

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9235, 9285;
Ruling Date: September 3, 2010; Ruling #2010-2619; Agency: Department of
Conservation and Recreation; Outcome: Remanded to AHO.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Conservation and Recreation
Ruling Number 2010-2619
September 3, 2010

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9235 and 9285.

FACTS

The pertinent facts of this case, as set forth in the hearing decision in Cases No. 9235 and 9285, are as follows:

On May 27, 2009, the Grievant filed an Employee Grievance Form A alleging:

1. Misapplication of the Commonwealth of Virginia Personnel Policies and Procedures.
2. Discrimination against me on the basis of my national origin, and age.
3. Retaliation against me on the basis of previous filed EEOC charges, court cases, and grievances.

This Grievance Form A was received by the Agency on May 27, 2009. This is Grievant's case number 9235.

On October 5, 2009, the Grievant filed an Employee Grievance Form A alleging:

1. Misapplication of the Commonwealth of Virginia Lay Off Policies and Procedures #1.30.
2. Discrimination against me on the basis of my national origin, and age.
3. Retaliation against me on the basis of previous filed EEOC charges, court cases, and grievances.

This Grievance Form A was received by the Agency on October 5, 2009. This is Grievant's case number 9285.

The Agency provided the Hearing Officer with a notebook containing ten (10) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with two notebooks. The first was titled "Layoff/Retirement Case #9285" and consisted of Tabs A-Z. This notebook was accepted in its entirety as Grievant Exhibit 1. The second was titled "Asccounts [sic] Payable Supervisor Position# 00010 Case #9235" and consisted of Tabs A-Z. This notebook was accepted in its entirety as Grievant Exhibit 2.

The Department of Conservation and Recreation ("DCR") has employed the Grievant since 1985. The Grievant is of East Indian origin and he is approximately seventy (70) years old. The Grievant has extensive education, including a Bachelor of Law, a Master's in Economics, a Master's in Business Administration and he is a Certified General Accountant. The Grievant has held many positions with DCR during his tenure. From 1985 through 1994, the Grievant administered and monitored DCR's Grants Program and Receivables, and as such, managed approximately eight (8) people. For the last several years, he has managed no more than one (1) person.

On or about February, 2009, DCR posted an opening for Position #00010. This position was for an Accounts Payable Supervisor. The requirements for this position were identified in an Employee Work Profile ("EWP"). The EWP indicated that this position would supervise two (2) or more classified employees. Under Organizational Objective, it stated that the position would supervise a team-oriented group of individuals within the Division of Finance to accurately process and audit payable documents, maintaining appropriate documentation to ensure that all transactions are processed in accordance with agency, state and federal requirements. In describing the skills required for this position, the EWP at paragraph 17 stated as follows:

Comprehensive knowledge of GAAP, along with considerable knowledge & understanding of fiscal operations for a large structured, complex organization; have considerable skill in the use of computer-based financial and office software applications; in addition to effective oral & written communication, customer service, negotiation, training, problem solving & research skills. Ability to work independently & make logical decisions; possess the ability to interpret/apply fiscal procedures; gather & analyze

data for reports; meet multiple deadlines & work effectively with agency management; employees, central agency staff & external contacts. **Progressively responsible leadership roles in preparation of supervising an accounts payable staff performing a variety of operational duties. Supervisory skills include communicating expectations, providing constructive feedback, effectively handling personnel matters, training/coaching & performance management.** The demonstrated ability to understand & develop internal control systems in a financial processing environment & to devise appropriate modifications to a control system in a changing environment. (Emphasis added)

Regarding education and experience, the EWP stated in part as follows:

Graduation from an accredited college or university with a degree in an accounting or business related discipline **or equivalent training & experience; current or recent proven supervisory experience in an accounting environment;** state experience & experience in the use of CARS, IDSS, and MS Office. Significant experience in accounting operations; policy/procedure development; supervising in a complex processing environment, and use of automated financial systems. Demonstrated understanding of supervisory principles may substitute for supervisory experience. (Emphasis added)

Under Core Responsibilities for this position, the EWP indicated that seventy percent (70%) of the Core Responsibility of this position would be supervisory. DCR created a one (1) page document, "Employment Opportunity" regarding this position and in that document listed the qualifications required. They were stated to be as follows:

