

Issue: Misapplication of the Hiring Policy; Hearing Date: 03/02/11; Decision Issued: 04/08/11; Agency: DRS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9507; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 04/21/11; EDR Ruling No. 2011-2969 issued 06/09/11; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 04/21/11; DHRM Ruling issued 06/20/11; Outcome: AHO’s decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9507

Hearing Date: March 2, 2011
Decision Issued: April 8, 2011

PROCEDURAL HISTORY

Grievant applied for the position of Lead Counselor but was not chosen for the position. On June 3, 2010, 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. The Agency denied Grievant's request for a hearing. On December 17, 2010, the EDR Director issued Ruling number 2011-2838 qualifying the matter for hearing. On February 2, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 3, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether the Agency misapplied or unfairly applied State hiring policies?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief he 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 Department of Rehabilitative Services employs Grievant as a Rehabilitation Counselor at one of its Facilities. He began working for the Agency in 1979. Grievant reported to Mr. W before he left the Agency.

In April 2010, the Agency used the Commonwealth's jobs website to solicit applications for employment for the position of Lead Counselor, Position number 01045. The position was open only to Agency employees. The job description stated:

Provides assistance to the Counselor Manager in programmatic and administrative functions and technical assistance to the VR staff to ensure efficient and effective daily operations of the [local office] in the Field Rehabilitation Services Division of the Agency. Provides comprehensive vocational rehabilitation services which result in employment outcomes to eligible customers with disabilities in the [local office]. Responsibilities: in the absence of the Manager, handles the day-to-day operations and programmatic functions which may include resolution of customer concerns, training, coordination, training/mentoring new counselors, and casework auditing. Provides VR services to a full caseload of Agency's customers.

Comprehensive experience performing case management required. Comprehensive knowledge of the social, economic, medical, vocational, & emotional issues impacting persons with disabilities; interviewing, evaluation, and counseling techniques; methods and tools for career counseling; Americans with Disabilities Act compliance requirements; barriers to employment and employment trends; and caseload management practices. Abilities to communicate effectively; establish and maintain effective working relationships with customers and the professional community; organize and manage multiple, sometimes unrelated, responsibilities in a timely manner and to prioritize duties, exercise responsible judgment with minimal supervision. Must be proficient in the use of Windows-based software applications. Masters degree in Rehabilitative Counseling or closely related field required. Applicants must possess a CRC (Certified Rehabilitation Counselor), or be eligible to sit for the certification examination. Must also possess a CRP

(Certified Rehabilitation Provider) or other certification that qualifies them to become a CRP without examination. Salary is negotiable above the minimum of the pay band based on qualifications.¹

May 5, 2010 was the closing date for the receipt of applications.

On May 3, 2010, the Agency created the Employee Work Profile for position 01045. The Employee Work Profile did not include a requirement that the employee hold a CRP.

The Agency received 38 applications for employment. Grievant submitted his application for employment which showed his education and work experience including his current position of Rehabilitation Counselor. Ms. S submitted an application for employment which showed her education and work experience including her current position of Vocational Rehabilitation Counselor. The Agency's human resource staff determined which applicants were qualified for the position. The Agency considered two individuals who were Agency employees to be qualified for the position. The Agency offered them interviews. Grievant and Ms. S were the two individuals selected for interviews. Interviews were scheduled for May 13, 2010.

The Agency formulated 10 questions to ask each candidate:

1. What is your understanding of the role of Lead Counselor based on the specific needs and internal resources within the [local] office? What specific knowledge, skills, abilities, and other qualifications do you offer to the position and to the unit?
2. Tell me about a time when your supervisor was absent and you had to make a very important decision. Specifically, what was the situation you were faced with and what was the outcome of your decision?
3. Identify three (3) characteristics you feel you possess that make you an effective leader. Give an example of how each characteristic has been used effectively in your work setting.
4. Tell me about a time when you had to communicate something that you knew the other person did not want to hear. How did you go about communicating it? How successful was the communication?
5. Tell me about a difficult situation (as a member of a team) when it was desirable for you to keep a positive attitude. What did you do? What were the effects of your actions?
6. We can sometimes identify a small problem and fix it before it becomes a major problem. Give an example of a time when you resolved such a problem without direction from a supervisor. What was the problem, how

¹ Agency Exhibit D.

did you resolve it, and why didn't you wait for a supervisor to tell you to deal with it?

