

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8469;
Ruling Date: July 26, 2007; Ruling #2007-1628; Agency: Department of
Conservation and Recreation; Outcome: Hearing Officer In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Conservation and Recreation
Ruling Number 2007-1628
July 26, 2007

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8469. By counsel, the grievant objected to the original decision on the basis that a witness testified falsely at hearing. For the reasons set forth below, this Department finds no reason to disturb the hearing decision.

FACTS

Selected facts as set forth in the March 19, 2007 hearing decision issued in Case Number 8469 are as follows:

The Department of Conservation and Recreation employs Grievant as an Accountant Senior. Grievant is a 67 year old male of East Indian origin. He began working for the Agency on June 1, 1985.

Grievant has earned a Masters in Business Administration, Masters in Economics, Bachelor of Law and is a Certified General Accountant. He has 35 years of experience in finance and accounting including 22 years with the Commonwealth of Virginia. He administered and monitored the Department of Conservation and Recreation Grants Program and Receivables from 1985 to 1994. He worked for six years as a Project Manager, one year as an Inventory Controller, five years as a Finance Officer, one year as a 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.

In the early 1990s, Grievant reported to Mr. S. Mr. S attempted to take disciplinary action against Grievant. Grievant believed Mr. S was motivated by racial animosity.

Grievant filed several grievances and legal actions against or involving the Agency. His most recent prior action was to file a lawsuit in Federal District Court on February 28, 2001 alleging discrimination and retaliation. He withdrew the matter on May 10, 2001.

Position 901 became vacant on September 25, 2005 when the employee holding the position transferred to another agency. The Agency began recruitment for the position on October 19, 2005.¹

The position closed for new applications on November 4, 2005. Mr. B and the Human Resource Officer screened the applications and decided to interview eight applicants. When the position became vacant, Mr. B spoke with the Human Resource Officer about properly filling the position. Mr. B knew Grievant had previously taken legal action because he was denied a position and Mr. B wanted to ensure the integrity of the process of selecting the person for the position

At the direction of the Agency's Human Resource Officer, each panel member reviewed "Tips for the Interview Panel" containing 14 instructions regarding how to perform the interviews. Two of the tips included:

¹ Position 901 was advertised as follows:

Financial and Auditing Services Manager I – Position # 901: The Division of Finance is seeking a dynamic, customer service oriented individual for the position of Grants and Revenue Accounting Manager. Duties include oversight of the Department's accounts receivable, cash management, and bond obligation accounting; review of grant expenditures for appropriateness, production of internal and external grant financial reports, and reconciliation of grant expenditures; preparation and analytic research of monthly financial reports for all divisions of the Department; liaison with internal and external auditors on grant and review topics; supervises a staff of three.

Qualifications: Considerable knowledge of generally accepted accounting principles and practices, particularly as applicable to government accounting operations. Comprehensive knowledge of grants management policies and procedures. Considerable knowledge and skill in the use of computer based accounting and financial software, preferably Microsoft Access. Demonstrated ability to train and oversee a professional staff, handling personnel matters effectively. Comprehensive managerial experience in the accounting for federal grants, funding assistance agreements or similar project accounting experience. Considerable experience with accounting operations for private or government entity, preferably in a complex private sector or fund accounting environment. Demonstrated ability to manage and direct staff in the efficient and effective execution of accounting practices. Demonstrated ability to research, review, and apply complex policies, procedures, regulations, and laws to operations, ensuring compliance with federal, state, and agency policies. Demonstrated ability to analyze financial information to research meaningful conclusions and develop reasonable alternatives in response to management needs. Demonstrated ability to communicate effectively both orally and in writing. Significant experience with automated accounting systems and financial analysis, including PC based applications preferred. Extensive experience with Microsoft Access preferred. Supervisory experience required. Experience working in a team oriented environment. Certification preferred, including, CPA, CIA, CMA, etc. Graduation from college or university with a bachelor's degree in accounting, finance, or related business area, is preferred.

Avoid “unlawful: questions – Any questions related to gender, race, color, ethnic background, national origin, age, religion, political affiliation, and disabilities is prohibited. Examples: Are you planning to have children? Since you are pregnant or have a disability, how will you be able to conduct field visits? How old are you? You look really young for a person with your credentials? How long do you plan to be in this position or with the agency? What nationality is your last name? ***

If you know the candidate – in a good or bad way – please remain neutral until the other panel members have discussed and written their impressions. Be careful in disclosing negative information about a candidate or making comments about behaviors or issues outside a work setting. Examples: The candidate has two written notices. The candidate is a member of my church/club and that candidate did a good/bad job doing something.

