

Issue: Retaliation (previous grievance activity); Hearing Date: 11/05/08; Decision Issued: 03/06/09; Agency: DCR; AHO: Carl Wilson Schmidt, Esq.; Case No. 8946; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 03/20/09; Reconsideration Decision issued 05/15/09; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 03/20/09; Outcome pending; Administrative Review: DHRM Ruling Request received 03/20/09; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8946

Hearing Date: November 5, 2008
Decision Issued: March 6, 2009

PROCEDURAL HISTORY

On July 19, 2007, Grievant filed a grievance alleging misapplication of policy, discrimination, and retaliation. On July 16, 2008, the EDR Director issued Ruling 2008-1823 denying qualification of Grievant's grievance for hearing. On August 5, 2008, the local Circuit Court issued an order affirming the EDR Director's Ruling except ordering that "Grievant's complaint of retaliation is grievable and qualifies for a hearing."

This matter was referred to the Hearing Officer on September 23, 2008. A hearing was held on November 5, 2008.

APPEARANCES

Grievant
Grievant's Representatives
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether the Agency 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 him. 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 Conservation and Recreation employs Grievant as an Accountant Senior with DCR.¹ The purpose of this position is:

To manage the accounting and financial operations of the [Division] to include development and monitoring of budgets, preparation of reports, analysis of data, providing assistance and direction to field units, and providing information to management for decision making.²

Grievant began working for the Agency as an Accountant Senior in July 1999. His duties in this position include:

Managing the accounting and financial operations of [the Division] to include development and monitoring of budgets expenditures and revenue.

Managing accurate budgets and reviewing and reconciling budgets.

Downloading data on FINDS.

Assembling data, analysis of data, and preparing various revenue reports.

Providing assistance and directions to field units and providing financial information to management for decision making.

Reconciling CARS expenditure and revenue reports and making corrections.

Writing procedures for budget, financial and accounting needs.

Monitoring cash flow projections and making internal control recommendations. Developing spreadsheets.

Serving as the Division Representative for annual audit and requests by internal auditor and/or auditor of public accounts.

Visiting parks to do a full review and/or auditing of the financial process including compliance with cash management manual, staff competency,

¹ Grievant's position was not in the unit reporting to Mr. B, the Director of Finance.

² Agency Exhibit 6.

and any specific [problem] field [locations] are having with financial process.

Liaison with internal & external auditors.

Training field staff.³

Grievant has 35 years of experience in finance and accounting, including 24 years with the Commonwealth of Virginia. He has 22 years experience working with Accounts Payable, 16 years in inventory control, 13 years working with Petty Cash, nine years in Payroll and 25 years in financial analysis and preparing reports.

Grievant has worked six years as a Project Manager, one year as an Inventory Controller, three years as a Senior Administrative Analyst, one year as a Business Manager, nine years as an Account Senior, one year as an Accountant, and one and a half years as a Fiscal Technician Senior.

Grievant has supervised as many as 12 people and as few as one person.

Grievant earned a Masters of Business and Administration degree in 1983. His major was General Accounting and his minor was Management Accounting.

On March 7, 2007, Grievant applied for the position of General Accounting Manager. The Position Description for this position is:

The Division of Finance is seeking a dynamic, customer service oriented individual for the position of General Accounting Manager. Duties include oversight of the Department's accounts payable, payroll, fixed assets, petty cash accounting; reconciliation of accounts; analytic research of monthly financial reports for all divisions of the Department; preparation of financial statements and reports for external reporting purposes; liaison with internal and external auditors on areas of oversight; supervision and performance management of a professional staff of eleven.

Position requires considerable demonstrated knowledge of generally accepted accounting principles and practices, particularly as applicable to government accounting operations of payroll, accounts payable, and fixed asset accounting. Experience overseeing payroll, preferably with the Commonwealth Integrated Payroll/Personnel System (CIPPS). Experience overseeing accounts payable operations. Comprehensive progressive experience managing complex accounting operations for private or government entity. Considerable knowledge and skill in the use of computer-based accounting and financial software. Demonstrated experience managing and directing staff in the efficient and effective execution of accounting practices. Demonstrated experience developing, researching, reviewing, and applying complex policies, procedures,

³ Grievant Exhibit 43.

regulations, and laws to operations, ensuring compliance with federal, state, and agency policies. Demonstrated experience analyzing financial information to reach meaningful conclusions and develop reasonable alternatives in response to management needs. Demonstrated ability to communicate effectively both verbally and in writing. Experience training and overseeing a professional staff, effectively handling personnel matters. Demonstrated history of progressive responsibility in financial management and supervision. Experience in a team oriented environment. Supervisory experience, to include performance management required.