7. Describe a time where you set a demanding goal for yourself and reached it. Did you encounter any obstacles and if so, what were they? How did you overcome those obstacles? Why did you persevere in the face of these obstacles?
8. Tell of a time when you did not live up to your work expectations. How did you become aware and what were your reactions?
9. Why do you want to be the Lead Counselor of the [local] office?
10. Is there any additional information that you would like to share in order to be considered for the Lead Counselor position in the [local] office?

At the bottom of each question was a space for the panel member to rate the candidate's answer as either Very Good, Good, Fair, or Poor.

After Ms. S received a letter notifying her that she would be selected for an interview, she contacted Mr. W and asked him if there was anything she needed to do to prepare for the interview.

To become a Certified Rehabilitation Counselor, an individual must sit for an exam that is given in March and October each year. Grievant was a Certified Rehabilitation Counselor. Ms. S was eligible to sit for the October 2010 CRC exam. She applied to take the examination in October 2010, but the examining Authority required additional documentation and delayed her examination until March 2011.

Ms. S was not a Certified Rehabilitation Provider at the time of application for the Lead Counselor position. Grievant was a Certified Rehabilitation Provider.

Mr. W was the Hiring Manager for the position of Lead Counselor. The person selected for the position would report to him.

Grievant presented evidence showing that Mr. W was untruthful to another employee. Mr. W had a negative attitude towards Grievant. Mr. W falsely accused Grievant of being unprofessional in the workplace. Mr. W sometimes behaved in an unprofessional manner and was observed doing so by other employees. Mr. W left the Agency in September 2010.

Grievant sometimes had difficulty using his hands. He asked the Agency to provide him with voice recognition software to enable him to use his computer. The Agency did not quickly provide Grievant with voice recognition software. As a result of the delay, Mr. W perceived that Grievant was not productive. When Grievant addressed this concern with staff in the Human Resource Department and Mr. W learned the Grievant contacted the Human Resource staff, Mr. W became upset with Grievant. Mr. W did not wish to have his decisions challenged by Grievant.

Mr. W asked Ms. E, Career Developer Supervisor, to serve on the hiring panel. Ms. E had 13 career counselors reporting to her and she was familiar with the process of counseling. Ms. E understood that the position of Lead Counselor would report to Mr. W and perform his duties when Mr. W was unable to do so. Ms. E understood that she was to listen to the answers given by each candidate, take notes regarding the answers, and then rate each answer. Ms. E was given resumes for each candidate which she reviewed prior to the interviews. After rating the answers given by Grievant and Ms. S, she concluded that Ms. S was best suited for the position of Lead Counselor. Ms. E considered the experience of each candidate prior to selecting Ms. S. Ms. E did not know Ms. S prior to the interview. She did not discuss the candidates before the interviews. Ms. E was not aware that Grievant had any physical limitations at the time of the interview. Ms. E testified that after reviewing how she rated each of Grievant's answers to the questions asked him, she would only would have changed question number nine. Increasing Grievant's rating with respect to question nine, however, would not change her conclusion that Ms. S was best suited for the position.

Mr. W asked Ms. Z to serve on the hiring panel. She was a manager with the Agency who had worked with Agency counselors on a regular basis. She had served on several hiring panels during the prior 10 years. Ms. Z read each candidate's application including the five-page addendum submitted by Grievant. As questions were asked of each candidate, Ms. Z took detailed notes of their answers. She rated each answer. Ms. Z believed that a lot of the information Grievant provided was "not current". In other words, several of Grievant's accomplishments occurred many years ago and, thus, were of less significance in her opinion. Ms. Z had worked with Grievant in the past and believed she had a good working relationship with him. She had also worked with Ms. S. After considering all of Grievant's answers, Ms. Z concluded that Ms. S was best suited for the position of Lead Counselor. Ms. Z reached her conclusion independently of the other panel members. Mr. W did not influence her decision.

Following the interviews, a Panel Interview Summary Report was prepared. Under the Agency's Recruitment and Selection policy, the Panel Interview Summary Report "is used only for panels and reflects the panel's consensus regarding the applicants."² The report highly recommended Ms. S for the position and did not recommend Grievant. The Report stated, in part:

Applicant Name	Relevant Work Experience & Education	Comments on Quality of Interview Response
[Ms. S]	Nearly 6 years of experience as a VR. Counselor II with DRS. Currently serves as a NCST, and "Your DRS Family" facilitator. MS degree in Counseling from [University].	[Ms. S] articulated response to the "Performance Based Interview" that reflected specific Situations, Tasks, Actions, and Results that were relative to the area of assessment. She was able to effectively communicate

² See, Agency Policy 12 – Recruitment & Selection.

