pre-selection of a candidate is prohibited under DHRM Policy 2.10 which establishes the process necessary to identify the candidate best suited for a particular position.¹⁰ The Grievants presented evidence suggesting that the Division Director had pre-selected Mr. S for position 350. For example, the Division Director led Mr. S to believe that the “job was his”. The Division Director also said that he would deny promotional opportunities to anyone making his job more difficult. These comments raise the question of what influence the Division Director had on the selection process for position 350.

The evidence is insufficient to show that the Division Director actually influenced the hiring panel for position 350. The Program Manager headed the hiring panel. On his first or second day of working at his new job, the Program Manager was introduced to Mr. S by the Division Director. The Program Manager did not form an opinion regarding hiring Mr. S as a result of that brief encounter. Other than this introduction, there is no evidence to suggest that the Division Director spoke to the Program Manager about Mr. S. There is no reason to believe that the Division Director attempted to directly influence the decision making of the Program Manager.

The Program Manager selected the Environmental Program Manager to be a panel member. The Environmental Program Manager had been employed by the Agency for approximately seven years. She did not know any of the candidates for the position. She did not know anything about Mr. S except what she learned through the interview process. After all of the interviews were completed and the panel discussed the top candidates, the Environmental Program Manager agreed that Mr. S was best suited for the position. No evidence was presented to show that the Environmental Program Manager was influenced by the Division Director into informing her opinion of the best suited candidate.

The Program Manager selected the GM Program Coordinator to be a panel member. He had been employed by the Agency for approximately 21 years. He had been a member of other hiring panels. He did not know anything about Mr. S except what he learned through the interview process. No evidence was presented to show that the GM Program Coordinator was influenced by the Division Director into forming her opinion of the best suited candidate.

¹⁰ See also, Va. Code 2.2-2901 stating, in part, that “[i]n accordance with the provisions of this chapter all appointments and promotions to and tenure in positions in the service of the Commonwealth *shall be* based upon merit and fitness, to be ascertained, as far as possible, by the competitive rating of qualifications by the respective appointing authorities”.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;¹¹ (2) suffered a materially adverse action¹²; 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.¹³

Grievant T and Grievant W argued they were retaliated against by the Agency as part of the Agency's selection process for position 350. Both Grievants engaged in protected activity by filing grievances. Both Grievants experienced materially adverse actions because they were denied selection for position 350. Neither Grievant, however, has shown that they were denied position 350 because of their protected activities. The Agency's hiring process with respect to position 350 was in accordance with DHRM Policy 2.10 and free from retaliation against the Grievants.

Grievants argue that the Division Director displayed his retaliatory intent on December 15, 2006 when he told Mr. M that he was actively recruiting for position 350 and would deny promotional opportunities to anyone who made his job more difficult. Although the Division Director's statement cannot be directly tied to any protected activities of Grievant W or Grievant T, the statement was inappropriate. Promotional opportunities should be based on employee merit and not a manager's personal dislike of an employee. If the Hearing Officer assumes for the sake of argument that the Division Director's statement reflected an intent to retaliate, there is no basis for the Hearing Officer to take action against the Agency. Neither Grievant suffered any materially adverse action as a result of the Division Director's expressed intent to deny promotional opportunities. Although the Grievants were not selected for position 350, the Division Director did not influence the decision-making for that position.

¹¹ 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 General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

¹² 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.

¹³ 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).

Grievant W sent an email to his State legislators raising several concerns about the Agency's operations. On December 1, 2006, a Legislator sent a copy of Grievant W's email to the Governor's Chief of Staff and asked the Chief of Staff to direct the Grievant W's email to the appropriate person for review. Subsequently, Grievant W requested information under the Virginia Freedom of Information Act. On April 24, 2007, the Chief of Staff sent Grievant W indicating that he had received Grievant W's Virginia Freedom of Information Act request. Although it is not necessary to address the details of the response, the Chief of Staff's email contains many personal comments about Grievant W that were not necessary to be included in the email to properly respond to Grievant W. There is no relief that the Hearing Officer can grant to Grievant W based on the Chief of Staff's email. The email was not sent by the Agency.¹⁴ The Governor's Office is not a party to this grievance and has not had an opportunity to present the circumstances and reasoning behind the email.

Grievant W engaged in protected activity when he reported his concerns about the Agency's close association with a private professional organization.¹⁵ Other than being displeased with Grievant W's complaint, it is unclear what action Agency managers may have taken against Grievant W because of his complaint.

