

Issue: Administrative Review of Hearing Officer's decision in Case No. 9507; Ruling Date: June 9, 2011; Ruling No. 2011-2969; Agency: Department of Rehabilitative Services; Outcome: Hearing Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Rehabilitative Services
Ruling Number 2011-2969
June 9, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9507. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The relevant facts of this case, as set forth in the hearing decision in Case Number 9507, are as follows:

Grievant applied for the position of Lead Counselor but was not chosen for the position. On June 3, 2010, Grievant timely filed a grievance to challenge the Agency's action.

* * *

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

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

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

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

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

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

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

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

The Agency formulated 10 questions to ask each candidate:

1. What is your understanding of the role of Lead Counselor based on the specific needs and internal resources within the [local] office? What specific knowledge, skills, abilities, and other qualifications do you offer to the position and to the unit?
2. Tell me about a time when your supervisor was absent and you had to make a very important decision. Specifically, what was the situation you were faced with and what was the outcome of your decision?
3. Identify three (3) characteristics you feel you possess that make you an effective leader. Give an example of how each characteristic has been used effectively in your work setting.
4. Tell me about a time when you had to communicate something that you knew the other person did not want to hear. How did you go about communicating it? How successful was the communication?
5. Tell me about a difficult situation (as a member of a team) when it was desirable for you to keep a positive attitude. What did you do? What were the effects of your actions?
6. We can sometimes identify a small problem and fix it before it becomes a major problem. Give an example of a time when you resolved such a problem without direction from a supervisor. What was the problem, how did you resolve it, and why didn't you wait for a supervisor to tell you to deal with it?
7. Describe a time where you set a demanding goal for yourself and reached it. Did you encounter any obstacles and if so, what were they? How did you overcome those obstacles? Why did you persevere in the face of these obstacles?
8. Tell of a time when you did not live up to your work expectations. How did you become aware and what were your reactions?
9. Why do you want to be the Lead Counselor of the [local] office?
10. Is there any additional information that you would like to share in order to be considered for the Lead Counselor position in the [local] office?

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

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

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

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

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

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

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

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

Ms. E testified that after reviewing how she rated each of Grievant’s answers to the questions asked him, she would only would have changed question number nine. Increasing Grievant’s rating with respect to question nine, however, would not change her conclusion that Ms. S was best suited for the position.

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

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

Applicant Name	Relevant Work Experience & Education	Comments on Quality of Interview Response
[Ms. S]	<p>Nearly 6 years of experience as a VR. Counselor II with DRS. Currently serves as a NCST, and “Your DRS Family” facilitator. MS degree in Counseling from [University]. Graduate Certificate in Sp.Ed/Acquired Brain Injury.</p>	<p>[Ms. S] articulated response to the “Performance Based Interview” that reflected specific Situations, Tasks, Actions, and Results that were relative to the area of assessment. She was able to effectively communicate a “solid” understanding of good leadership principles as relative to current needs, resources, as demonstrated in her current work role with DRS and other related experiences with the [Community Services Board] and professional</p>

		<p>organizations. She presented as very positive, “forward thinking”, and enthusiastic. It was clearly evident that she wanted this job; and ensured for the “best fit”.</p> <p>She clearly conceptualized the “big picture” perspective for the Lead Counselor Position in the [local office] and is highly recommended for hire.</p>
[Grievant]	<p>MS degree in Rehabilitation Counseling from [University]. Certified Rehabilitation Counselor (CRC). Certified Rehabilitation Provider (CRP). 31 years experience as a VR Counselor II with DRS.</p>	<p>[Grievant] articulated responses to “Performance Based Interview” questions with broad examples and situations that did not directly relate to the targeted area of assessment. Information discussed was very hard to follow at times, with no direct correlation to questions. He pointed out several examples of meaningful work in the 80’s and 90’s. He failed to adequately capture the “big picture” perspective for the Lead Counselor position in the [local office], and is not recommended for hire.¹</p>

Based on the forgoing facts, the hearing officer denied the grievant any relief, having reached the following Conclusions of Policy:

Department of Human Resource Management Policy 2.10 governs the hiring of executive branch employees. Once applications for employment are submitted, the Agency screens those applications and advances to an interview those applicants possessing at least the minimum qualifications for the position. A group of two or more individuals may interview job applicants for selection or

¹ Decision of the Hearing Officer in Case 9507 (“Hearing Decision”), issued April 8, 2011 at 1-6. Footnotes from the original Hearing Decision have been omitted here.

for referral to the hiring authority for selection. A set of interview questions must be developed and asked of each applicant. Interviewers must document applicants' responses to questions to assist with their evaluation of each candidate's qualifications. Selection is "the result of the hiring process that identifies the applicant best suited for a specific position."

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

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

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

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

The selection of an employee for a position represents an opinion. Sometimes a hiring panel forms the "correct opinion" and sometimes it forms the "incorrect opinion". The Hearing Officer is not a Super Personnel Officer. In other words, the Hearing Officer cannot resolve this grievance based upon his

personal opinion regarding who he would have selected had he been a panel member. Even if the Hearing Officer concludes that the hiring panel formed an “incorrect opinion” and the Hearing Officer would have selected Grievant instead of Ms. S for the position, the fact that the two panel members held a different opinion does not show that their opinion was arbitrary or capricious. Both panel members considered the facts before them and formulated a judgment based on those facts.

