Issues: Reconsidered Compliance (Grievance Procedure – 30 Day Rule) and Qualification – Management Actions (Recruitment/Selection) Ruling; Ruling Date: June 15, 2010; Ruling #2010-2502, 2010-2553; Agency: Department of Behavioral Health and Developmental Services; Outcome: Grievant Not in Compliance, Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

RECONSIDERED RULING OF DIRECTOR

In the matter of the Department of Behavioral Health & Developmental Services
Ruling Nos. 2010-2502 and 2010-2553
June 15, 2010

The grievant has requested that this Department (EDR) reconsider its compliance determination in Ruling No. 2010-2432. In addition, the agency has asked for reconsideration of the qualification determination in the same ruling.[1]

FACTS

The grievant initiated his June 16, 2009 grievance primarily to challenge a selection process in which he competed unsuccessfully. Although the grievant was selected for an interview, he was not recommended for the position. One of the grievant's claims is that the agency failed to properly take into account his veteran status.

When the agency head failed to qualify the grievant's June 16th grievance for hearing, he sought a qualification ruling from this Department. In Ruling No. 2010-2432, this Department qualified the grievant's misapplication of policy claim because the grievant had raised a sufficient question as to whether the agency properly considered the grievant's veteran status during the selection process.[2] However, this Department determined that certain other management actions grieved in the June 16th grievance (e.g., the grievant's receipt of an interim evaluation on May 1, 2009 and the grievant's temporary transfer to a different unit on May 13, 2009) occurred more than 30 calendar days prior to the initiation of the grievance and as such, were untimely challenged.[3] The grievant now seeks reconsideration of Ruling No. 2010-2432 on the basis that he timely challenged the May 1, 2009 interim evaluation and the May 13, 2009 transfer and as such, these two actions should have been qualified for a hearing.

Additionally, during the grievant's pending request for reconsideration of the compliance matter, the agency requested a reconsideration of this Department's qualification determination in Ruling No. 2010-2432. These requests are discussed separately below.

[1] This Department does not generally reconsider its qualification rulings and will not do so without sufficient cause. For example, EDR might reconsider a ruling containing a mistake of fact, law, or policy and the party seeking reconsideration has no opportunity for appeal. However, there must be clear or convincing evidence of such a mistake for reconsideration to be appropriate.
[2] EDR Ruling No. 2010-2432.
[3] *Id.*

DISCUSSION

Grievant's Request

In his request for reconsideration to this Department, the grievant claims that his grievance was "actually initiated on May 26, 2009 and recorded by [the facility] Human Resources Department on May 27, 2009."[4] As such, the grievant asserts that the May 1, 2009 interim evaluation and the May 13, 2009 temporary transfer to a different unit were timely grieved and should be "considered by the hearing officer as a part of the hearing." However, the May 26th grievance only challenges the selection process, not his interim evaluation and temporary transfer.

The issues section of the May 26th grievance states "I was not offered the [job] for the second time. The person that was hired does not meet the educational requirements and does not have the knowledge, skills, experience that I have for the job." In support of his belief that he should have been hired for the job, the grievant states in the facts supporting section of the May 26th grievance that he has 10 and a half years experience, has a preferred degree and he was offered a second interview last time he applied for this same position while the person hired for the current job was not. As relief, the grievant seeks the job and/or equivalent monetary relief. There were no attachments to the May 26th grievance and no other issues indicated on the Form A other than those previously mentioned.

Based on the foregoing, this Department affirms its earlier compliance ruling that the May 1, 2009 and May 13, 2009 events were not timely challenged. The only action challenged in the May 26th grievance is the selection process. As such, the grievant cannot use the May 26th grievance as a basis to assert that these actions were timely challenged in his June 16th grievance.[5] Moreover, there is no evidence that the grievant and the agency agreed in writing to extend the 30 calendar day time frame so that the grievant could challenge these acts in his June 16th grievance.[6] Because the May 1st interim evaluation and the May 13th temporary transfer were not challenged in the May 26th grievance, this Department affirms its earlier ruling that these two acts were not timely challenged.[7] This Department's rulings on matters of compliance are final and nonappealable.[8]

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[4] In support of his claim, the grievant asserts that on May 27, 2009, he gave a grievance Form A dated May 26, 2009 to the human resources department at his work facility. The agency human resource representative that received the May 26th grievance claims that she and the grievant agreed on May 27, 2009 that she would review the recruitment file to assess whether there was a basis for the grievance before proceeding with the May 26th grievance. The grievant and the human resources representative met again on June 11, 2009 to discuss the hiring process and discuss mediation as an alternative to the grievance process. At that time, the human resources representative believes that she gave the grievant the May 26th grievance form and advised the grievant to give the form to the appropriate step respondent in the grievance process. Shortly thereafter, the grievant filled out another Form A and submitted this new form to the appropriate step respondent on June 16, 2009.