	<p>Graduate Certificate in Sp.Ed/Acquired Brain Injury.</p>	<p>a “solid” understanding of good leadership principles as relative to current needs, resources, as demonstrated in her current work role with DRS and other related experiences with the [Community Services Board] and professional organizations. She presented as very positive, “forward thinking”, and enthusiastic. It was clearly evident that she wanted this job; and ensured for the “best fit”.</p> <p>She clearly conceptualized the “big picture” perspective for the Lead Counselor Position in the [local office] and is highly recommended for hire.</p>
<p>[Grievant]</p>	<p>MS degree in Rehabilitation Counseling from [University]. Certified Rehabilitation Counselor (CRC). Certified Rehabilitation Provider (CRP). 31 years experience as a VR Counselor II with DRS.</p>	<p>[Grievant] articulated responses to “Performance Based Interview” questions with broad examples and situations that did not directly relate to the targeted area of assessment. Information discussed was very hard to follow at times, with no direct correlation to questions. He pointed out several examples of meaningful work in the 80’s and 90’s. He failed to adequately capture the “big picture” perspective for the Lead Counselor position in the [local office], and is not recommended for hire.³</p>

³ Agency Exhibit K.

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 contends that the Agency's decision not to select him for the position was arbitrary or capricious. The Grievance Procedure Manual defines arbitrary or capricious as, "[i]n disregard of the facts or without a reasoned basis." Under the Agency's Recruitment & Selection Policy, if the "supervisor is a member of the panel, he/she has the same authority within the panel as the other members." In other words, a majority of the panel for the Lead Counselor position could choose the best suited candidate. Two of the panel members testified at the hearing. Questions designed to seek information related to the applicant's knowledge, skills, and ability to perform the job were asked of each candidate. It is clear that Ms. E and Ms. Z listened to the question responses given by both candidates, pondered each applicant's appropriateness for the position, and independently concluded that Ms. S was best suited for the position. Neither panel member disregarded the facts or acted without a reasoned basis. The Agency's decision to select Ms. S as the Lead Counselor was not arbitrary or capricious.

Grievant contends that the Agency's decision to select Ms. S was arbitrary or capricious because it disregarded one of the requirements of the position. When the position of Lead Counselor was placed on the State's jobs website, it stated that applicants "must also possess a CRP (Certified Rehabilitation Provider) or other certification that qualifies them to become a CRP without examination."⁴ Ms. S did not possess a CRP yet she received the position.

The evidence showed that in April 2010 a Human Resource employee posted an outdated description of the Lead Counselor position. The Lead Counselor position was created May 3, 2010. The Employee Work Profile did not list a CRP as a requirement. The error was made before any applications for employment were received by the Agency. In other words, the Agency did not alter the criteria for the position after it received Ms. S's application. Ms. S's failure to have a CRP is not significant in this case because it was not a requirement of the position.

Grievant argued that his credentials and experience were superior to those of Ms. S. He argued that he was clearly the superior candidate.

⁴ The Agency's failure to post the correct information in the website advertisement did not adversely affect Grievant because he applied for the position and was selected for an interview. With respect to Grievant, the Agency's mistake is harmless error.

The selection of an employee for a position represents an opinion. Sometimes a hiring panel forms the “correct opinion” and sometimes it forms the “incorrect opinion”. The Hearing Officer is not a Super Personnel Officer. In other words, the Hearing Officer cannot resolve this grievance based upon his personal opinion regarding who he would have selected had he been a panel member. Even if the Hearing Officer concludes that the hiring panel formed an “incorrect opinion” and the Hearing Officer would have selected Grievant instead of Ms. S for the position, the fact that the two panel members held a different opinion does not show that their opinion was arbitrary or capricious. Both panel members considered the facts before them and formulated a judgment based on those facts.

Grievant argued that Mr. W was the Hiring Manager on the panel and he improperly influenced the other two panel members so that they would also conclude that Ms. S should be selected. He points out that the scoring of each question by each panel member was so similar that the outcome must have been predetermined. The credible testimony of Ms. E and Ms. Z showed that they did not rely upon Mr. W to rate the answers to each question and that they formulated their opinions independently of each other and of Mr. W.

