Issue: Administrative Review of Hearing Officer's Decision in Case No. 9227; Ruling Date: April 21, 2010; Ruling #2010-2529; Agency: College of William & Mary; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the College of William and Mary
Ruling No. 2010-2529
April 21, 2010

The grievant has requested that this Department administratively review the hearing decision in Case Number 9227. For the reasons set forth below, we will not disturb the decision.

FACTS

The facts of this case, as set forth in the hearing decision in Case Number 9227, are as follows. [1]

> The College of William and Mary employs Grievant as a Housekeeper for one of its facilities. Grievant is highly regarded for his housekeeping skills by his co-workers including Agency supervisors. Because of Grievant's physical strength, he is often asked to operate heavy equipment that other co-workers cannot or will not operate. Grievant as *[sic]* a member of a union devoted to advocating for the betterment of its members.
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> The Agency had an opening for the position of Housekeeping Worker Senior for one of its facilities. Grievant, Mr. G, and Ms. R were selected for interviews because all three were qualified for the position.
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> Mr. S. worked as a Housekeeping Supervisor for the Agency. He was asked to serve on the panel. Mr. S had not supervised Grievant or Mr. G before but knew Grievant was a member of the union. Ms. A worked as a Housekeeping Supervisor for the Agency. She supervised Grievant. When the position became available, Ms. A spoke with Grievant and encouraged him to apply. She told Grievant he would be a good shift leader and that he should apply for the position. The Agency asked Ms. A to serve on the hiring panel. She did not know the Grievant was a member of the union.
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> Mr. S and Ms. A took turns asking questions of each candidate. The list of questions was given to them after approval by Human Resource staff. They wrote

[1] Decision of the Hearing Officer in Case Number 9227 issued January 14, 2010 ("Hearing Decision") at 2-3. Footnotes from the original decision have been omitted.

down each applicant's answers in the space after each question. Although the Manager did not ask questions from the written list, she sometimes asked "follow up" questions if she thought the applicant did not understand what was being asked.

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

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

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

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

Based on these "findings of fact," the hearing officer reached the following "conclusions of policy," ultimately denying the grievant relief.[2]

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

Grievant argued that the selection process was flawed because the panel concluded that Mr. G had more supervisory and leadership experience than the Grievant. Grievant argued that Mr. G did not have adequate supervisory or leadership experience. He points to Mr. G's application for employment which

[2] *Id*. at 3-5

does not list his extensive leadership experience. Mr. G worked for the Agency for only six months prior to the interview.

The Housekeeping Worker Senior position is primarily a supervisory position whose duties include, but are not limited to, the following: "[p]rovide daily [oversight] of housekeeping functions" including supervising classified employees, preparing work schedules, and training new employees. During the interview, Mr. G told the panel that his father ran a company and he had been working for his father overseeing the company's operations. When his father stepped down, Mr. G. started running the company. Mr. G told the panel that he had 15 years of work experience with his father in a cleaning business and six months of work experience with the Agency. This evidence is sufficient to support the panel's conclusion that Mr. G had more leadership experience than did the Grievant. The panel's selection was not arbitrary or capricious.

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

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

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity; (2) 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 nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

Grievant engaged in a protected activity because he was a member of the union. He suffered a materially adverse action because he was not selected for a position for which he was qualified. Grievant has not established a link between his protected activity and the materially adverse action. No evidence has been presented to show the Grievant's union membership was discussed or even

> considered as part of the hiring process for the Housekeeping Worker Senior position. In addition, Grievant has not established that to the extent his Supervisor was "watching him", she was doing so as a form of retaliation for his membership in the union. Indeed, Ms. A testified that she did not know Grievant was a member of the union before the interviews. There is no reason for the Hearing Officer to believe that the Agency's non-selection of Grievant for the open position was a pretext for retaliation.

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."[3] 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.[4]

Challenge to Hearing Officer's Findings of Fact and Conclusions

The grievant challenges a number of the hearing officer's findings and conclusions. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[5] and to determine the grievance based "on the material issues and grounds in the record for those findings."[6] 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.

Based upon a review of the hearing record, sufficient evidence supports key hearing officer findings such as:

> (1) Mr. S believed that Mr. G was the best suited candidate for the position after considering Mr. G's application for employment and his answers to the interview questions.[7]
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> (2) Ms. A *[sic]* believe that Mr. G was the best suited candidate for the position after considering Mr. G's application for employment and his answers to the interview questions.[8]

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[3] Va. Code § 2.2-1001(2), (3), and (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Va. Code § 2.2-3005.1(C).
[6] *Grievance Procedure Manual* § 5.9.
[7] Testimony of Mr. S beginning at 11:00.
[8] Testimony of Ms. A beginning at 27:00.

> (3) No one attempted to influence the outcome of the selection process because of Grievant's union membership.[9]

Accordingly, this Department cannot conclude that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence and the material issues in the case. Consequently, this Department has no reason to disturb the hearing decision on this basis.

New Evidence

In support of his case, the grievant has stated that the employees supervised by Mr. S have offered to provide a notarized statement regarding alleged questioning by Mr. S about their union affiliation, purportedly at the request of Mr. S's supervisor.

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[10] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the trial ended.[11] The fact that a party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party claiming evidence was "newly discovered" must show that:

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[12]

Here, the evidence that the grievant seeks to have considered does not appear to be "newly discovered." The grievant has provided nothing to indicate that the additional statements should be considered newly discovered evidence under the above standard. Specifically, the grievant has provided nothing to show that the statements could not have been secured prior to the hearing and submitted at hearing. Consequently, there is no basis to re-open or remand the hearing for consideration of this additional evidence.

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[9] Testimony of Mr. S beginning at 12:30; Testimony of Ms. A beginning at 27:30.

[10] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd on reh'g*, 399 S.E.2d 29 (Va. Ct. App. 1990) (en banc) (explaining "newly discovered evidence" rule in state court adjudications); *see also* EDR Ruling No. 2007-1490 (explaining "newly discovered evidence" standard in context of grievance procedure).

[11] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).

[12] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

Excluded testimony

Finally, the grievant makes reference to "pertinent, excluded testimony" by a potential witness. The grievant asserts that this witness would have stated that she was not given an opportunity to informally tell the panel about herself in a pre-interview and to corroborate the "fact" that the grievant was also not afforded this opportunity.

First, the grievant concedes that this witness was never called because this witness could not be located. Moreover, our review of the record does not reveal any attempt by the grievant to request that the hearing officer suspend the hearing until the witness could be found. Secondly, even if such testimony had been provided, it would not have corroborated anything because the grievant never testified that he was not given the opportunity to informally share information with the panel prior to the interview. If he was not, it would indeed be troubling that the same process was not implemented with each candidate and quite possibly a policy violation. However, given the lack of any record evidence as to this point, we cannot disturb the decision on the basis that applicants were subjected to different processes.

Relief

The grievant asserts that the hearing decision fails to address the grievant requested relief of a transfer to another location.

Because the hearing officer found no wrongdoing by the agency, he was not required to address the requested relief.

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]

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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* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).