[5] The outcome would likely have been different had the grievant included these two acts as part of his May 26th grievance. Although the grievance procedure provides that a grievant should generally submit the grievance package to the first-step respondent when initiating a grievance, *Grievance Procedure Manual* § 2.4, this Department has long held that initiating a grievance with the wrong management representative will not bar the grievance for noncompliance. *E.g.*, EDR Ruling No. 2008-1858; EDR Ruling No. 2007-1512; EDR Ruling No. 2006-1114; EDR Ruling No. 2004-645; EDR Ruling No. 2001-230.

[6] *See Grievance Procedure Manual* § 2.2

[7] Additionally, to the extent the grievant argues that the transfer was not permanent until July 21, 2009, that act would have occurred after the grievant initiated his grievance on June 16th, making it a claim that could not be

Agency's Request – Veteran's Status

During the management resolution steps of the June 16th grievance, the agency sought clarification from the Department of Human Resource Management (DHRM) regarding the application of a veteran's preference in hiring decisions. Specifically, the agency asked the following: "[i]s there a need to apply a veteran preference at the interview/final selection stage, and must the agency somehow balance the veteran status against the qualifications of another candidate who performed better during the interview?" In a July 17, 2009 e-mail, a DHRM policy analyst responded that veteran's preference is to be applied "after the initial screening and during the screening to identify the interview pool. Since the ruling did not indicate that preference has to be given at every step, our guidance does not state to consider vet status again during the interview stage. This would cause, in effect, a preference multiplier." In light of this interpretation of policy by a DHRM policy analyst, the agency asks this Department to reconsider its January 4, 2010 qualification determination in Ruling No. 2010-2432.

The agency did not provide this Department with a copy of the July 17, 2009 e-mail during the investigation for EDR Ruling No. 2010-2432, as it could have. This Department generally will not repeat the qualification process simply because a party has waited until after we have issued our qualification determination to provide potentially relevant evidence. EDR has taken a similar approach in dealing with disputes over the admission of newly discovered evidence at grievance hearings. In those cases, we have held that where a party was aware of the existence of the evidence in question prior to the hearing but did not attempt to introduce it at hearing, such evidence will not be viewed as newly discovered evidence that the hearing officer will be required to review in a re-opened hearing.[9] Likewise, EDR will not re-open the qualification process to consider for the first time evidence that could have been brought forth prior to the issuance of the qualification decision.[10]

However, in this instance, the agency is not merely presenting additional evidence for EDR to consider, but is asserting that EDR's assumptions about an applicable policy were incorrect. The July 17, 2009 e-mail is simply evidence in support of the agency's argument that the policy language does not require what EDR indicated it might. Therefore, in a case such as this, where an agency has no right of appeal from a qualification ruling, it makes sense to reconsider the original qualification determination if the result would be affected. In this case, the result is affected by this reconsideration.

As discussed in EDR Ruling No. 2010-2432, DHRM Policy 2.10 provides that: "[c]onsistent with the requirements of the Va. Code §§ 2.2-2903[11] and 15.2-1509, the veteran's military service shall be taken into consideration by the Commonwealth during the selection

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added. *See Grievance Procedure Manual* § 2.4 ("Once the grievance is initiated, additional claims may not be added.").

[8] *See* Va. Code §§ 2.2-1001(5), 2.2-3003(G).

[9] *See, e.g.*, EDR Ruling No. 2008-1765; EDR Ruling No. 2007-1576.

[10] *See e.g.*, EDR Ruling No. 2008-2023.