Graduation from college or university with a bachelor's degree in accounting, finance, or related business area preferred. Recent supervisory experience and current certificate issuance such as CPA or CIA also preferred. Hiring salary range is \$39,384-\$65,000.

Position closes at 5 p.m. on 3/23/07. ***

Successful candidate must pass a criminal background check and complete a Statement of Economic Interest form. Women and minorities are encouraged to apply. EOE.⁴

Three people were selected to conduct the applicant screening. The Human Resource Director was selected because he was head of the human resource department for the Agency. Mr. B, the Director of Finance, was selected because the General Accounting Manager position reported to him. Ms. J, a Human Resource Generalist, was selected because the General Accounting Manager position was one of the positions for which she was to provide human resource support.

The Agency drafted a spreadsheet containing 10 possible parameters by which to compare the applications. The names of each applicant were listed as rows while the parameters were listed as columns. Each screener was to look at each application and indicate on the spreadsheet whether the applicant satisfied the parameter. The 10 parameters were as follows:

Number	Parameter
1.	Considerable demonstrated knowledge of generally accepted accounting principles and practices as applicable to accounting operations of payroll, account payable, and fixed asset accounting.
2.	Comprehensive progressive experience managing complex accounting operations for private or government entity.
3.	Considerable knowledge and skill in the use of computer based accounting and financial software.
4.	Demonstrated ability to communicate effectively both verbally and in

⁴ Grievant Exhibit 25.

	writing.
5.	Demonstrated experience developing, researching, reviewing, and applying complex policies, procedures, regulations, and laws to operations, ensuring compliance with federal, state, and agency policies.
6.	Demonstrated history of progressive responsibility in financial management and supervision.
7	Demonstrated experience analyzing financial information to reach meaningful conclusions and develop reasonable alternatives in response to management needs.
8	Experience training and overseeing a professional staff, effectively handling personnel matters.
9	College graduate with a bachelor's degree in accounting, finance, or related business area.
10	Current certification preferred, such as CPA or CIA.

Approximately 29 people applied for the position of General Accounting Manager. Each screener independently evaluated each application.⁵ If the applicant met the parameter, the screener was supposed to write a checkmark on a score sheet. If the applicant did not meet the parameter, the screener was supposed to write a check minus on the score sheet. After separately evaluating each applicant using the ten parameters, the screeners met to discuss which applicants to select for interview.

The three screeners led by the Human Resource Director decided to disregard items 4, 8, 9, and 10.⁶ There is no reason to believe that the Agency disregarded these items in order to retaliate against Grievant. For example, the screeners decided to utilize the tenth parameter, namely whether the employee was a CPA or CIA, only as a preferred criterion. Grievant did not have a current CPA or CIA as did none of the selected applicants.⁷ The screeners also disregarded parameter 4 which addressed the applicants' ability to communicate effectively verbally and in writing. Grievant's application contained minor typographical errors and both Ms. J and Mr. B gave Grievant check minuses. Disregarding the fourth criteria benefited Grievant. If there was difficulty distinguishing between applicants, the screeners would utilize the tenth criterion to decide who to interview.

⁵ Under 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 the minimum qualifications and which of the qualified applicants an agency wishes to interview. DHRM Policy 2.10 does not require an agency to grant interviews to every minimally qualified applicant.

⁶ Parameter 4 was "Demonstrated ability to communicate effectively both verbally and in writing." Parameter 8 was, "Experience training and overseeing a professional staff, effectively handling personnel matters." Parameter 9 was, "College graduate with a bachelor's degree in accounting, finance, or related business area." Parameter 10 was, "Current certification preferred, such as CPA or CIA."

⁷ Grievant is a Certified General Accountant in another country. It is not clear that the screeners would have considered a certification earned in another country as equaling U.S. certifications such as CPA and CIA.

