

Issue: Age Discrimination; Hearing Date: August 24, 2001; Decision Date:  
September 21, 2001; Agency: Virginia Department of Transportation; AHO: Carl  
Wilson Schmidt, Esquire; Case Number: 5263

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of Virginia Department of Transportation Case Number 5263

Hearing Date: August 24, 2001  
Decision Issued: September 21, 2001

**PROCEDURAL HISTORY**

On May 7, 2001, Grievant filed a grievance alleging he was not selected for two positions because he was discriminated against based on his age. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 24, 2001, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Representative  
Assistant Division Administrator  
HR Generalist III  
State Structure Engineer

**ISSUE**

Whether the Agency discriminated against Grievant because he is at least 40 years old.<sup>1</sup>

**BURDEN OF PROOF**

The burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency discriminated against him because of his age. *Grievance Procedure Manual*

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<sup>1</sup> Grievant contends he was discriminated against because of his age. He did not allege that the Agency misapplied its hiring policy except to the extent it discriminated against him. The Hearing Officer will not separately address whether the Agency complied with its Hiring Policy other than in the context of age discrimination.

(“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. *GPM* § 9.

## **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Transportation employs Grievant as an Environmental Program Manager. He has held that position since June 1979. He is 59 years old. Grievant has developed significant knowledge, skill, and abilities throughout his impressive career.

Grievant manages the Virginia Byways program. He coordinates with local governments and organizations. Grievant also coordinates funding and activities and provides advice to Agency managers regarding its six year improvement plan. He manages and generates policies, specifications, and standards relating to integration of environmental and landscape design for highway construction and maintenance programs and projects. Several programs are within Grievant’s responsibility including vegetation establishment, vegetation control, pesticide application, certification and re-certification, seed specifications and Virginia byways. One of Grievant’s duties is to propose legislation, regulations, and policies regarding the Agency’s Operations/Landscape section. Grievant also manages a five million dollar grants program. (Grievant’s Exhibit 21).

In 1977 to 1979, Grievant owned his own landscaping business. Before owning his own business, Grievant worked as a Civil Engineering Technician with direct supervision of three employees from 1971 to 1977. From 1965 to 1971, Grievant was a Chief Engineer with an electric power company. He supervised two employees.

Grievant is well educated. He received an Associate degree in Engineering Technology from American University in 1966. He received an Associate degree in Business Administration from John Tyler Community College in 1977. He finished his education with a B.S. degree in Horticulture/Landscape from Virginia Polytechnic Institute and State University in 1979.

Grievant is licensed in Commercial Pesticide, is a Certified Arborist, and is a licensed Landscape Architect.

### Assistant Division Administrator

In September 1999, Grievant applied for a newly created position of Assistant Division Administrator (“ADA”).<sup>2</sup> The Job Announcement for this position states:

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<sup>2</sup> Grievant filed his grievance more than 30 days past the time he learned he would not be selected for the position. Section 2.2 of the Grievance Procedure Manual states that, “[T]he written grievance must be initiated within 30 calendar days of the date that the employee knew, or should have known, of the event that formed the basis of the dispute. This 30-day requirement may be extended only if there is an agreement between the parties to waive this requirement or there is an agreement to mediate the dispute. Any such agreement should be in writing.” Grievant’s Form A specifically refers to the Assistant Division Administrator position. The Hearing Officer concludes that when the Agency Head qualified the grievance for a hearing, the Agency agreed to waive the 30-day requirement. Consequently, the Hearing

VDOT's Environmental Division has an exciting opportunity for an individual to provide leadership & oversight for the statewide vegetation management program to include: research, budgeting, manpower, legal sufficiency, and administration. The incumbent will assure commitment to the Dept. mission, goals, and values through the development, implementation, and management of statewide strategies to achieve a unified roadside vegetation program. Successful candidate should possess a thorough knowledge of environmental vegetation; experience organizing, supervising & managing people & programs; strategic planning; skill/ability to communicate orally & in writing; experience work [with] large groups, train staff, plan goals & objectives, develop budgets; PC/design. Degree in related field &/ or training & experience.

