Issues: Misapplication of hiring policy and Retaliation (other protected right); Hearing Date: 01/08/10; Decision Issued: 01/14/10; Agency: W&M; AHO: Carl Wilson Schmidt, Esq.; Case No. 9227; Outcome: No Relief – Agency Upheld;
Administrative Review: Reconsideration Request received 01/29/09; Reconsideration Decision issued 02/22/10; Outcome: Original decision affirmed;
Administrative Review: EDR Ruling Request received 01/29/10; EDR Ruling #2010-2529 issued 04/21/10; Outcome: AHO's decision affirmed;
Administrative Review: DHRM Ruling Request received 01/29/09; DHRM Ruling issued 04/23/10; Outcome: Declined to review.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9227

Hearing Date: January 8, 2010
Decision Issued: January 14, 2010

PROCEDURAL HISTORY

Grievant applied and interviewed for a job with the Agency. He was not selected. On February 9, 2009, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On November 2, 2009, the EDR Director issued Ruling 2009-2333 qualifying the grievance for hearing. On December 1, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the 30 day time requirement based on the unavailability of the parties. On January 8, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether the Agency misapplied or unfairly applied State policy?

2. 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 relief he 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:

The College of William and Mary employs Grievant as a Housekeeper for one of its facilities. Grievant is highly regarded for his housekeeping skills by his co-workers including Agency supervisors. Because of Grievant's physical strength, he is often asked to operate heavy equipment that other co-workers cannot or will not operate. Grievant as a member of a union devoted to advocating for the betterment of its members.

The Agency had an opening for the position of Housekeeping Worker Senior for one of its facilities. Grievant, Mr. G, and Ms. R were selected for interviews because all three were qualified for the position.

Mr. S. worked as a Housekeeping Supervisor for the Agency. He was asked to serve on the panel. Mr. S had not supervised Grievant or Mr. G before but knew Grievant was a member of the union. Ms. A worked as a Housekeeping Supervisor for the Agency. She supervised Grievant. When the position became available, Ms. A spoke with Grievant and encouraged him to apply. She told Grievant he would be a good shift leader and that he should apply for the position. The Agency asked Ms. A to serve on the hiring panel. She did not know the Grievant was a member of the union.

Mr. S and Ms. A took turns asking questions of each candidate. The list of questions was given to them after approval by Human Resource staff. They wrote down each applicant's answers in the space after each question. Although the Manager did not ask questions from the written list, she sometimes asked "follow up" questions if she thought the applicant did not understand what was being asked.

After all three applicants completed their interviews, Mr. S, Ms. A, and the Manager met to discuss which candidate should be selected for the position. Mr. S believed that Mr. G was the best suited candidate for the position after considering Mr. G's application for employment and his answers to the interview questions. Ms. A

believe that Mr. G was the best suited candidate for the position after considering Mr. G's application for employment and his answers to the interview questions.

At no time during the interview process or selection process did Mr. S, Ms. A, or the Manager mention Grievant's union membership. No one attempted to influence the outcome of the selection process because of Grievant's union membership. Although Ms. A was Grievant's supervisor, she did not discuss Grievant's work performance

At the conclusion of the interview process, Mr. S, Ms. A, and the Manager signed a "Summary of Selection for Position … Housekeeping Worker Senior" stating:

> The committee is in agreement that [Mr. G] answered the questions in more detail; demonstrated better communication skills; and had more supervisory and leadership experience. Based on the needs of the department, [Mr. G] is the finalist with [Grievant] as the first alternate.

CONCLUSIONS OF POLICY

Department of Human Resource Management Policy 2.10 governs the hiring of executive branch employees. Once applications for employment are submitted, the Agency screens those applications and advances to an interview those applicants possessing at least the minimum qualifications for the position. A group of two or more individuals may interview job applicants for selection or for referral to the hiring authority for selection. A set of interview questions must be developed and asked of each applicant. Interviewers must document applicants' responses to questions to assist with their evaluation of each candidate's qualifications. Selection is "the result of the hiring process that identifies the applicant best suited for a specific position."