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

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

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

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

Since there is seldom eyewitness testimony as to an employer's mental processes, age discrimination can also be established through circumstantial evidence using an analysis of the employee's *prima facie* case and shifting burdens of production.

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

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

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

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

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity; (2) suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a 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 argued that the Agency retaliated against him by denying him the position of Lead Counselor. Grievant engaged in protected activity because he had filed numerous complaints with the Agency and with outside authorities. He suffered a materially adverse action because he was denied a position for employment. Grievant has not established a connection between his protective activity and the materially adverse action. No credible evidence was presented that Ms. E or Ms. Z were aware of Grievant's protected activities or took action against them as a form of retaliation. If the Hearing Officer assumes for the sake of argument that Mr. W intended to retaliate against Grievant, the outcome of this case remains the same. Ms. E and Ms. Z selected Ms. S without regard to retaliation against Grievant. They represented a majority of the panel who would have selected Ms. S regardless of any actions by Mr. W.²

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

Findings of Fact

The grievant's request for administrative review primarily challenges the hearing officer's findings of fact. 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 the grounds in the record for those findings.”⁶ 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. Here, the grievant primarily contests the hearing officer's findings regarding the selection process in this matter. This Department cannot find 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.

Although the grievant has argued that he was better qualified and the agency's decision to select Ms. S was arbitrary, the hearing officer correctly explained in his decision that he is not a super-personnel officer and it is not his place to resolve this grievance based upon his personal opinion regarding who he would have selected had he been a panel member. The hearing officer conceded that Mr. W, one of the three panel members, did not appear to care for the grievant.

² Hearing Decision at 7-10.

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.

The grievant asserts that, based on the finding that Mr. W had a negative attitude toward the grievant, the hearing officer should have concluded that the selection process was biased and unfair. However, the hearing officer found that the two other panel members independently concluded that Ms. S was the best suited candidate for the position and that neither panel member acted without a reasoned basis or with a disregard of the facts. Furthermore, he found that retaliation did not play a role in the selection process. There is record testimony evidence to support these findings.⁷ Accordingly, this Department has no reason to remand the decision on the basis of the hearing officer's findings.⁸

Alleged Bias of Hearing Officer

The grievant claims the hearing officer was biased against him. The EDR *Rules for Conducting Grievance Hearings (Rules)* address bias primarily in the context of recusal. The *Rules* provide that a hearing officer is responsible for:

[v]oluntarily disqualifying himself or herself and withdrawing from any case (i) in which he or she cannot guarantee a fair and impartial hearing or decision, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.⁹

Similarly, EDR Policy 2.01 states that a “hearing officer must voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot guarantee a fair and impartial hearing or decision or when required by the applicable rules governing the practice of law in Virginia.”¹⁰

The EDR requirement of recusal when the hearing officer “cannot guarantee a fair and impartial hearing,” is generally consistent with the manner in which the Virginia Court of Appeals approaches the judicial review of recusal cases.¹¹ The Court of Appeals has indicated that “whether a trial judge should recuse himself or herself is measured by whether he or she harbors ‘such bias or prejudice as would deny the defendant a fair trial.’”¹² We find the Court

⁷ Hearing testimony beginning at 3:45:00 and 5:28:00.

⁸ The grievant complains that the hearing officer did not reference testimony about his inability to type, or the fact that the successful applicant was the lesser of two evils. A hearing officer need not recite all facts or testimony revealed during a hearing. The hearing officer found that Mr. W had falsely accused the grievant and that he had an unprofessional attitude towards the grievant. That being said, the hearing officer also found, and record testimony supports, that Mr. W did not influence the decisions of the other two panel members. Finally, grievant accuses the hearing officer of an apparent ex-parte discussion with the agency representation based on the alleged absence in the hearing record of any testimony regarding Ms. S's plan to sit for the CRC exam. The grievant is incorrect in asserting that the record is devoid of any discussion of examination plans. This testimony begins at 2:06:00.

⁹ *Rules* at II.

¹⁰ EDR Policy 2.01, p. 3.

¹¹ While not always dispositive for purposes of the grievance procedure, this Department has in the past looked to the Court of Appeals and found its holdings persuasive.

¹² *Welsh v. Commonwealth*, 14 Va. App. 300, 315 (1992). (“In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.” *See Commonwealth of Va. v. Jackson*, 267 Va. 226, 229; 590 S.E.2d 518, 520 (2004)).

of Appeals standard instructive and hold that in compliance reviews by the EDR Director of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision. The party moving for recusal of a judge has the burden of proving the judge's bias or prejudice.¹³

The grievant has offered insufficient evidence of bias. The mere fact that findings align more favorably with one party than another will rarely, if ever, standing alone constitute sufficient evidence of bias.¹⁴ Therefore, this Department has no reason to remand the decision for this reason.