The ideal candidate will have comprehensive knowledge of GAAP, along with considerable knowledge & understanding of fiscal operations for a large structured, complex organization; have considerable skill in the use of computer-based financial & office software applications; in addition to effective oral & written communication, customer service, negotiation, training, problem solving & research skills. The successful candidate should also be able to work independently & make logical decisions; possess the ability to interpret/apply fiscal procedures; gather and analyze data for reports; meet multiple deadlines & work effectively with agency management; employees, central agency staff & external contacts. The ideal candidate should have **Progressively**

responsible leadership roles in preparation of supervising an accounts payable staff performing a variety of operational duties. Supervisory skills include communicating expectations, providing constructive feedback, effectively handling personnel matters, training/coaching & performance management. The demonstrated ability to understand & develop internal control systems in a financial processing environment & to devise appropriate modifications to a control system in a changing environment is also important. **Strongly prefer:** Graduation from an accredited college or university with a degree in accounting or business related discipline **or equivalent training & experience; current or recent proven supervisory experience in an accounting environment;** state experience & experience in the use of CARS, IDSS and MS Office. (Emphasis added)

Prior to the actual interviews for this new position, Ms. A, a Human Resources Generalist met with the panel members who would be conducting the interview. The panel consisted of an account manager who worked with this Agency and two (2) other state employees who did not work for this Agency. Prior to the commencement of the questions, Ms. A reviewed all of the questions with the panel and spent approximately thirty (30) minutes with them to assist them in the interview process. She did not take part in the interview.

There were fifteen (15) questions that were presented to each of five (5) candidates. Each of the panelists recorded their thoughts on the question sets for each of the interviewees. There were five (5) candidates; four (4) were female and one (1) was male; two (2) were African-American, two (2) were Caucasian, and one (1) was Asian; four (4) were over the age of forty (40) and one (1) was thirty-nine (39) years old. The two (2) finalists were a Caucasian female over the age of forty (40) and a black female who was thirty-nine (39) years old. The job was going to be offered to the Caucasian female, but because she indicated that she would not take the job because of other employment, the job was offered to the other finalist candidate and it was accepted.

After the interviews, the three (3) panelists produced a summary statement for each of the two (2) finalists and the Grievant. The statement for the Grievant stated as follows:

Candidate has a long recognizable (over thirty years) background of state accounting experience. The candidate shared his experience in the 1980s and 1990s when he was an accounts payable supervisor. Due to budget cuts he was laid off from his position as accounts payable supervisor. However, over the past thirteen years, [Candidate] has not shown any progressive growth

in his accounting functions and does not show evidence to have any progressive supervisory experience comprising of more than one accountant. Moreover, his responses to the panel's questions were not concise. He did not provide any in-depth details of his knowledge and capabilities to fill the complex and changing environment regarding the position of accounts payable supervisor. [Candidate's] answer regarding accounting controls over the credit card program did not address the significance of reconciling the Visa statement to cardholder logs, maintaining an internal spreadsheet for tracking, time sensitivity of processing, or the use of Visa's merchant website to maintain proper controls for the credit card program. Candidate referred several times to developing and writing policy and procedures to maintain controls regarding accounting processes. However, the candidate's answer to developing and writing a specific policy and/or procedure did not show the components associated with developing a policy and/or procedure. Moreover, candidate did not mention getting proper authorization to implement a specific policy or procedure. Additionally, the lack of details regarding what internal controls needed to be addressed in the development of a policy or procedure was not covered. The candidate did not answer the question regarding the resolution of "time-sensitive" problems/priorities to the satisfaction of the panel. His answer was general in nature and did not offer a specific example detailing how he resolved a time-sensitive problem. Moreover, the candidate's example was a normal function that is performed on a routine basis for any accounts payable position. The panel does not recommend [Candidate] for the position of accounts payable supervisor.

The corresponding summary statement for Finalist A, was as follows:

Candidate has extensive experience working for a state agency in accounts payable. She is currently employed as an Accounts Payable Supervisor with the Dept. of Alcoholic Beverage Control. She has hand-on, current experience will [sic] all facets of the accounts payable process to include the complete processing cycle from start to finish, problem resolution, training of staff, research, and in applying state accounting policies and procedures. During the interview, she displayed effective verbal communication skills, as her responses to the interview questions were concise and applicable to the role of the accounts payable supervisor position. Moreover, candidate shared additional in-depth knowledge of her abilities to understand the complexities of the position's duties by explaining processes involved in some of the accounts payable functions such as reconciling the small purchase card monthly. In addition, the candidate currently utilizes FINES and CARS to download and review the error log. The candidate conveyed an ability to effectively organize and document procedures as well as an understanding of the importance of staff training. She supplied

supporting examples by expanding on areas such as the Prompt Pay Act, managing, and training of AP staff. In addition, the candidate conveyed skills, such as handling staff disciplinary issues and vendor complaints and how she has effectively resolved issues in a timely and professional manner. The panel recommends [Finalist A] for the position.