[11] Va. Code § 2.2-2903(B) states: "[i]n a manner consistent with federal and state law, if any veteran applies for employment with the Commonwealth that is not based on the passing of any examination, such veteran shall be given preference by the Commonwealth during the selection process, provided that such veteran meets all the knowledge, skill, and ability requirements for the available position."

process, provided that such veteran[12] meets all of the knowledge, skill, and ability requirements for the available position. Additional consideration shall also be given to veterans who have a service-connected disability rating fixed by the United States Veterans Administration."[13] Further, on April 30, 2009, DHRM provided policy guidance as to the application of this "Veteran's Preference." In pertinent part, the policy guide states:

> The Code of Virginia requires that state agencies shall give preference in the hiring process to veterans. … The following guidelines are designed to help agencies achieve this required level of preference.
>
> **Initial screening:** Applicants are screened to identify those who meet the minimum requirements for the position – the equivalent of achieving a passing score on a test. No preference is given. Applicants must meet the required criteria at a minimum or better level on their own.
>
> **Preference applied after initial screening phase:** After the initial screening, veteran status is noted for the candidates. The state application provides preliminary notice of veteran status; the agency may need to follow up to identify the exact status of veteran applicants. At this stage, preference shall be given by treating veteran status as a preferred qualification. Further preference shall be given if the veteran applicant also has a service-connected disability rating by treating the veteran's disabled status as a second preferred qualification. Adding a preferred qualification criterion for veteran status and, if applicable, a second preferred criterion for disabled veteran status will therefore result in the veteran applicant and the disabled veteran applicant receiving the additional preference required by Code.[14]

As stated in the July 17, 2009 e-mail, and as reiterated by a DHRM Policy Analyst during this Department's investigation for this reconsidered ruling, this policy language and guidance only requires an agency to consider the preferred qualification of veteran status and/or a veteran's service-connected disabled status during screening for interviews, which is consistent with the interpretation asserted by the agency head in this case. Further, as this Department noted in EDR Ruling No. 2010-2432, "if the agency head's interpretation of the DHRM policy guidance is correct, and the veteran's preference is only assessed during screening for interviews, there would be no material impact on the grievant by any failure to consider his veteran status in this case."

Given these requirements of the policy, even if the grievant's veteran status had not been considered during screening, he successfully passed that hurdle and was interviewed for the position anyway. Therefore, because DHRM Policy 2.10 does not require the agency to have considered his veteran status at any point other than screening for interviews, there is no

[12] DHRM Policy 2.10 defines "veteran" as "[a]ny person who has received an honorable discharge and has (i) provided more than 180 consecutive days of full-time, active-duty service in the armed forces of the United States or reserve components thereof, including the National Guard, or (ii) has a service-connected disability rating fixed by the United States Department of Veterans Affairs." DHRM Policy 2.10, "Recruitment Management System (RMS)."
[13] DHRM Policy 2.10, "The Selection Process."
[14] DHRM Policy 2.10, *Hiring*, Policy Guide, Veteran's Preference, April 30, 2009.

misapplication of the policy by not considering the grievant's veteran status at any other point in the process. In the end, the grievant was not harmed by any alleged failure to consider his veteran status at screening. Therefore, these allegations do not raise a sufficient question as to whether the agency failed to follow the requirements of policy in taking the grievant's veteran status into account for the grievance to qualify for hearing.[15]

For the above reasons, the grievant's claim of misapplication and/or unfair application of policy regarding the agency's consideration of his veteran status, or lack thereof, does not qualify for a hearing. This determination is a reversal of EDR Ruling No. 2010-2432. However, the analysis does not end here. Indeed, the grievant raised other claims of misapplication and/or unfair application of policy and retaliation with respect to the selection process, which were not addressed in EDR Ruling No. 2010-2432. As such, those claims must be addressed in this reconsidered ruling to determine whether the grievance may qualify for a hearing on other grounds.

Misapplication and/or Unfair Application of Policy

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[16] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[17] An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[18] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[19] For purposes of this ruling only, it will be assumed that the grievant has alleged an "adverse employment action" as to this grievance in that it appears the position he applied for would have been a promotion. The grievant has raised a number of alleged errors during the selection process, each of which is addressed below.

Selection Decision

The grievant generally asserts that he was a better candidate for the position than the individual eventually chosen. The grievance procedure accords much deference to management's exercise of judgment, including management's assessment of applicants during a

[15] To the extent the grievant may argue that the applicable policy and/or the agency's application thereof was inconsistent with the requirements of the Virginia Code, the grievant can raise that argument with the circuit court, if he decides to appeal this ruling. *See infra*.
[16] *See Grievance Procedure Manual* § 4.1(b).
[17] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.
[18] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[19] *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

selection process. Thus, a grievance that challenges an agency's action like the selection in this case does not qualify for a hearing unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.[20]

The interview panel found that the successful candidate performed better in the interview than the grievant. According to the interview notes, the grievant's answers were "rambling" and not focused on the questions at times, while the successful candidate demonstrated strong communication skills. Further, the panel believed that the successful candidate better demonstrated the ability to perform the supervisory tasks of the position. The grievant did not demonstrate supervisory experience. As such, this was a key factor in the panel's decision to choose the successful candidate over the grievant for a supervisory position.