(Grievant's Exhibit 2).

Grievant was not selected for the Assistant Division Administrator position. The Hiring Manager drafted an interview summary as follows:

[Grievant] has a BS Degree in Horticulture and approximately 20 years of job related experience. He has work experience with vegetation management and the Virginia byway program. He was not considered the best qualified applicant for this position. His responses to questions regarding program objectives and priorities for this position with statewide responsibility focused on internal reorganization, compensation and retitling concerns. His responses were not specific and did not indicate an insight to the responsibilities of his role. For example, he lacked the supervisory and management experience held by other candidates. His work experience has been more project than program oriented. His budget experience is limited to special projects using grant or special allocation funds.

(Grievant's Exhibit 9).

The successful candidate for the Assistant Division Administrator position was in his early 40s. He formerly worked as a Transportation Roadside Development Manager in one of the Agency's regional locations. Seventy-five percent of his duties focused on grounds maintenance of approximately 100 acres. His responsibilities included supervising grass mowing; trimming or removal of plant materials; pesticide activity; snow and ice removal; drainage, grading, and filling projects; layouts for concrete walks, floors, patios and steps; road, signs, and fence maintenance; hauling and demolition of buildings; and determining the number and variety of plants to use in planting beds. His responsibilities also included keeping timesheets for his employees. Fifteen percent of his duties involved supervising gasoline storage and all college vehicles and outdoor equipment. Ten percent of his job involved supervising trash pickup. He supervised two full time staff and seven students during the summer.

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Officer will address whether the Agency discriminated against Grievant based on his age in the context of his rejection for the Assistant Division Administrator position.

The successful candidate received an Associate Degree in science in 1977. He earned a B.S. in Horticulture in 1979 and began working on his Master's degree in 1993.

As part of the selection process, the Hiring Manager wrote an interview summary regarding the successful candidate:

[Successful candidate] has an Associates Degree in Science and a B.S. degree in Horticulture. He is working towards obtaining a Masters Degree in Plant Pathology in December 2000. He has approximately 16 years of related experience. During his 12 years of employment with VDOT, he has managed the ... District roadside program. His district program areas are identical to this position. He has supervised a workforce of 25 employee and contractor personnel. He plans and administers the district-wide budget for vegetation management. He designed a program to expedite the issuance of permits for work on VDOT rights of way. As a result, he was assigned responsibility to administer the program and issue all permits. [Successful candidate] has an excellent concept on the objectives and benefits of a statewide integration vegetation program as indicated by his answer to question #3. The selection panel determined that he was the best overall qualified applicant for the position.

(Grievant's Exhibit 13).

#### Engineering Manager II

In February 2001, Grievant applied for the position of Engineering Manager II ("EM"). The Job Announcement for this position states:

##### Job Duties/Qualifications

Provides statewide management of environmental design, landscape contract management, Virginia Byway and Grant program. The successful candidate should possess the following knowledge, skills & abilities: Thorough knowledge of forestry, agronomy, landscape architecture and horticulture; agency programs as related to personnel roadside management and environmentally sound maintenance & construction methods; ability to utilize computer software; demonstrated ability to manage programs; to develop & administer contracts and budgets; oral and written communication; environmental issues, landscape techniques and methods; develop project standards; read and interpret highway and landscape design plans; certified landscape architect; ability to obtain Virginia contracting certification or equivalent training.

(Grievant's Exhibit 15).

Following Grievant's interview, the Hiring Manager<sup>3</sup> drafted an interview summary explaining why Grievant was not selected for the position. Grievant's strengths were described

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<sup>3</sup> The Hiring Manager for the Engineering Manager II position was the successful candidate for the Assistant Division Administrator position.

as, “Has knowledge of various roadside programs and experience with grant programs.” His weaknesses were described as:

Limited landscape design experience, has CAD but does not use everyday. Does not have “direct supervisory” and personnel management experience. Does not develop budgets, monitors them (limited to grants). Contract administration is limited to setting up accounts and monitoring expenditures.