The corresponding summary statement for Finalist B, was as follows:

Candidate has experience working for a state agency in accounts payable and is currently employed as an Accounts Payable Supervisor with the Dept. of Corrections. She has current and prior supervisory experience and has sufficient knowledge regarding the accounts payable process to include reviewing invoices, resolving processing errors, and in applying state accounting policies and procedures. During the interview, she displayed professional verbal communication skills. Her response to the interview questions were concise and relevant to the role of the accounts payable supervisor. However, the candidate did not expand on any of the questions that would have provided a more in-depth knowledge of her capabilities to handle the day-to-day responsibilities of the position although the basic information was discussed. The candidate was able [to] describe effective organization skills and a good sense of the importance of the Prompt Pay Act. She provided good reasoning on the importance of customer service. She currently supervises four Fiscal Technicians and conveyed a good understanding of dealing with employee discipline issues, staff training and in handling complex financial problems. The panel recommends [Finalist B] for the position if the first candidate does not accept the position.

Based on these summary statements, the Grievant was not recommended for the position for which he interviewed.

During the course of his employment with DCR, the Grievant has filed numerous grievances and EEOC complaints. One of those grievances was to grieve his non-selection for the position of Accounts Payable Supervisor. The Third Step Respondent to the grievance filed as case number 9235, stated in part as follows:

You have been employed by the Department of Conservation & Recreation a total of 22 years between 1985 and 1996, and again between 1998 and 2009. During these periods, you have filed a total of 34 complaints including 19 employee grievances, 12 Federal EEOC complaints, 2 state EEO complaints and one federal

law suit. Of the 34 complaints, 24 alleged discrimination based on race/age or retaliation, the same basis as your current complaint. While you withdrew 4 of these complaints, none of the remaining 20 have been ruled in your favor. The time and resources involved in processing these grievances and state and Federal EEOC complaints over the past 22 years have been extraordinarily disproportionate compared to all other complaints received by the agency; i.e. since 2003 only 10 other similar actions have been received for the “**entire agency.**” DCR has spent thousands of dollars to pay for Administrative Hearings and Agency Advocate services just related to your cases, not counting the value of staff time and the associated lost productivity. In addition, significant staff time was also required to research and respond to your nine Freedom of Information Act requests submitted since March, 2006. At the same time the agency was expending resources and lost productivity associated with your complaints, you were proven guilty of defrauding the agency of 397 work hours (almost 50 work days) during 2006 and received appropriate disciplinary action.

In breaking down the 19 employee grievances referenced above, 6 have upheld action taken by the agency; 7 complaints were withdrawn by you; 1 grievance was ruled not grievable by the Department of Employment Dispute Resolution (EDR); 2 were resolved internally in your favor at the First and Second Management Step; 1 involving misapplication of the layoff policy was resolved in your favor by EDR; 1 resolved via reduction in disciplinary action via grievance panel; and the 1 current grievance that is the subject of this response. With the exception of the pending Federal EEOC complaint, all of the federal and state EEO complaints were either ruled without cause or there was insufficient evidence to support the charges. The federal law suit was withdrawn with prejudice by you.

The author of this Third Step Response testified before the Hearing Officer. He stated that before he wrote the Third Step Grievance Response on July 10, 2009, he consulted with the appropriate parties in Human Resources and with the Attorney General’s Office. After such consultations, he denied the grievance and ended the grievance by stating in part as follows:

In sum, based on previous rulings by Judge T.J. Markow and Administrative Hearing Officers cited herein, it is determined that this current grievance is not based on new evidence not already ruled on, has no merit and is opined to be submitted by you only to harass the agency or otherwise impede its efficient operations.

Therefore, in accordance with Section 2.4, #4 of the Employee Grievance Manual, your grievance dated May 27, 2009, is being administratively closed due to noncompliance with the required grievance procedures set forth in the Grievance Procedure Manual - e.g. employee grievances are "*Not to be used to harass or otherwise impede the efficient operations of government*". You have the right to request a compliance ruling from the EDR Director to overturn the closing of this grievance. Your ruling request must be made within 5 workdays of receiving this notification.

The Grievant requested a Compliance Ruling from the Director of EDR regarding this matter. On August 20, 2009, the Director of EDR issued her Compliance Ruling of Director. In her ruling, the Director stated in part as follows:

The agency appears to argue that the high number of the grievant's past unsuccessful grievances and complaints, which alleged similar charges, indicates that his May 27, 2009 grievance is for no purpose other than to harass or impede the operations of government. While the number of grievances in which this grievant has been involved is comparatively high, it cannot be said that the number and/or timing of these grievances is so excessive that the May 27, 2009 grievance should be closed. Indeed, it appears that the last grievance the grievant submitted was in 2007. Conversely, in EDR Ruling No. 99-138, the grievant who was found to be harassing and/or impeding the operations of government had filed 24 grievances in a span of about two years, many of which were submitted within days of each other.

As to the alleged frivolous nature of the May 27, 2009 grievance, it is understandable that the agency would consider the grievant's complaints of discrimination and retaliation to be spurious at this point. The grievant has apparently never succeeded on such claims, even though he has raised them multiple times and in multiple venues. Nevertheless, the May 27, 2009 grievance does not simply raise these claims, but also raises issues of misapplication of policy. Further, we cannot conclude at this early stage that there are no new facts related to the challenged selection that could support the grievant's claims of discrimination or retaliation.