Grievant T presented evidence of retaliation by Mr. R who went out of his way to make sure Grievant's return to the Agency following his grievance was difficult. The Hearing Officer cannot grant any relief to Grievant T regarding the actions of Mr. R because the Agency removed Mr. R from employment and abolished Mr. R's position. The Hearing Officer's order with respect to retaliation would be prospective. Since Mr. R is no longer employed by the Agency, Mr. R cannot use his position within the Agency to retaliate against Grievant T.¹⁶

Grievant T presented evidence of his belief that in the Fall of 2005 Mr. D was "following me around the State, looking for something to fire me on." Grievant W also presented evidence of his belief that Mr. D was singling him out because his "rejection rate" was too high. At the time of the hearing, Mr. D had retired and was no longer an employee with Agency. If the Hearing Officer assumes for the sake of argument that Mr. D retaliated against Grievant T and Grievant W, there is no basis for the Hearing Officer to order the Agency to prohibit further retaliation by Mr. D.

¹⁴ No evidence was presented showing that Agency managers construed the Chief of Staff's email as an authorization to retaliate against Grievant W. In addition, no evidence was presented showing that the Chief of Staff's instruction to the Deputy Commissioner regarding email was carried out against Grievant W.

¹⁵ Mr. D was an officer of the organization.

¹⁶ Grievant W also presented evidence of a conflict in 2005 when Mr. R inappropriately yelled and cursed at Grievant W. Given Mr. R's removal from the Agency, there is no basis for the Hearing Officer to grant Grievant W relief with respect to the actions of Mr. R.

Grievant W argues that the Agency retaliated against him by restricting his access to an office building containing the Human Resource Office. On April 20, 2007, Grievant W went to an agency office building and was denied entry by a security guard. A security guard was acting under the instructions of the HR Analyst II. Grievant called the Commissioner's office and spoke with the Deputy Commissioner's Secretary, Ms. B. Ms. B instructed the security guard to permit Grievant to enter the building and Grievant did so.

Grievant W engaged in a protected activity because he had previously filed a grievance and was in the process of filing a grievance on April 20, 2007. Grievant W did not suffer a materially adverse action. He was not denied access to the building; he was merely delayed for a short period of time. Although the delay is unfortunate, it is not sufficiently material to have dissuaded a reasonable worker from engaging in a protected activity. Even if the Hearing Officer assumed for the sake of argument that the delay was a materially adverse action, Grievant W has not established a connection between his protected activity and the delay. Grievant did not work in the office building and did not have free access to the building's interior. It was appropriate for the Agency to screen his entry into the building. The HR Analyst II testified that she did not know that Grievant W needed to enter the interior of the building in order to make copies. She had instructed the security guard to let her know immediately when Grievant W arrived so that she could obtain his grievance information. She did not want Grievant W to have full access to the building because she feared his presence may result in conflicts. No credible evidence was presented to suggest that the HR Analyst II attempted to prevent Grievant W from gaining entry to the building because he had engaged in a protected activity. Accordingly, the Agency did not retaliate against Grievant W on April 20, 2007.

In July 2007, Grievant T applied for a position in a neighboring county that had become vacant. Grievant T held that position for nine years prior to his removal in 2001. Mr. MH was the hiring manager for the position. Mr. S was also on the hiring panel. Grievant T interviewed for the position but the position was given to another applicant. Sometime later, Mr. S spoke with Grievant T about the position. Mr. S told Grievant T that he was the most qualified person for the job but that Grievant T was too valuable to the Agency in his present position.¹⁷ Grievant asked to meet with the Program Manager and asked him why he had been denied the position. The Program Manager told Grievant T that Grievant T had angered some people in Human Resources and in positions above the Program Manager. He told Grievant T that "you are stuck where you are".

The Agency acted contrary to DHRM Policy 2.10 by failing to select Grievant T for his former position in a neighboring county. Nothing in DHRM Policy 2.10 authorizes an agency to disregard an applicant's knowledge, skills, and abilities when selecting the person best suited for a position. Agencies may not disregard an employee's merit and fitness in favor of the agency's business need to keep an applicant in another position.

¹⁷ Another employee, Mr. L, overheard Mr. S's statement.

In addition, the Agency's decision to retain Grievant in his existing position appears to be a pretext for retaliation against him. This conclusion is confirmed by the Program Manager's statement to Grievant T that he had angered some people in Human Resources and in management positions within the Agency.

The question arises regarding what relief the Hearing Officer can grant to Grievant T with respect to the retaliation he suffered in July 2007. The issues before the Hearing Officer are defined by the grievance filed by Grievant T on March 28, 2007. Grievant T seeks relief with respect to retaliation occurring before March 28, 2007. Grievant T did not file a grievance specifically referring to the denial of his former position. Accordingly, the Hearing Officer has no authority to order the Agency to repeat the hiring process for Grievant T's former position. The Hearing Officer has no authority to order the Agency to refrain from retaliating against Grievant T with respect to hiring decisions. The sole relevancy of the evidence regarding retaliation against Grievant T in July 2007 is that it can be used to show a pattern or practice of retaliation with respect to retaliation occurring prior to March 28, 2007.

DECISION

For the reasons stated herein, Grievant T's request for relief is **denied**. Grievant W's request for relief 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.
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
830 East Main St. STE 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 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.¹⁸

[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

¹⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.