While the grievant may disagree with the agency's assessment, he has presented insufficient evidence that might suggest the agency's selection disregarded the facts or was otherwise arbitrary or capricious. In reviewing the interview notes, there may have been a few questions the grievant answered in greater detail than the successful candidate, but there were other questions the successful candidate provided far better responses than the grievant. This Department can find nothing to indicate that the grievant was so clearly the better candidate that the selection of the successful candidate disregarded the facts. Rather, it appears the agency based its decision on a good faith assessment of the relative qualities of the candidates and their performances during the interview.

Pre-selection

The grievance has also raised the issue of pre-selection. State hiring policy is designed to ascertain which candidate is best suited for the position, not just to determine who might be qualified to perform the duties of the position.[21] Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.[22] As such, an agency may not pre-select the successful candidate for a position, without regard to the candidate's merit or suitability, and then merely go through the motions of the selection process.

There is insufficient evidence in this case to raise a question that pre-selection may have tainted the process. Indeed, the selected candidate was not the agency's first choice, making a pre-selection argument tenuous at best. It does not appear that the agency simply went through the motions of the selection process. On the contrary, the agency appears to have acted based on a reasoned analysis of the applicants. The agency determined that the successful candidate was better suited for the position based on her knowledge, skills, and abilities. The grievant has not raised a sufficient question for the issue of pre-selection to qualify for hearing.

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[20] *See Grievance Procedure Manual* § 9. Arbitrary or capricious is defined as a decision made "[i]n disregard of the facts or without a reasoned basis."

[21] *See* Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.

[22] Va. Code § 2.2-2901 (stating, in part, that "[i]n accordance with the provisions of this chapter all appointments and promotions to and tenure in positions in the service of the Commonwealth *shall be* based upon merit and fitness, to be ascertained, as far as possible, by the competitive rating of qualifications by the respective appointing authorities") (emphasis added).

Announcement

The grievant asserts that the agency changed the requirements of the position from those listed in the published job announcement. Specifically, the announcement stated that a requirement of the position was graduation from an accredited school or university with advanced course work in social work. The grievant argues that the successful candidate did not meet the educational requirements and, therefore, was not eligible for the position.

The agency states that the position description was altered prior to the posting of the announcement to broaden the subject-matter of course work that met this requirement. The new description required course work in social work, counseling, psychology, or a related field. However, due to a "clerical error," an earlier version of the announcement was published with the old description of requiring advanced course work in social work. The agency, however, assessed the candidates on the actual updated job description, rather than the incorrect announcement. Further, the agency states that applicants for similar positions who did not have course work in social work have been considered and even received the position in past selections.

Even though there may have been an error in this announcement, the error did not harm the grievant. He was still interviewed for the position, along with the successful candidate. Further, the successful candidate appears to have met the stated educational requirements of the actual job description. As such, any error with regard to this announcement had no impact on the grievant's candidacy for the position and demonstrates insufficient evidence of any misapplication and/or unfair application of policy to qualify for a hearing.

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[23] (2) the employee suffered a materially adverse action;[24] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[25] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[26]

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[23] *See* Va. Code § 2.2-3004(A). Only 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 Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

[24] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

[25] *See, e.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

[26] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

The grievant's retaliation claim fails to qualify for hearing because he has not presented sufficient evidence of a causal link between an alleged protected activity and a materially adverse action. There is no indication of potential retaliation other than the grievant has filed at least one grievance in the past and now did not receive the job for which he applied. However, as stated above, the agency's selection of the successful candidate appears to have been based upon a reasonable evaluation of the knowledge, skills, and abilities of the applicants. There is no indication that retaliation tainted the process. As such, the grievant's retaliation claim does not qualify for hearing.

CONCLUSION, APPEAL RIGHTS, AND OTHER INFORMATION

Based on the foregoing, this Department has reconsidered its qualification determination in EDR Ruling No. 2010-2432. Because the grievance does not raise a sufficient question of misapplication and/or unfair application of policy or retaliation, as stated above, to qualify for a hearing, this Department reverses its prior qualification of this grievance and determines that it does not qualify.

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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Claudia Farr
Director