Grievant has not identified any section of DHRM Policy 2.10 that the Agency misapplied. Grievant has not established that the Agency unfairly applied DHRM Policy 2.10 such that the Agency's action was a disregard of the intent of that policy. There is no basis to grant Grievant relief regarding his non-selection for the position.

Grievant argued that the selection process was flawed because the panel concluded that Mr. G had more supervisory and leadership experience than the Grievant. Grievant argued that Mr. G did not have adequate supervisory or leadership experience. He points to Mr. G's application for employment which does not list his extensive leadership experience. Mr. G worked for the Agency for only six months prior to the interview.

The Housekeeping Worker Senior position is primarily a supervisory position whose duties include, but are not limited to, the following: "[p]rovide daily [oversight] of housekeeping functions" including supervising classified employees, preparing work schedules, and training new employees. During the interview, Mr. G told the panel that his father ran a company and he had been working for his father overseeing the

company's operations. When his father stepped down, Mr. G. started running the company. Mr. G told the panel that he had 15 years of work experience with his father in a cleaning business and six months of work experience with the Agency. This evidence is sufficient to support the panel's conclusion that Mr. G had more leadership experience than did the Grievant. The panel's selection was not arbitrary or capricious.[1]

Grievant was qualified for the position of Housekeeping Worker Senior. He was selected for an interview because he was qualified for the position based on his application. Simply because Grievant was qualified for the position, it does not mean that he must be given that position when there is another qualified candidate who is best suited for the position. It was not unfair to deny Grievant the position given that another qualified person was selected.

Grievant argues he was more qualified for the position than was Mr. G. DHRM Policy 2.10 does not require agencies to select the most qualified candidate; it required agencies to select "the applicant best suited for a specific position." Mr. G's responses during the interview provided a basis for the panel to select him over Grievant.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[2] (2) suffered a materially adverse action[3]; 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.[4]

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[1] It is unclear how many employees Mr. G supervised when he was running his father's company. If Mr. G was running the company with no other employees, the panel's statement that Mr. G had greater supervisory experience may be an error. The panel's statement that Mr. G had greater leadership experience, however, would not be in error. Running a business would require leadership skills necessary to lead the business to profitable operations. When all things are considered, the panel's conclusion that Mr. G might be a better leader is supported by the evidence.

[2] *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.

[3] 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.

[4] 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 engaged in a protected activity because he was a member of the union. He suffered a materially adverse action because he was not selected for a position for which he was qualified. Grievant has not established a link between his protected activity and the materially adverse action. No evidence has been presented to show the Grievant's union membership was discussed or even considered as part of the hiring process for the Housekeeping Worker Senior position. In addition, Grievant has not established that to the extent his Supervisor was "watching him", she was doing so as a form of retaliation for his membership in the union. Indeed, Ms. A testified that she did not know Grievant was a member of the union before the interviews. There is no reason for the Hearing Officer to believe that the Agency's non-selection of Grievant for the open position was a pretext for retaliation.

DECISION

For the reasons stated herein, 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.[5]

[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

[5] 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: 9227-R

Reconsideration Decision Issued: February 22, 2010

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's request for reconsideration makes the same arguments he made or could have made during the hearing. Grievant asked for transfer as part of his relief. Given that Grievant had not prevailed in his grievance, there is no basis for the Hearing Officer to order transfer. Grievant continues to argue that he would have been a better choice for the position. The question before the Hearing Officer is not to substitute his hiring preference over that of the hiring panel, but rather to determine whether the Agency failed to comply or misapplied State policy. Grievant has not established the Agency failed to comply with policy.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. 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

April 23, 2010

RE: **Grievance of [Grievant] v. College of William and Mary**
Case No. 9227

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 the Department of Human Resource Management 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. While you identified DHRM Policy No. 2.10 as being the policy officials of the College of William and Mary violated, you did not identify how that policy was violated. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence and with the resulting decision. We must therefore we must respectfully decline to honor your request to conduct the review.

Sincerely,

Ernest G. Spratley
Assistant Director, Office of
Equal Employment Services