Grievant argued that panel member Ms. Z was “not field oriented.” Grievant argued that Ms. E “had no clue regarding rehabilitation”. DHRM Policy 2.10 requires that selection panel members should “become familiar with the basic responsibilities of the position for which they will interview applicants”. The evidence showed that Ms. Z and Ms. E were familiar with the basic responsibilities of a Lead Counselor. DHRM policy does not require that a panel member be able to perform the job duties or have experience performing the job duties of a position in order to serve as a hiring panel member for that position. The Agency has a policy governing Recruitment and Selection. Agency Policy 12.5.4 governs panel composition and states, “[i]nterview panels will consist of at least three members, each of whom must be knowledgeable of at least one major component of the position.” The policy does not define “knowledgeable”. Ms. E was knowledgeable regarding the act of counseling. Although she may not have had in-depth knowledge with respect to rehabilitation counseling, she was knowledgeable regarding the skills necessary for counseling based on her work supervising 13 career counselors. Ms. Z was knowledgeable with respect to counseling because she had worked with rehabilitation counselors for several years. Grievant has not established that the Agency failed to comply with policy with respect to the selection of Ms. E and Ms. Z for the panel.

Grievant argued that “it was a done deal” before interviews began for the position. No credible evidence was presented to support this allegation. Ms. E and Ms. Z formulated their opinions regarding who to select for the position after the interviews were completed.

Grievant argued that the Agency discriminated against him based on his age. Age discrimination can be established by proof of disparate treatment. When an employee who is 40 years or older alleges disparate treatment, liability depends on whether the Agency’s action was motivated by the employee’s age. Since there is seldom eyewitness testimony as to an employer’s mental processes, age discrimination

can also be established through circumstantial evidence using an analysis of the employee's *prima facie* case and shifting burdens of production.

To establish a *prima facie* case of age discrimination, an employee must show that: (1) the employee is at least 40 years old, (2) was otherwise qualified for the position, (3) was rejected despite being qualified for the position, and (4) was rejected in favor of a substantially younger candidate on the basis of age.

If an employee can establish a *prima facie* case, the burden of producing evidence shifts to the employer. This means that the employer must produce evidence that the employee was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. This burden is one of production, not persuasion. Credibility does not factor into the analysis at this stage.

No evidence was presented that the hiring panel discussed Grievant's age. Grievant is over 40 years old. He is 54 years old. He was otherwise qualified for the position of Lead Counselor. He was rejected for that position, however, he was not rejected in favor of a substantially younger candidate. Ms. S is either 52 or 53 years old. A one or two year age difference does not meet the standard of a substantially younger candidate. Accordingly, Grievant's assertion that he was discriminated against based on his age is unsupported by the evidence. His request for relief must be denied.

Grievant argued that the Agency failed to provide him with a reasonable accommodation. The Employee Relations Consultant testified that the process to address Grievant's request for accommodation began in January 2010 and was completed approximately seven months later. Although evidence was presented to suggest that the Agency was slow to provide Grievant with accommodation, it is unclear whether Grievant, at the time of the hearing, required any additional accommodation.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁵ (2) suffered a materially adverse action⁶; 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

⁵ 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.

⁶ 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.⁷

Grievant argued that the Agency retaliated against him by denying him the position of Lead Counselor. Grievant engaged in protected activity because he had filed numerous complaints with the Agency and with outside authorities. He suffered a materially adverse action because he was denied a position for employment. Grievant has not established a connection between his protective activity and the materially adverse action. No credible evidence was presented that Ms. E or Ms. Z were aware of Grievant's protected activities or took action against them as a form of retaliation. If the Hearing Officer assumes for the sake of argument that Mr. W intended to retaliate against Grievant, the outcome of this case remains the same. Ms. E and Ms. Z selected Ms. S without regard to retaliation against Grievant. They represented a majority of the panel who would have selected Ms. S regardless of any actions by Mr. W.

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:

⁷ 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).

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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Rehabilitative Services

June 20, 2011

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9507. The grievant is challenging the decision because he believes the hearing decision is inconsistent with policy. For the reasons stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his PROCEDURAL HISTORY, the hearing officer stated the following:*

Grievant applied for the position of Lead Counselor but was not chosen for the position. On June 3, 2010, 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. The Agency denied Grievant's request for a hearing. On December 17, 2010, the EDR Director issued Ruling number 2011-2838 qualifying the matter for hearing. On February 2, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 3, 2011, a hearing was held at the Agency's office.