For the above reasons, this Department cannot conclude from the surrounding facts and circumstances that the grievant is using the grievance procedure to harass or otherwise impede the efficient

operations of the agency. There is insufficient evidence to establish that the grievant's intent was to harass or impede rather than to challenge a management action on the basis of alleged discrimination, retaliation, and misapplication of policy.

Pursuant to her ruling, the Director of EDR found that the grievance was compliant with Section 2.4 of the Grievance Procedure Manual ("GPM") and that it must be permitted to proceed.

Subsequently, the Grievant requested an opinion from the Director of EDR as to whether or not his grievance number 9235 qualified for a hearing. On November 4, 2009, the Director issued her Qualification Ruling of Director ordering that the Grievant did qualify for a hearing. In her Finding, the Director stated in part as follows:

According to documentation provided by the agency, the grievant did not make the second round of interviews due to his performance in the interview. For instance, the agency's documentation notes 1) the grievant's answers were not concise, 2) he did not provide sufficient detail of how his knowledge and abilities would allow him to meet the job requirements, 3) his answer on the question about controls for credit card programs did not include a discussion of certain specific controls, 4) his answer to a question about the development of a specific policy or procedure did not include a discussion of the various steps in having a new policy developed and approved, and 5) his answer to a question about resolution of "time-sensitive" problems did not address how he resolved the issues and his example was a "routine" task.....The agency found that the grievant had failed to describe certain specific controls of a credit card program in response to a particular question during the interview. While this appears to be supported by the panel's interview notes, reference to the same interview notes finds that some of these specific controls may not have been mentioned by the successful candidate either. The agency also felt that the grievant failed to articulate the processes for getting a new policy or procedure approved and did not satisfactorily describe resolution of a "time-sensitive" matter. Again, the interview notes do not appear to reflect that the other two successful candidates articulated all the processes for developing a new policy or procedure. Further, the grievant's and a successful candidate's answers regarding the "time-sensitive" question do not appear to have identified significantly different issues, as reflected in the interview notes.

The Hearing Officer has carefully reviewed all of the questions and all of the rather cryptic notation made by the interviewers. During the hearing, the advocates for the Grievant questioned various witnesses about question fifteen (15) of the interview questions. That question was as follows:

What was the most **complex financial problem** that you had to resolve?

What was the problem and how did you fix it? (Emphasis added)

The panel member who testified before the Hearing Officer indicated in her notes that the first finalist identified the “most complex financial problem” that she had dealt with was the purchase of new personal computers. It appears that there was a computer problem and she called the Information Technology Department to get it fixed. The second finalist seems to have indicated that the “most complex financial problem” that she had dealt with was an erroneous due date for a monthly payment to Anthem. It appears that she got another Supervisor to review the batch before releasing. By way of contrast, the Grievant set forth a scenario where he dealt with an entirely separate Agency and convinced that Agency and his superiors that his Agency had made a substantial overpayment in taxes and he was able to finally recover that overpayment. Further, in the following year, he had to once again convince both his Agency Head and the second Agency that the same mistake had been made for a second time. In the course of dealing with this “complex financial problem,” he saved his Agency several hundred thousand dollars. The Hearing Officer would note that the two (2) finalists seem to have totally mis-answered question 15, unless the Agency is of a mind that a “complex financial problem” amounts to buying a new computer or changing the date that a payment is made.

This same witness testified that she was “blown away” by the interview that was given by Finalist A. She quite candidly testified that she penalized the Grievant for his answer to Question 15 because such an event had simply never occurred at her Agency and she did not understand the complexity of what he had to go through to recover these inappropriately spent funds. She also answered a question stating, “that simply would not be an issue in my agency.” She further testified that she did not have a college degree and that this job could be performed without a college degree. She testified that the panel did not have to ask the other candidates to repeat their answers, indicating that she and the other panel members had difficulty in understanding the Grievant. This witness was extraordinarily forthright in her answers and the Hearing Officer found her testimony to be extremely credible.

After reviewing the documentary evidence and listening to the witnesses’ oral testimony, the Hearing Officer can find no substantial support for the Agency’s justification that the Grievant was not at least as qualified as the two (2) finalists who were selected. However, the Hearing Officer can find no substantial

support for the Grievant's position that he was at least as qualified as the two (2) finalists. The Hearing Officer finds that the answers given to the fifteen (15) questions that were presented to the two (2) finalists and the Grievant, were all uniformly mediocre based on the Hearing Officer's perspective. Accordingly, the Hearing Officer must give great deference to the findings of the panelists who actually took part in the interviews.