Panel members were selected in January 2006. Mr. B chaired the panel. He is the Director of Finance. He began working for the Agency in 1999 when Grievant was not working in the Division of Finance. Mr. B supervised Mr. S but did not know of any “issues” between Mr. S and Grievant. Mr. B knew Grievant had filed prior grievances. He learned this information through office gossip.

Mr. B wanted Mr. S to serve on the panel. Mr. S reported to Mr. B. Mr. B decided to have Ms. S on the panel prior to knowing who had applied for the position. Mr. B suspected Grievant would be applying for the position.

Ms. FC was a panel member. She was selected for the panel because she would have to work with the person in the position on a daily basis (although the position did not report to her). She had a lot of knowledge regarding grants. She began working for DCR in 1987. She had worked with Grievant in the early 1990s when Grievant worked with finance. Ms. FC knew that Grievant and Mr. S worked together in the 1990s but she did not know of any problems in their working relationship. She suspected Grievant had taken legal action in the past because of rumors she heard at work.

Applicants were interviewed by the panel on January 17, 2006 and January 18, 2006. Fourteen questions were asked of each applicant. Panel members wrote down the answers given by each applicant.

After each applicant completed his or her interview, the applicant completed a writing exercise. Each candidate completed a writing exercise in the same office with the same laptop and under supervision of a human resource employee.

Panel members adhered to the "Tips". Panel members considered only the contents of Grievant's application and what Grievant said during the interview when deciding how to rank Grievant's as an applicant.

The three panel members together rated the candidates. They rated the applicants and decided who to select in a collective manner. No one panel member decided which candidate to select. The three panel members did not discuss Grievant's prior grievances. They did not discuss any conflict between Grievant and Mr. S.

Mr. V was the highest ranked candidate. He was a white male in his late 40s. Ms. M was ranked second. Ms. M was a white female born in 1955. Ms. F was ranked third. Ms. F was a black female in her late 40s.

A summary was prepared discussing each candidate interviewed. The panel evaluated the top five applicants as follows:

[Mr. V] demonstrated, verbally and in writing, all the KSAs required of this position. He has extensive accounting experience working for the Commonwealth of Virginia and effectively communicated his knowledge of GAAP to the interview panel. His federal grant experience including administering multiple Medicaid fraud grants, crime prevention grants and domestic violence grants. He has excellent managerial experience in grants, and domestic violence grants. He has excellent managerial experience in grants management, and account receivable, financial reporting and cash management. Just as important, he understood the accounting principles that provide the foundation of grants accounting (i.e. Cash management principles, indirect cost rate preparation). He has experience using Access as a method of tracking debt collection (similar to DCR's accounts receivable database) and Excel, tools needed for this position. He also has several years of supervisor experience. [Mr. V] displayed strong oral communication skills to the interview panel. Additionally, [Mr. V] displayed strong written communications skills on the work sample.

[Ms. M] demonstrated, verbally and in writing, all the KSAs required of the position. However [Ms. M] has some exposure to federal grant. [Ms. M] had excellent experience with accounts receivable, financial reporting and cash management. She also displayed excellent knowledge of the accounting principles of grant accounting (i.e. Cash management principles, indirect cost rate preparation). [Ms. M] has limited Access experience, using Access to maintain a Workforce Investment Act database in her current position, but she has a strong computer programming background, taking annual program classes to stay current. [Ms. M] also displayed good oral, communication skills. [Ms. M's] work sample was well written.

[Ms. F] demonstrated vital KSAs required of the position – relating to the interview panel relevant experience dealing with federal grants and accounts receivable. However, she did not demonstrate the necessary experience in financial analysis and reporting nor the cash management principles that exhibit comprehensive knowledge of grants management policy. For example, [Ms. F] was unfamiliar with the Cash Management Investment Act (CMIA) of 1990 and with indirect cost rate calculations. [Ms. F] had good experience with Access. [Ms. F] also displayed good oral communications skills. [Ms. F's] work sample was not well composed.'