Appearance of Bias

While this Department has found no evidence of actual bias, we note the following regarding the appearance of bias. The *Rules for Conducting Grievance Hearings* ("Rules") instruct that the hearing officer should avoid the appearance of bias.¹⁵ The *Rules* caution, for example, that when questioning a witness, the "tone of the inquiry, the construct of the question, or the frequency of questioning one party's witnesses can create an impression of bias, so care should be taken to avoid appearing as an advocate for either side."¹⁶ In this case, the hearing officer appeared to be exasperated with the grievant and his frustration with the grievant was apparent in the tone of his voice. Some level of aggravation by the hearing officer is understandable. The grievant repeatedly failed to follow hearing officer instructions, for example, to refrain from providing his own testimony when questioning witnesses. However, even when justifiably frustrated by a party's failure to follow a directive, a hearing officer must remain cognizant that his or her reaction and conduct can be misconstrued as personal animosity or bias if not appropriately tempered. The hearing officer is reminded that as he directs parties, he should do so in a manner that will not reasonably call into question his impartiality. The *Rules* caution that a hearing officer should use care regarding the "tone" of witness questioning. Such caution is also applicable to the tone used in admonishing parties. Notwithstanding any potential harshness in the tenor of the hearing officer's admonitions, we stress that we observed no evidence of any actual bias in this case.

Inability to Present Testimony

The grievant asserts that there were "inappropriate actions taken by the hearing officer that prevented [the grievant] from questioning witnesses." Specifically, the grievant asserts that he was unable to adequately question panel member Ms. Z., who testified telephonically from an airport. The grievant asserts that he had to repeat questions and could not understand answers.

¹³ Jackson, 267 Va. at 229, 590 S.E.2d at 519-20.

¹⁴ *C.f.*, Al-Ghani v. Commonwealth, No. 0264-98-4 1999 Va. App. LEXIS 275 at *12-13 (May 18, 1999)("The mere fact that a trial judge makes rulings adverse to a defendant, standing alone, is insufficient to establish bias requiring recusal.").

¹⁵ *Rules* at § II.

¹⁶ *Id.* at IV (c).

In addition, the grievant asserts that he was not allowed to ask specific questions about what a rehabilitation counselor does.

Based on this Department's review of the hearing recording, we cannot conclude that the grievant was unduly hampered from questioning this witness. It is true that apparently due to background noise, questions to this witness had to be repeated. However, once repeated, the witness appeared to understand them and responses to the questions were audible and understandable. Furthermore, while the grievant is correct that this witness did not have access to her own interview notes, she nevertheless testified that: (1) she did not recommend the grievant for hire, (2) his answers did not seem pertinent to the majority of the questions and were not current, (3) he did not seem focused, (4) he did not demonstrate a lot of leadership examples, and (5) overall, she "didn't think it was a real strong interview."¹⁷ In addition, this witness testified that she reached her determination regarding the candidates independent of other panel members and that nobody influenced or attempted to influence her decision-making.¹⁸

The grievant also objects to the hearing officer's taking over of the questioning of panel member Ms. E. We find no error with the hearing officer's actions. The hearing officer explained that he was stepping in because the grievant was doing such an ineffective job of questioning the witness. We cannot conclude that the hearing officer was wrong to step in. When it seemed apparent that the grievant's attempt to question the witness was becoming increasingly inefficient and unproductive, the hearing officer stepped in and questioned her, probing why the two candidates received their respective interview scores. In a similar vein, the hearing officer intervened and questioned the successful applicant, Ms. S, regarding her knowledge and experience as compared to the grievant's. Thus, it seemed entirely evident to this Department that the hearing officer was merely attempting to discern the underlying facts surrounding the selection.

Finally, at hearing, the hearing officer explained to the grievant that panel members need not have detailed knowledge of the position for which they serve as interviewers, they need only to be familiar with the position under policy.¹⁹ This Department cannot conclude that this is an erroneous statement of policy, however, DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.²⁰ Accordingly, if he has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise this issue in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14th St., 12th Floor, Richmond, VA 23219.

Disregarding the Job Announcement Requirements

The grievant asserts that the agency disregarded one of the listed minimal requirements for the position: that the successful applicant possess a CRP (Certified Rehabilitation Provider) or other certification that qualifies them to become a CRP without examination. The hearing

¹⁷ Hearing recording 5:31:00-5:34:00.

¹⁸ *Id.*

¹⁹ Hearing recording 5:41:00-5:42:00.

²⁰ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653; 378 S.E.2d 834 (1989).

officer recognized that the announcement required the CRP or equivalent certification and that Ms. S did not possess such certification. He explained, however, that the evidence showed that the inclusion of the CRP requirement was erroneous.

The question of whether the CRP was erroneously omitted is a question of fact and one for the hearing officer to make. The question of whether an agency can ignore a requirement stated on a job announcement, even if the requirement was placed in the announcement erroneously, is a question of policy. Accordingly, if he has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise this issue in a request for administrative review to the Director of the Department of Human Resource Management.

CONCLUSION

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.²¹ 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.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³

Claudia T. Farr
Director

²¹ *Grievance Procedure Manual* § 7.2(d).

²² Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²³ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).