According to Virginia Code Section 2.2-2901(A), "...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 authority." The Department of Human Resource Management ("DHRM") at Policy 2.05 prohibits employment discrimination on the basis of "race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or against otherwise qualified persons with disabilities." Pursuant to Policy 2.10, once applications for employment are submitted, the Agency screens these applications and advances to an interview those applicants possessing at least these minimum qualifications for the position. A group of two (2) 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 candidates' qualification(s). Selection is the result of the hiring process that identifies the applicant best suited for a specific position.

As the Hearing Officer found in Case #8469, the Agency did not violate DHRM Policy 2.10. The panel made its decision based on each applicant's written application and also on each applicant's performance during the interview. The panel gave considerable weight to how well each applicant performed during the interview. DHRM Policy 2.10 does not prohibit this type of weighting. While it is arguable that the Grievant was a stronger candidate based on his written application, it was this panel's belief that he did not perform nearly as well in his oral presentation. DHRM Policy 2.10 does not mandate that an Agency hire the most qualified candidate for any position. Rather, it requires that an Agency hire the candidate who is best suited for a specific position.

The Grievant argues that his education more closely met the requirements in the job posting and the EWP. The Grievant fails to recognize that both the job posting and the EWP speak to educational qualifications and/or work and experiential qualifications. One can be a substitute for the other. Clearly, the panel found that the two (2) finalists' combination of education and work or experiential qualifications exceeded those of the Grievant. The Hearing Officer can find no misapplication of policy towards the Grievant regarding this grievance.

Regarding this particular grievance, the Grievant also alleged misapplication of policy, discrimination and retaliation. The Director of EDR has determined as follows:

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; (2) the employee suffered a materially adverse action; and (3) a casual 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. Evidence establishing a casual connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.

There is no question that the Grievant has engaged in significant and numerous protected activities. Likewise, there is no question that he has experienced a materially adverse action in that he was not selected for this supervisory position. One (1) of the members of the interview panel worked at the Agency where the Grievant was employed and was certainly aware of the Grievant's long history of protected activities. One (1) of the witnesses that testified was a Division Director and his testimony was that, "There is probably no Human Resources Office in the Commonwealth that does not know the name of the Grievant." As stated earlier in this Decision, the Deputy for Administration and Finance, at the Third Step Grievance Response, dismissed this grievance in part because of the numerous grievances, EEOC complaints and EEO complaints that the Grievant had filed. This person complained about harassment to the Agency and cost to the Agency when defending these matters.

While it is obvious that the Grievant has engaged in significant protected activity over a number of years regarding this Agency, the Grievant provided no evidence that he was denied this position because of such protected activities. The Grievant is essentially assuming that he was turned down because of his protected activity and yet he offered no concrete evidence to support that assumption. While one (1) of the panel members most likely was aware of this activity, the other two (2) did not work for this Agency and there simply is no evidence that any of the panel members based their decision in whole or in part on the prior protected activity filings made by the Grievant. It appears to the Hearing Officer, based on the documentary evidence and the oral testimony before him, that the more likely reason for the Grievant being denied this position was his failure to impress the panelists in the interview. Said another way, the Grievant

did not receive the position because he was not the best suited for the position. In this matter, the Grievant has not established a causal link between his protected activity and the material adverse action.

The Grievant argued that he was discriminated against because of 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. Grievant has established his *prima facie* case. He was over 40 years old. He was otherwise qualified for the position. He was rejected for the position in favor of a candidate approximately 30 years younger.

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.

The Agency has met its burden of production. The Agency selected Finalists A and B because in the judgment of panel members, they were the best suited candidates for the position.

If the employer meets its burden of production, the employee has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer were not the employer's true reason, but were a pretext for discrimination. In other words, the employee may attempt to establish that the employer's proffered explanation is unworthy of credence. In appropriate circumstances, the Hearing Officer can reasonably infer from the falsity of the employer's explanation that the employer is trying to cover up a discriminatory purpose.

The Grievant complains that the Agency hired someone younger than him. Inasmuch as the Grievant is seventy (70) years old, it is likely that someone will be hired who is younger than he is. The question is whether or not he was discriminated against because of his age. The Hearing Officer has neither read nor heard any evidence whatsoever that the panel was influenced by the Grievant's age. Not only has the Grievant not established by a preponderance of the evidence that the reasons offered for the Agency's selection of Finalists A and B were not the true reasons for such selections, the Grievant has offered the Hearing Officer no evidence that age was an issue.

As set forth in Case # 8469, an employee can establish discrimination by presenting evidence of disparate treatment or disparate impact. Grievant may establish discrimination based on color or national origin by presenting evidence that: (1) he is a member of a protected class; (2) he is qualified for the position; (3) in spite of his qualifications he was rejected; and (4) he was rejected in favor of someone not of his color or national origin. If the Agency presents credible evidence of a nondiscriminatory reason for its actions, then Grievant has not established he was discriminated against because of his color or national origin, unless there is sufficient evidence that the Agency's stated reason is merely a pretext or excuse for improper discrimination.