[Mr. M] had good grant experience, dealing with administration of entitlement grants, construction grants and subgrantee allocations. He did not indicate the accounts receivable background and Access experience. Additionally, there was some concerns about his supervisory philosophy – he used the word “blunt” on more than one occasion to describe his management style. Finally, [Mr. M] had to refer to several pages of notes during the interview before answering questions.

[Grievant] could not elaborate on his previous grant experience, e.g. He could not recall how many grants he was responsible for or the dollar value of these grants. [Grievant] did not indicate that he prepared an indirect cost proposal. [Grievant] did not elaborate his relevant experience in accounts receivable or cash management to the interview panel. He stated that he had many years of

experience, but offered no details such as the type of receivables, or the key elements of cash control procedures. [Grievant] stated that he has training in Access, but has not used it in his current job.

The panel selected Mr. V and an offer of employment was made to him. Mr. V rejected the offer because he had already accepted an offer of employment with another employer.

The panel rated Ms. M second because she had a lot of grant experience and cash management experience. She was offered the position and accepted the offer.

Mr. B did not select Grievant because Grievant did not provide details of his work experience to substantiate his experience. Grievant just listed his experience without giving details of that experience.²

The hearing officer held that the agency did not violate the state's hiring policy when it hired the successful candidate rather than the grievant. The hearing officer found that:

[t]he panel made its decision based on each applicant's written application and also on each applicant's "performance" during the interviews. The panel gave considerable weight to how well each applicant performed during the interviews. Nothing in DHRM Policy 2.10 prohibits this weighing. Grievant's answers to the panel did not fully describe the particulars of his experience. Although Grievant may have been a strong candidate "on paper", his oral performance did not fully present his strengths. Since the panel was relying primarily on the candidate's oral presentations, Grievant did not appear as strong a candidate as he might otherwise have been.

Grievant contends the Agency violated DHRM Policy 2.10 by permitting Mr. S to remain on the interview panel because Mr. S was familiar with Grievant's prior work performance. Nothing in DHRM Policy 2.10 prohibits an agency from permitting a panel to include a member knowledgeable about one of the candidate's work performance. The Agency did not act contrary to DHRM Policy 2.10 by permitting Mr. S to serve on the hiring panel.

² March 19, 2007 Hearing Decision in Case 8469, pp. 2-7.

Grievant argues he was more qualified for the position than was Ms. M. 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.” Ms. M’s responses during the interview panel were more detailed and related to grants.

Upon review of the detailed record in this appeal, there exist sufficient facts to support the conclusion that Ms. M was qualified for Position 901 and that the Agency’s panel could formulate the opinion that Ms. M was the best suited for the position. The Agency’s decision to rank Ms. M and offer her the position was not arbitrary or capricious.³

The hearing officer also rejected the grievant’s assertion that the hiring decision was based on the grievant’s national origin or color. He observed that:

The Agency has presented credible evidence of a nondiscriminatory reason for its failure to select Grievant, namely that it believes it selected the better suited applicant. Ms. M was qualified for the position and she fully presented her qualifications during the panel interviews. There is no reason to believe the Agency rejected Grievant as a pretext or excuse for improper discrimination against him.

Grievant argues Mr. S hates him because he is East Indian. Grievant presented as evidence of this conclusion the ongoing conflict he had with Mr. S when Grievant reported to Mr. S.

The existence of conflict between a supervisor and a subordinate may result from many causes. The conflict could arise because of differences of opinion regarding work performance. It could arise because of personality conflicts between the supervisor and subordinate. It could arise because a supervisor dislikes persons of a certain race and the employee is of that race. Grievant has not presented sufficient evidence to show that the conflict between him and Mr. S was based on Mr. S’s dislike of him because he is an East Indian. Conflict alone proves the existence of the conflict, but not the reason for the conflict.

Grievant argues a pretext for discrimination was revealed by the Agency’s summary of his answers to the interview questions. For example, the summary states, “[Grievant] did not indicate that he prepared an indirect cost proposal.”

The summary statement about Grievant is misleading. The question asked was, “Do you have any experience in creating an indirect

³ *Id.* at 7-8.

cost proposal? If so, please describe your methodology for calculating an indirect cost rate.” Grievant answered the question, “Yes” and then presented his methodology. Grievant answered the question asked of him. He was not asked if he had actually prepared an indirect cost proposal, he was asked if he had experience and what was his methodology. The summary criticizes Grievant for failing to say he had previously prepared an indirect cost proposal but that was not the question Grievant was asked.