(Grievant’s Exhibit 23).

The successful candidate for the Engineering Manager II position was in his 40s and had substantial experience and education. For eight years, the successful candidate worked as a Senior Landscape Architect for the transportation department of another state. He was responsible for landscape and environmental planning, design, construction, and maintenance. He reviewed capital projects and wrote environmental documents for impacts, permits and compliance. Among his duties included coordinating bike and pedestrian programs. He prepared reports, public presentations, and workshops. He directly supervised three professional staff.

Before working as a Senior Landscape Architect, the successful candidate served as Project Manager in a landscape architecture business. He was responsible for all aspects of planning, design, and production of site design. He worked in grading, site utilities including permitting design of on-site detention/retention facilities. Two landscape architects reported directly to the successful candidate.

The successful candidate also worked as a Project Manager for another employer in Virginia. He handled all aspects of planning, design, and production of public and private projects, campus master plans, historic trees inventory and management. He performed site engineering for office projects including grading and utility plans.

The successful candidate is well educated. He received a B.A. in Environmental Studies in 1977 and a Bachelor of Landscape Architecture, *Magna Cum Laude*, in 1978. He also earned a Master of Regional Planning in 1987. The successful candidate received his landscape architect license

The Hiring Manager prepared an interview summary explaining why the panel selected the successful candidate:

Strengths: Has BLA/BS degree in Landscape Architecture. Masters in Regional Planning. Currently a Senior Landscape Architect for NY DOT. Licensed [landscape architect with] NY State. Excellent communication skills. Answers to questions were thorough and specific. Has extensive management and supervisory experience with botanical gardens, Parks Dept. and NY DOT. Project responsibilities range from \$250,000 to \$60,000. Has worked with bikeways, cultural ... grant and wetlands programs. Has contract administration experience, administers from “cradle to grave”. Has budget experience (establishes priorities, works within caps, determines if work is performed by staff and consultant). Has training experience with field personnel on landscape design.

Weakness: Currently not performing actual design, however is proficient in CAD or microstation.

(Grievant's Exhibit 26).

## CONCLUSIONS OF LAW

Governor Gilmore's Executive Order Number Two declares that it is the firm and unwavering policy of the Commonwealth of Virginia to assure equal opportunity in all facets of state government. Discrimination on the basis of age is prohibited. Policy 2.05 of the Department of Human Resource Management "(DHRM)" prohibits employment discrimination in all aspects of the hiring process.

Age discrimination can be established by proof of disparate treatment.<sup>4</sup> 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.<sup>5</sup>

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.

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 (particularly if the falsity is accompanied by a suspicion of mendacity) that the employer is trying to cover up a discriminatory purpose.

Grievant has met his *prima facie* case. He is 59 years old, qualified for both positions, rejected despite his qualification, and rejected in favor of substantially younger candidates.

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<sup>4</sup> Grievant acknowledged that he could not establish age discrimination through evidence of intentional discrimination.

<sup>5</sup> See, Reeves v. Sanderson Plumbing, Inc., 530 U.S. 133 (2000) and O'Connor v. Consolidated Coin Caters Corp., 56 F.3d 542 (1995), *rev'd on other grounds*, 517 U.S. 308 (1996).

The Agency contends Grievant was rejected for younger candidates because those candidates were better suited for the positions. The Agency presented sufficient evidence to suggest it selected the best-suited candidates. Consequently, the Agency has met its burden of production.

The question becomes whether the Agency's allegation that it selected the best-suited candidate is a pretext for discrimination. Grievant contends the Agency's explanation is a pretext because he was better suited for the positions. To discern the answer to this question, the Hearing Officer reviewed the documents submitted and the testimony of the witnesses.