In reviewing the totality of all of the documentary evidence issued and in listening to all of the witnesses, the Hearing Officer finds no evidence whatsoever that race discrimination played any part in the Grievant's failure to be named as a finalist or to be brought back for a second interview. The Agency presented credible evidence of a non-discriminatory reason for its failure to select the Grievant. A panel witness testified that the panel felt that the Grievant was not the first or the second best qualified person for the job. The Hearing Officer can find no evidence that would require him to substitute a different opinion for that of the panel's.

On December 31, 2009, the Grievant was laid off from the Agency. On October 5, 2009, the Grievant initiated a grievance challenging his prospective layoff of December 31, 2009. The Grievant alleges that the Agency misapplied Policy #1.30, that they discriminated against him on the basis of national origin and age, and they retaliated against him because of the filing of EEOC complaints, court cases and grievances. The Grievant filed with EDR a Request to Qualify this grievance for hearing. This grievance is case #9285. On February 5, 2010, the Director of EDR issued her Ruling qualifying this matter for a hearing.

During the summer of 2009, the Governor's Office directed that all State Agencies prepare budgets that anticipated a five, ten or fifteen percent cut in funding. In prior years, when this Agency had dealt with potential funding cuts, it

had eliminated vacant positions. The Director of Human Resources for the Division of Administration testified as a witness for the Agency. Regarding this potential reduction in funds, he testified that the Department of Planning and Budget, "...wanted blood in the street; you must actually fire people..." Several witnesses for the Agency testified that they had informal discussions with the Grievant regarding whether he would be interested in retiring at this time. Because of existing state policies, he and the other potential retirees would be offered an enhanced retirement which would increase their annual retirement payments. It appears from the testimony of all of the witnesses, that the Agency was attempting to meet its required fund reductions by securing the retirements of those people who were in the position to retire and who desired to retire.

Early in this process, the Grievant's name was put forward as someone who would be willing to consider retirement. After his name was put forward, the concept of his retirement took on a life of its own. The former Director of this Agency was requested as a witness by the Grievant, but he declined to testify. Agency witnesses defined him as a micro-manager and it appears that early in this process, according to Agency witnesses, he had determined that the Grievant would be a candidate for layoff and/or retirement.

The policy the Grievant alleges that the Agency violated is Policy 1.30-Layoff. The particular sections which the Grievant challenges are found under the heading Agency Decisions Prior to Implementing Layoffs and they are as follows:

Each agency determines the factors that will guide the layoff process according to the criteria below. Each agency is responsible to identify employees for layoff in a manner consistent with their business needs and the provisions of this policy.

Before implementing a layoff, agencies must:

-determine whether the entire agency or only certain designated work unit(s) are to be affected;

-designate business functions to be eliminated or reassigned;

-designate work unit(s) to be affected as appropriate;

-review all vacant positions to identify valid vacancies that can be used as placement options during layoff; and

-determine if they will offer the option that allows other employee(s) in the same work unit, **Role**, and performing

substantially the same duties to request to be considered for layoff if no placement options are available for employee(s) initially identified for layoff. Valid vacancies can be filled after the agency has determined that no employees to be affected by layoff are eligible for or interested in the positions.

After identifying the work that is no longer needed or that must be reassigned, agencies must select employees for layoff within the same work unit, geographic area, and **Role**, who are performing substantially the same work, according to the following layoff sequence:

-wage employee(s) performing the same work (wage employees are not covered by the provisions of this policy or Policy 1.57, Severance Benefits);

-the least senior through the most senior part-time restricted employee; and then

-the least senior through the most senior part-time classified employee; and then

-the least senior through the most senior full-time restricted employee (if the position is anticipated to be funded for longer than 12 months); and then

-the least senior through the most senior full time classified employee. (Emphasis added)

The word "Role" is defined in this Policy as follows:

A Role describes a broad group of positions in a Career Group assigned to a specific Pay Band that are assigned different levels of work at various skill or knowledge levels.

The Agency had determined that the Grievant was in a Career Group of one. The Grievant's immediate supervisor testified in this matter. She did not recommend that the Grievant be laid off. She testified that she was already working sixty (60) hours per week, that her Agency was understaffed, and that she had no time to pick up his job functions. She further testified that the Agency laid off employees who had said they wanted to be laid off or retire.

Another witness was the Division Director and his testimony was that he did not recommend that the Grievant be laid off.

The Grievant was laid off on December 31, 2009. On February 1, 2010, the Grievant was returned to his position and he is currently working approximately thirty (30) hours per week at the same hourly pay. He is also receiving his enhanced retirement. Agency witnesses testified that he was returned to his position because there was no one else at the Agency who could perform his tasks.