The results of the screening process for Grievant and the four applicants who were selected for interviews are as follows:⁸

Grievant	1	2	3	5	6	7
Human Resource Director ⁹	Checkmark	Up-down	Checkmark	Checkmark	Moved downward	Checkmark
Mr. B ¹⁰	Checkmark	X	Checkmark	Checkmark	X	Checkmark
Ms. J	Check minus	Check minus	Checkmark	Check minus	Minus	Checkmark

Applicant A	1	2	3	5	6	7
Human Resource Director	Checkmark	Checkmark	Checkmark	Checkmark	Checkmark	Checkmark
Mr. B	Checkmark	Checkmark	Checkmark	Checkmark	Checkmark	Checkmark
Ms. J	Checkmark	Checkmark	Checkmark	Check minus	Checkmark	Check minus

Applicant B	1	2	3	5	6	7
Human Resource Director	Checkmark	Checkmark	Checkmark	Checkmark	Checkmark	Checkmark
Mr. B	Checkmark	Checkmark	Checkmark	Checkmark	Checkmark	Checkmark
Ms. J	Checkmark	Checkmark	Checkmark	Checkmark	Check minus	Checkmark

Applicant C	1	2	3	5	6	7
Human Resource Director	Checkmark	Checkmark	Checkmark	Checkmark	Checkmark	Checkmark

⁸ A fifth person was selected for an interview but that person withdrew prior to being interviewed.

⁹ The Human Resource Director testified that instead of writing “check minus” he wrote “up-down” and “moved downward”.

¹⁰ Mr. B wrote “X” instead of “check minus”.

Mr. B	X	Checkmark	Checkmark	Checkmark	Checkmark	Checkmark
Ms. J	Check minus	Checkmark	Checkmark	Checkmark	Checkmark	Checkmark

Applicant D	1	2	3	5	6	7
Human Resource Director	Checkmark	Checkmark	Check plus	Checkmark	Checkmark	Checkmark
Mr. B	Checkmark	Checkmark	Checkmark	Checkmark	Checkmark	Checkmark
Ms. J	Checkmark	Checkmark	Checkmark	Checkmark	Checkmark	Checkmark

On June 20, 2007, Grievant was informed that he was not selected for an interview.¹¹ The Agency screeners appear to have given greater weight to more current work experience than to past work experience. The Agency has discretion to make this judgment and appears to have done so consistently. There is no evidence the Agency exercised this discretion in order to retaliate against Grievant.

CONCLUSIONS OF POLICY

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;¹² (2) suffered a materially adverse action¹³; 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

¹¹ Agency Exhibit 1.

¹² 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.

¹³ 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.

causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.¹⁴

Grievant engaged in protected activities because he has filed several grievances and he has filed several EEOC complaints. Grievant has suffered a materially adverse action because he was denied the opportunity to interview for a job opening he desired and for which he believed he was qualified. The question is whether there exists a causal link between Grievant's protected activities and the materially adverse action he suffered.

The Human Resource Director, Mr. B, and Ms. J knew that Grievant had engaged in protected activities such as filing grievances. Simply because they knew Grievant had filed grievances does not show that they screened out Grievant in order to retaliate against him. Ms. J denied she retaliated against Grievant in the screening process. Her denial was very credible. It is highly likely that her denial was truthful. Mr. B denied he retaliated against Grievant in the screening process. His denial was credible. It is more likely than not that his denial was truthful. The Hearing Officer observed the demeanor of the Human Resource Director and can conclude his demeanor did not reveal an intention to retaliate against Grievant.

Grievant argues that the Agency inserted the requirement of "progressive experience" and "progressive responsibility" in order to retaliate against Grievant. This argument fails. The Agency inserted the word "progressive" prior to receiving any applications. No one in the Agency knew that Grievant would apply for the position once it was advertised. The Human Resource Director testified that use of the term "progressive" was not uncommon in State government hiring.

Grievant argues that he met the criteria for the position and that the Agency's failure to select him is evidence of a pretext for retaliation. This argument is untenable. When Grievant's application is compared to the applications of those selected for an interview, all three screeners rated Grievant inadequate with respect to items 2 and 6. None of the applicants selected for an interview were rated unsatisfactory by all three screeners for a particular item.

