Issue: Retaliation (other protected right); Hearing Date: 11/04/09; Decision Issued; 11/09/09; Agency: W&M; AHO: Carl Wilson Schmidt, Esq.; Case No. 9199; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 11/23/09; Reconsideration Decision issued 12/23/09; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 11/23/09; DHRM Form Letter issued 02/10/10; Outcome: Declined to review; Administrative Review: EDR Ruling Request on Reconsideration Decision received 01/06/10; EDR Ruling #2010-2501 issued 03/01/10; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9199

Hearing Date: November 4, 2009
Decision Issued: November 9, 2009

PROCEDURAL HISTORY

On February 3, 2009, Grievant timely filed a grievance alleging the Agency retaliated against her for her membership in a union. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On September 4, 2009, the EDR Director issued Ruling 2009-2284 qualifying the grievance for hearing. On October 5, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 4, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representatives
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether the Agency retaliated against Grievant because of her membership in a union?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she seeks 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:

The College of William and Mary employs Grievant as a Housekeeper. She has been employed by the Agency for approximately 8 years. Grievant reports to the Housekeeping Supervisor who supervises staff working in the Library.

Grievant is a member of a union. She holds the position of Shop Steward. On many occasions she has assisted other employees with their employment concerns regarding the Agency. Many employees and managers are aware of Grievant's actions to improve working conditions for her coworkers.

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;[1] (2) suffered a materially adverse action[2]; 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

[1] *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.

[2] 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.[3]

Participating in a union is a protected activity.[4] Grievant engaged in protected activity because she was a member of a union. Grievance suffered materially adverse actions because her overtime pay was reduced, she did not receive requested training, and she was denied a promotion. Grievant has not established a causal link between her protected activity and a materially adverse action. The Agency did not engage in behavior as a pretext for discrimination or retaliation against Grievant because of her union activity.

Grievant had been working overtime hours in the Museum for several years. She contends that the Agency stopped allowing her to work in the Museum because of her membership in the Union. This argument is untenable. The Agency separates its buildings by zones. When overtime work was needed in the buildings in a particular zone, the Agency gave preference to the employees already working in that zone. If the employees already working in that zone did not wish to work overtime, then the Agency would attempt to obtain employees assigned to buildings in a different zone. For several years, the Library and the Museum had been in the same zone. During that time, Grievant and Ms. F[5] regularly worked overtime hours in the Museum even though their regular work area was the Library because the two buildings were in the same zone. In the summer of 2008, the Agency placed the Library and the Museum in different zones. The Museum Director's Secretary continued to request that Grievant and Ms. F work overtime in the Museum because they were experienced and capable employees. Mr. S was the Housekeeping Supervisor working in the Museum.[6] Several of his employees came to him and complained that overtime work in the Museum was being given to Grievant and Ms. F. As a result of those complaints, Mr. S cause the Museum to discontinue selecting Grievant and Ms. F to perform overtime work.[7] Mr. S did not act because of Grievant's union affiliation; he acted because his subordinate employees wanted to receive overtime pay instead of Grievant receiving that overtime pay.[8]

Grievant argued that she and the coworker, Mr. L were scheduled to receive training. Grievant contends that Mr. L. was permitted to receive some of the training but

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[3] 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).

[4] See, Va. Code § 40.1-57.3.

[5] It is not clear whether Ms. F is also a member of the union.

[6] Mr. S began working at the Museum in June 2008.

[7] The practice changed in December 2008.

[8] Grievant testified that Mr. S approached her and asked why she was working overtime in the Museum. He told her his employees had wondered why she was selected for the overtime work.

her training was canceled. She contends her training was canceled because of her membership in the Union. The evidence, however, showed that Grievant's training was canceled because of a conflict between Grievant and Mr. L. The Housekeeping Supervisor went on vacation and was absent from work for two weeks in 2008. Mr. L was to carry the radio and assume the duties of the Housekeeping Supervisor during the first week. Grievant was to carry the radio and assume the duties of the Housekeeping Supervisor during the second week. Grievant complained to the Agency that Mr. L was not acting in accordance the Agency's expectations.[9] The Housekeeping Manager, Ms. W, spoke with each employee and concluded that they do not work well together. As a result, the Housekeeping Manager concluded that neither Mr. L nor Grievant should assume the duties of the absent Housekeeping Supervisor. Grievant's on-the-job training was not canceled because of her protected activity; it was canceled because of the conflict between Mr. L and Grievant.

Grievant applied for a position as a Senior Housekeeper with the Agency. Grievant contends she was denied this position because of her union membership. No evidence was presented to suggest that the three-person panel decided not to select Grievant because of her union membership.[10] Grievant's suspicion that she was denied the promotion because of her union membership is not sufficient to establish that the Agency retaliated against her.

Grievant argued that she was only permitted to access the Internet during her lunch and breaks. The evidence showed that employees holding positions similar to Grievant's position were held to the same restriction.

Grievant was "verbally assaulted" by a male coworker. She complained to Agency managers. The Associate Director for Facility Management counseled the male employee who apologized to Grievant. Grievant told the Associate Director that everything was okay between her and the male employee. No credible evidence was presented to show that the Agency failed to investigate or resolve the dispute because of Grievant's union membership.

Grievant argued that the Housekeeping Supervisor had instructed Grievant's coworkers not to talk to Grievant. The Housekeeping Supervisor denied making that statement. The Housekeeping Supervisor told employees that if they had complaints about her to come to her directly. Grieving construed the statement as an instruction that the employee should not speak with Grievant about their concerns. It is understandable that a supervisor would want her subordinates to come directly to her with complaints about her performance. The Housekeeping Supervisor's comments did not appear to be an attempt to retaliate against Grievant because of her union membership.

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[9] Grievant testified that Mr. L told Grievant that she was "backstabbing" him.

[10] Mr. L also applied for the position and was not selected by the panel.

Based on the evidence presented, the Hearing Officer cannot find that the Agency retaliated against Grievant for her participation in a union.

DECISION

For the reasons stated herein, the Grievant'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
   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.[11]

[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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Carl Wilson Schmidt, Esq.
Hearing Officer

[11] 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: 9199-R

Reconsideration Decision Issued: December 23, 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.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant restates the arguments and evidence that were presented or could have been presented during the hearing. 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

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Carl Wilson Schmidt, Esq.
Hearing Officer

February 10, 2010

RE: **Grievance of [Grievant] v. College of William and Mary**
Case No. 9199

Dear [Grievant]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In our opinion, your request does not identify any such policy. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence and with the resulting decision. In addition, you have raised the issue of your agency not adhering to the provisions of the resolution of your grievance as agreed upon at the second step management level. The DHRM has no authority to enforce the conditions of that agreement. We must therefore we must respectfully decline to honor your request to conduct the review.

Sincerely,

Ernest G. Spratley