Considering the requirements for age, race, or national origin, discrimination is set forth earlier in this Decision, the Hearing Officer can find no evidence that the Grievant was laid off because of his age, race or national origin. Regarding the layoff, the Hearing Officer finds no evidence that this layoff took place because of his prior use of the Grievance Procedure, EEOC filings, EEO filings, court cases or FOIA filings. The question before the Hearing Officer is whether or not state policy was misapplied. In construing the state policy, considering the documentary evidence and the oral testimony, the Hearing Officer finds that the Grievant has not borne his burden of proof to establish that state policy was misapplied in this matter. The Hearing Officer heard from several witnesses, including the Grievant, who spoke of informal conversations that took place at various locations in the Agency regarding the pending reduction in Agency funds and the need to either terminate employees or to have employees accept a layoff with enhanced retirement benefits. The Hearing Officer finds that it is entirely credible that the Grievant entered into conversations with fellow employees and with members of the management of this Agency that he would certainly consider the enhanced retirement package that was going to be offered in order to reduce head count at this Agency without the need to fire employees. The Hearing Officer can find no misapplication of policy for the Agency to take that into consideration when creating a list of people to lay off in this matter. Once that decision was made and announced, the burden is on the Grievant to establish that his name was on that list by way of a misapplication of state policy or by way of the Agency retaliating against him or by way of the Agency discriminating against him because of his age, race or national origin. The Hearing Officer finds no credible evidence from the Grievant that any of those took place.¹

Based upon the preceding facts and conclusions, the hearing officer found that the grievant had not met his burden of proof. The hearing officer upheld his original hearing decision in a May 5, 2010 reconsidered decision.

¹ Hearing Decision in Case No. 9235 and 9285, issued April 8, 2010, (“Hearing Decision”) at 1-17 (footnotes omitted).

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.”² 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.³ The grievant has presented several objections in his request for administrative review, which are addressed below.

Case No. 9285 (Layoff)

The grievant asserts that the agency improperly selected him for layoff. He notes, as did the hearing decision, that neither his immediate supervisor nor the Division Director recommended his position for elimination. The grievant’s request for administrative appeal asserts that the hearing decision erroneously upholds the agency’s selection of his position for layoff on the basis of informal conversations/gossip that took place in the men’s room. Indeed, the hearing officer’s determination that the grievant failed to prove a misapplication of policy appears to have been based upon his conclusion that it was appropriate for the agency to consider the grievant’s informal conversations about enhanced retirement benefits as a factor in determining who should be laid off.⁴ This question is ultimately a policy question and the grievant has appealed to the Director of the Department of Human Resources Management. However, the *Rules for Conducting Grievance Hearings* requires that hearing decisions contain “the findings of fact on material issues and the grounds in the record for those findings.”⁵ Here, the hearing decision, while quoting specific provisions of the applicable Layoff Policy 1.30,⁶ does not contain the grounds in the record for the hearing officer’s apparent determination that the grievant failed to prove that those provisions were misapplied.⁷

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

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

⁴ Hearing Decision at 17.

⁵ *Rules for Conducting Grievance Hearings*, V (C).

⁶ Hearing Decision at 15-16.

⁷ The policy provisions cited in the hearing decision require agencies, prior to layoff, to “determine whether the entire agency or only certain designated work unit(s) are to be affected; designate business functions to be eliminated or reassigned; [and] designate work unit(s) to be affected as appropriate.” As such, Policy 1.30 appears to focus on the “business functions” that need to be eliminated or reassigned rather than particular individuals who will be eliminated or reassigned. Moreover, while policy requires agencies to determine whether employees can “request” to be considered as substitutes, such individuals are to serve as substitutes for those “initially identified for layoff.” In other words, while policy clearly allows an agency to use substitutes, the “initially identified” language seems to indicate the consideration of substitutes necessarily comes only after the “initial” determination of which jobs will be eliminated, which is in turn driven by an assessment of which business functions (as opposed to particular individuals) must be eliminated. The notion that the layoff policy first focuses on the work to be eliminated (rather than the individual to be eliminated) appears to be reflected in another provision of policy which was cited in the hearing decision: “after identifying the work that is no longer needed or that must be reassigned, agencies must select employees for layoff.” (Emphasis added.)