In his FINDINGS OF FACT, the hearing officer stated, in part, the following:

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Rehabilitative Services employs Grievant as a Rehabilitation Counselor at one of its Facilities. He began working for the Agency in 1979. Grievant reported to Mr. W before he left the Agency.

In April 2010, the Agency used the Commonwealth's jobs website to solicit applications for employment for the position of Lead Counselor, Position number 01045. The position was open only to Agency employees. The job description stated:

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* Footnotes included in the original document were not included in this document.

training, coordination, training/mentoring new counselors, and casework auditing. Provides VR services to a full caseload of Agency's customers.

Comprehensive experience performing case management required. Comprehensive knowledge of the social, economic, medical, vocational, & emotional issues impacting persons with disabilities; interviewing, evaluation, and counseling techniques; methods and tools for career counseling; Americans with Disabilities Act compliance requirements; barriers to employment and employment trends; and caseload management practices. Abilities to communicate effectively; establish and maintain effective working relationships with customers and the professional community; organize and manage multiple, sometimes unrelated, responsibilities in a timely manner and to prioritize duties, exercise responsible judgment with minimal supervision. Must be proficient in the use of Windows-based software applications. Masters degree in Rehabilitative Counseling or closely related field required. Applicants must possess a CRC (Certified Rehabilitation Counselor), or be eligible to sit for the certification examination. Must also possess a CRP (Certified Rehabilitation Provider) or other certification that qualifies them to become a CRP without examination. Salary is negotiable above the minimum of the pay band based on qualifications.

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3. Identify three (3) characteristics you feel you possess that make you an effective leader. Give an example of how each characteristic has been used effectively in your work setting.
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7. Describe a time where you set a demanding goal for yourself and reached it. Did you encounter any obstacles and if so, what were they? How did you overcome those obstacles? Why did you persevere in the face of these obstacles?
8. Tell of a time when you did not live up to your work expectations. How did you become aware and what were your reactions?
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At the bottom of each question was a space for the panel member to rate the candidate's answer as Very Good, Good, Fair, or Poor.

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Following the interviews, a Panel Interview Summary Report was prepared. Under the Agency's Recruitment and Selection policy, the Panel Interview Summary Report "is used only for panels and reflects the panel's consensus regarding the applicants.

In his CONCLUSIONS OF POLICY, the hearing officer wrote, in part, the following:

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."

The selection of an employee for a position represents an opinion. Sometimes a hiring panel forms the "correct opinion" and sometimes it forms the "incorrect opinion". The Hearing Officer is not a Super Personnel Officer. In other words, the Hearing Officer cannot resolve this grievance based upon his personal opinion regarding who he would have selected had he been a panel member. Even if the Hearing Officer concludes that the hiring panel formed an "incorrect opinion" and the Hearing Officer would have selected Grievant instead of Ms. S for the position, the fact that the two panel members held a different opinion does not show that their opinion was arbitrary or capricious. Both panel members considered the facts before them and formulated a judgment based on those facts.

Grievant argued that Mr. W was the Hiring Manager on the panel and he improperly influenced the other two panel members so that they would also conclude that Ms. S should be selected. He points out that the scoring of each question by each panel member was so similar that the outcome must have been predetermined. The credible testimony of Ms. E and Ms. Z showed that they did not rely upon Mr. W to rate the answers to each question and that they formulated their opinions independently of each other and of Mr. W.

Grievant argued that panel member Ms. Z was "not field oriented." Grievant argued that Ms. E "had no clue regarding rehabilitation". DHRM Policy 2.10 requires that selection panel members should "become familiar with the basic responsibilities of the position for which they will interview applicants". The evidence showed that Ms. Z and Ms. E were familiar with the basic responsibilities of a Lead Counselor. DHRM policy does not require that a panel member be able to perform the job duties or have experience performing the job duties of a position in order to serve as a hiring panel member for that position. The Agency has a policy governing Recruitment and Selection. Agency Policy 12.5.4 governs panel composition and states, "[i]nterview panels will consist of at least three members, each of whom must be knowledgeable of at least one major component of the position." The policy does not define "knowledgeable". Ms. E was knowledgeable regarding the act of counseling. Although she may not have had in-depth knowledge with respect to rehabilitation counseling, she was knowledgeable regarding the skills necessary for counseling based on her work supervising 13 career counselors. Ms. Z was knowledgeable with respect to counseling because she had worked with rehabilitation counselors for several years. Grievant has not established that the Agency failed to comply with policy with respect to the selection of Ms. E and Ms. Z for the panel.