The question is whether this mistake in the summary is sufficient to establish a pretext for discrimination. The Hearing Officer finds it is not sufficient. The mistake appears to be an oversight. The mistake appears to be minor. The panel members’ primary focus was on Grievant’s inability to describe in detail his grant experience. Grievant’s inability to give a description is understandable given that he was not involved in grants since the mid 1990s. If the panel members had not made a mistake regarding describing Grievant’s answer to the indirect cost question, it is unlikely that their rank of him would have changed.⁴

In addition, the hearing officer rejected the grievant’s assertion that the hiring decision was based on the grievant’s age finding that “[t]he agency selected Ms. M because in the judgment of the panel members she was the best suited candidate for the position.”⁵ The hearing officer also rejected the grievant’s argument that the hiring decision was based on retaliation, finding that the grievant did not receive the position because he was not the best suited for the position.⁶

The grievant sought reconsideration of the hearing decision from the hearing officer, challenging the credibility of Mr. B. The grievant asserted that Mr. B sat as recorder of the grievant’s February 2000 grievance hearing but when he was asked about his involvement with the 2000 hearing, he denied any participation. The hearing officer observed in his June 6, 2007 Reconsideration Decision that:

If the Hearing Officer assumes for the sake of argument that Mr. B sat in Grievant’s February 2000 hearing, the outcome of this case does not change. During the grievance before this Hearing Officer, Mr. B testified that he knew Grievant had filed a prior grievance when Grievant did not get an interview for a position prior to Mr. B’s arrival. Mr. B said he had heard through office gossip that Grievant had filed other complaints, but Mr. B was unaware of the details of those complaints. This testimony shows that Mr. B was not attempting to hide his knowledge that Grievant had filed prior grievances. Grievant’s assertion that Mr. B was untruthful about whether he participated in the February 2000 would be of significance if Mr. B had denied any knowledge of Grievant’s prior

⁴ *Id.* at 9.
⁵ *Id.* at 10.
⁶ *Id.* at 11.

grievances. Instead, Mr. B admitted he knew of Grievant's prior grievances; he merely denied participating in one grievance hearing occurring several years earlier. The evidence and arguments offered by Grievant are insufficient to contradict Mr. B's credible testimony during the hearing.⁷

Accordingly, the hearing officer upheld his earlier decision and again denied the grievant relief.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions...on all matters related to procedural compliance with the grievance procedure."⁸ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁹

The grievant asserts that the hearing decision does not comply with the grievance procedure because it was based on the untruthful testimony of Mr. B. The grievant raised substantially the same objection with the hearing officer. The hearing officer responded to this objection by explaining that the grievant's "assertion that Mr. B was untruthful about whether he participated in the February 2000 [hearing] would be of significance if Mr. B had denied any knowledge of Grievant's prior grievances." The hearing officer explained that "Instead, Mr. B admitted he knew of Grievant's prior grievances; he merely denied participating in one grievance hearing occurring several years earlier." He concluded that the "evidence and arguments offered by Grievant are insufficient to contradict Mr. B's credible testimony during the hearing."

Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹⁰ and to determine the grievance based "on the material issues and grounds in the record for those findings."¹¹ By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.¹² Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

⁷ June 6, 2007 Reconsideration Decision, p.1.

⁸ Va. Code § 2.2-1001(2), (3), and (5).

⁹ See *Grievance Procedure Manual* § 6.4(3).

¹⁰ Va. Code § 2.2-3005.1(C).

¹¹ *Grievance Procedure Manual*, § 5.9.

¹² Va. Code § 2.2-3005(C)(5).

The grievant's challenge here contests the weight and credibility that the hearing officer accorded to the testimony of a witness at the hearing, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority and so long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings. Such is the case here, where the hearing officer has explained that any inaccuracy in Mr. B's testimony regarding his involvement with the grievant's 2000 hearing was not dispositive and did not nullify Mr. B's otherwise credible testimony. This is precisely the sort of determination reserved solely to the hearing officer. Accordingly, this Department has no reason to second-guess the hearing officer or to remand the decision.

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.¹³ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.¹⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁵ This Department's rulings on matters of procedural compliance are final and nonappealable.¹⁶

Claudia T. Farr
Director

¹³ *Grievance Procedure Manual*, § 7.2(d).

¹⁴ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

¹⁵ *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 445, 573 S.E. 2d 319 (2002).

¹⁶ Va. Code § 2.2-1001 (5).