More importantly, the substitution provision of Policy 1.30 seems to address employees who “request” to be considered as substitutes, not those who speculate as to whether they may be interested in enhanced retirement benefits. The hearing officer has not explained how he reached his conclusion that policy allows an agency to use informal discussions to determine who shall be laid off or what evidence or other grounds supports this conclusion. Accordingly, this decision is remanded for further clarification as to the grounds for this finding.⁸

Case Number 9235 (Nonselection)

The grievant asserts that the hearing decision fails to address two factual issues identified in this Department’s qualification Ruling No. 2010-2443 as follows:

According to documentation provided by the agency, the grievant did not make the second round of interviews due to his performance in the interview. For instance, the agency’s documentation notes 1) the grievant’s answers were not concise, 2) he did not provide sufficient detail of how his knowledge and abilities would allow him to meet the job requirements, 3) his answer on the question about controls for credit card programs did not include a discussion of certain specific controls, 4) his answer to a question about the development of a specific policy or procedure did not include a discussion of the various steps in having a new policy developed and approved, and 5) his answer to a question about resolution of “time-sensitive” problems did not address how he resolved the issues and his example was a “routine” task.....The agency found that the grievant had failed to describe certain specific controls of a credit card program in response to a particular question during the interview. While this appears to be supported by the panel’s interview notes, reference to the same interview notes finds that some of these specific controls may not have been mentioned by the successful candidate either. The agency also felt that the grievant failed to articulate the processes for getting a new policy or procedure approved and did not satisfactorily describe resolution of a “time-sensitive” matter. Again, the

⁸ By remanding this decision we are not intimating that we believe policy has (or has not) been misapplied. We are simply holding that the record source for the hearing officer’s findings and conclusions regarding the operation of the layoff policy is not stated in the decision or otherwise evident. As to remaining issues raised in the request for administrative review such as the agency’s alleged failure to lay off a temporary employee first and the agency’s alleged inconsistent application of policy (e.g., the agency head purportedly using an entirely different criterion in determining that the grievant should be laid off), these are policy issues that ultimately must be addressed by the DHRM Director. These issues, however, were not addressed by the hearing officer in his decision, presumably because, as stated in the decision, the “Agency had determined that the Grievant was in a Career Group of one” and thus properly targeted for layoff. If upon remand the hearing officer should conclude that his original determination regarding the propriety of using informal statements as a criterion in determining whom to lay off was incorrect, he should address the issues of the temporary employee and the allegedly inconsistent process used by the former agency head (and any motivation for using the purportedly different criterion) in his reconsidered decision.

interview notes do not appear to reflect that the other two successful candidates articulated all the processes for developing a new policy or procedure. Further, the grievant's and a successful candidate's answers regarding the "time-sensitive" question do not appear to have identified significantly different issues, as reflected in the interview notes.

EDR Ruling 2010-2443 concluded that:

The agency has stated that the grievant was not advanced to the second interview based on deficiencies in his first interview. However, because the interview notes (on their face at least) appear to indicate that the other two successful candidates may have shared some of the same deficiencies but were not downgraded, there are sufficient questions raised as to whether the agency's explanation could have been pretextual. As such, the grievance raises a sufficient question of retaliation to qualify for a hearing.

This ruling is not meant to indicate that the grievant should have advanced to the second round of interviews or that the agency engaged in retaliation, discrimination, or misapplication policy. Further, no part of this ruling is meant to suggest that this Department has found sufficient evidence to establish the grievant's case at hearing. This ruling only determines that there are sufficient questions raised by the facts, as reflected in the interview notes, to qualify for hearing under a theory of retaliation. The disputed factual questions at issue are more properly assessed by a hearing officer.

In his hearing decision, the hearing officer acknowledges the factual questions raised in EDR's qualification ruling, and indicates that all interview questions and interviewer notes were carefully reviewed. While the hearing decision does not expressly address the inconsistencies between the panelists' interview notes and their ultimate assessment of the candidates' interview performance, the decision nevertheless cites sufficient record evidence in support of its conclusion that the grievant did not prove, by a preponderance of the evidence, that discrimination or retaliation impacted the agency's selection decision. The hearing decision cites to specific explanations provided by one of the panelists in her "extremely credible" testimony, which indicated the "panel's belief that he [the grievant] did not perform nearly as well in his oral presentation" as the other candidates. Indeed, the hearing decision states that the hearing officer found "no evidence" that the grievant's prior protected activities or protected class status were the cause of his nonselection.

Hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.⁹ 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 record evidence and the material issues of the case, this Department

⁹ Va. Code § 2.2-3005(C)(5).

cannot substitute its judgment for that of the hearing officer with respect to those findings. Here, the hearing officer weighed the evidence, determined witness credibility and made his findings of fact based on the record evidence and the material issues surrounding the grievant's nonselection. Accordingly, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

CONCLUSION, APPEAL RIGHTS, AND OTHER INFORMATION

This case is remanded to the hearing officer for further clarification and consideration in Case No. 9285 as set forth above. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other new matter addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).¹⁰ Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.¹¹

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.¹² 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.¹³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁴

Claudia T. Farr
Director

¹⁰ See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

¹¹ See *Grievance Procedure Manual* § 7.2(a).

¹² *Grievance Procedure Manual* § 7.2(d).

¹³ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹⁴ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).