Grievant argued that "it was a done deal" before interviews began for the position. No credible evidence was presented to support this allegation. Ms. E and Ms. Z formulated their opinions regarding who to select for the position after the interviews were completed.

Grievant argued that the Agency discriminated against him based on his age. Age discrimination can be established by proof of disparate treatment. When an employee who is 40 years or Older alleges disparate treatment, liability depends on whether the Agency's action was motivated by the employee's age. Since there is seldom eyewitness testimony as to an employer's mental processes, age discrimination can also be established through circumstantial evidence using an analysis of the employee's *prima facie* case and shifting burdens of production.

To establish a *prima facie* case of age discrimination, an employee must show that: (1) the employee is at least 40 years old, (2) was otherwise qualified for the position, (3) was rejected despite being qualified for the position, and (4) was rejected in favor of a substantially younger candidate on the basis of age.

If an employee can establish a *prima facie* case, the burden of producing evidence shifts to the employer. This means that the employer must produce evidence that the employee was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. This burden is one of production, not persuasion. Credibility does not factor into the analysis at this stage.

No evidence was presented that the hiring panel discussed Grievant's age. Grievant is over 40 years old. He is 54 years old. He was otherwise qualified for the position of Lead Counselor. He was rejected for that position; however, he was not rejected in favor of a substantially younger candidate. Ms. S is either 52 or 53 years old. A one or two year age difference does not meet the standard of a substantially younger candidate. Accordingly, Grievant's assertion that he was discriminated against based on his age is unsupported by the evidence. His request for relief must be denied.

Grievant argued that the Agency failed to provide him with a reasonable accommodation. The Employee Relations Consultant testified that the process to address Grievant's request for accommodation began in January 2010 and was completed approximately seven months later. Although evidence was presented to suggest that the Agency was slow to provide Grievant with accommodation, it is unclear whether Grievant, at the time of the hearing, required any additional accommodation.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity; (2) suffered a materially adverse action; 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 non retaliatory 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 there from may be considered on the issue of whether the Agency's explanation was pretextual."

Grievant argued that the Agency retaliated against him by denying him the position of lead Counselor. Grievant engaged in protected activity because he had filed numerous complaints with the Agency and with outside authorities. He suffered a materially adverse action because he was denied a position for employment. Grievant has not established a connection between his protective activity and the materially adverse

action. No credible evidence was presented that Ms. E or Ms. Z were aware of Grievant's protected activities or took action against them as a form of retaliation. If the Hearing Officer assumes for the sake of argument that Mr. W intended to retaliate against Grievant, the outcome of this case remains the same. Ms. E and Ms. Z selected Ms. S without regard to retaliation against Grievant. They represented a majority of the panel who would have selected Ms. S regardless of any actions by Mr. W.

For the reasons stated above, the hearing officer denied the grievant's request for relief.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In his request to this Department for an administrative review of the original hearing decision, the grievant appears to indicate that DRS was inconsistent in its application of the hiring policy. More specifically, the grievant alleges that the agency modified the requirements for a vacant position and selected a successful candidate for the vacant position who did not have the qualifications for the position.

According to the decision rendered by the hearing officer and the administrative review by the Department of Employment Dispute Resolution, the evidence supports that the agency did modify the EWP for the position but did it before the recruitment period ended which was before the interviews were held. According to the evidence, an agency employee erroneously placed the advertisement of the vacancy which included a requirement of possessing a CRC. The new EWP did not include that requirement. The evidence does not support that this action had a negative effect on your being the successful candidate, especially since both you and the successful candidate were deemed to be qualified and interviewed. It is permissible, and recommended, that agencies update their EWPs when positions become vacant.

Concerning whether the successful candidate was qualified for the position, according to the hearing officer decision, the successful candidate had applied for her CRC certification but could not set for the examination for a number of months because the testing authority required additional documentation and delayed her examination until March 2011. Though not a requirement for her to possess a CRC, she was eligible for certification at the time the interviews were conducted.

Based on the above, it is the opinion of this Agency that the hearing officer's ruling is consistent with the applicable policies. Therefore, this Agency has no basis to interfere with the application of this hearing decision.

Ernest G. Spratley