Grievant contends he should have been rated as satisfying the second parameter because he had comprehensive progressive experience managing complex accounting operations for private or government entities. Based on the testimony presented, the Agency considered "progressive experience" to be experience reflecting an increasing level of difficulty and breadth. Although Grievant had significant experience in a variety of areas over his 35 year career, from 1999 forward his experience has been stagnant. The Agency's decision to distinguish between Grievant and the other applicants based on "progressive experience" is supported by the

¹⁴ 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).

evidence and, in itself, does not support the conclusion that it was a pretext for retaliation against Grievant.

Grievant argued that he should have been scored as having met the requirements of parameter 6. He points out that although he supervised only one employee, Applicant B only supervised one employee yet Applicant B was given an interview. Grievant's adds that from 1985 to 1994 he supervised up to 12 employees including 8 to 9 accountants and fiscal technicians. Grievant asserts this inconsistency reveals the Agency's intent to retaliate against him. The evidence showed that although Applicant B only supervised one employee, Applicant B's work program responsibilities were increasing. For example, in 1999, Applicant B worked on a temporary assignment and had some Controller duties. In 2006, Applicant B worked full time as a Controller responsible for overseeing "the company's financial functions, including accounts payable, accounts receivable, cash flow, departmental profitability, general ledger integrity, and payroll." Applicant B's compensation nearly doubled during that time. In contrast to Applicant B, the number of employees Grievant supervised decreased from more than eight employees to one employee. Although the number of employees supervised by Applicant B may not have been increasing, Applicant B still differed from Grievant who experienced a decrease in the number of employees supervised.

Grievant supervised one employee at the time he submitted his application for the position. The number of employees and the type of program he supervised had remained constant since 1999. All three screeners concluded that Grievant lacked progressive experience in managing complex accounting operations. This conclusion is supported by the evidence.

Grievant has not presented sufficient evidence of a causal link between his protected activities and the materially adverse action he suffered. Grievant has not presented sufficient evidence that the Agency's assessment of his application was motivated by improper factors. Rather, it appears that the determinations were based on an assessment of Grievant's application in relation to the Agency's stated requirements for the position and weighed against the qualifications of the other applicants. Accordingly, Grievant's request for relief must be denied.

DECISION

For the reasons stated herein, Grievant's request for relief from alleged retaliation 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
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.¹⁵

[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

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8946-R

Reconsideration Decision Issued: May 15, 2009

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

(1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant disputes the Hearing Officer’s findings of facts. Grievant’s assertions of his version of the facts are either incorrect, irrelevant, or immaterial. For example, Grievant asserts that the Hearing Officer did not consider why his experience was not progressive. Grievant contends his experience was not progressive because his position was eliminated in 1994 due to budget cuts. The reason why Grievant’s experience was not progressive is irrelevant. The fact remained that Grievant’s experience was not progressive and that was a factor the Agency was seeking in its screening progress.

As another example, Grievant asserts that the Human Resource Director did not investigate or find out that Mr. B was a recorder of a prior 2000 grievance hearing filed by Grievant. Mr. B was a witness to Grievant's 2006 grievance. Mr. B knew Grievant engaged in protected activity because he was a witness to the 2006 grievance. Whether Mr. B was a recorder of a 2000 grievance is of little significance because Grievant has already established that Mr. B knew of his protected activity. In other words, whether Mr. B knew of at least two times Grievant engaged in protected activities (in 2000 and in 2006) does not change the conclusion that Mr. B knew Grievant engaged in protected activity.¹⁶ Mr. B's knowledge that Grievant engaged in protected activity on at least one occasion is sufficient to establish the foundation that Mr. B *could* have retaliated against Grievant. The Hearing Officer took into consideration that Mr. B had knowledge that Grievant engaged in protected activity.

Grievant has not established any incorrect legal conclusion. He has not offered any newly discovered evidence. For this reason, the request for reconsideration is **denied**.

APPEAL RIGHTS

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 agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁶ The Original Hearing Decision states, "The Human Resource Director, Mr. B, and Ms. J knew that Grievant had engaged in protected activities such as filing grievances."