*Documentation.* One way to measure whether Grievant was inappropriately excluded from consideration is to determine whether the Agency collected appropriate information and then considered that information. The Hiring Policy states that interview questions should seek information "related to the applicant's knowledge, skills, and ability to perform the job." Questions that are not job-related or that are contrary to Equal Employment Opportunity standards are not permitted. P&PM § 2.10(VI)(B). In order to determine whether questions are job-related, the Hearing Officer reviewed the job announcements and the position descriptions for the two positions. The Hearing Officer concludes that the questions asked were appropriate for the requirements of the positions.

Each panel member wrote Grievant's answers to panel questions. The Hearing Officer compared those answers with the interview summaries for Grievant and for the successful candidates for each position. Based on that review, the Hearing Officer concludes:

- Grievant's interview summaries for the ADA and the EM positions accurately reflect the answers he gave to panel questions.
- The interview summaries for the ADA and EM successful candidates accurately reflect the answers given by them to panel questions.
- The Agency appropriately considered answers to questions and interview summaries to select who it believed was the best-suited candidate for each position.

Grievant's performance during the interview process may have played a role in his receiving lower marks. The Hearing Officer reviewed the notes of each panel member and compared Grievant's responses to the responses of the successful candidate. For each position many of Grievant's responses were comparable with those of the successful candidates. Overall, however, panel member expresses slightly more concern about the quality of the answers given by Grievant. For example, in response to the ADA interview question, "What do you believe should be the objective of a roadside vegetation management program?", Grievant initially responded that he was not sure what response the panel was seeking.<sup>6</sup> After hearing Grievant's response to the ADA interview question, "What would be your approach in creating either a program or policy for statewide implementation?", the panel member wrote, "APA knowledge was not correct." Another panel member wrote, "Has limited knowledge of Admin Process Act." With respect to the Engineering Manager II position, Grievant finished his interview in 35

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<sup>6</sup> One panel member described Grievant's response as, "not quite sure what we want ..."



minutes rather than the 50 taken by most other candidates.<sup>7</sup> A career as impressive as Grievant's career surely would require more than 35 minutes to discuss.

After reviewing the written evidence and the oral testimony, the Hearing Officer concludes that (1) Grievant did not perform as well during the interview process as did the successful candidates for the two positions and (2) Grievant's performance affected the Agency's decision to reject him for the positions.

*Testimony.* Agency witnesses testified that Grievant's was not considered in the selection process and that Grievant was not the best-suited candidate for the positions. Their testimony was credible and supported by the record.<sup>8</sup>

Grievant contends he was improperly rejected for the positions because the Agency mistakenly concluded he lacked direct supervisory experience. Based on the evidence presented, the Hearing Officer concludes that Grievant does not have relevant direct supervisory experience because he does not have any employees reporting directly to him.<sup>9</sup> He does not write evaluations, approve leave records, or conduct other duties regarding direct subordinates. Grievant's supervision experience in his present position consists of supervising programs and giving directions to the individuals in different locations of the State who implement the programs.

Both positions require supervisory experience. The ADA job announcement states that the successful candidate, "should possess a thorough knowledge of ... supervising and managing people ...." The EM position description states, "Supervises a staff of landscape architects and technicians in the development of landscape plans for construction projects or other aesthetic initiatives."<sup>10</sup> It was appropriate for the Agency to distinguish between candidates based on their direct supervisory experience. Although the Hearing Officer disagrees with the degree of importance the Agency attached to this distinction, the Agency's distinction is appropriately within the scope of the Agency's judgment and not based on Grievant's age.

Grievant contends the Agency improperly disregarded his budget experience. Both the ADA and EM positions reveal a preference for candidates with experience developing budgets.

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<sup>7</sup> Grievant contends he finished in 35 minutes because he was informed that the interview would not exceed 35 minutes. Assuming Grievant was misinformed of the length of time he had to complete the interview, the Hearing Officer cannot conclude misinformation was intentional. The fewer minutes devoted by Grievant to answering questions supports the Hearing Officer's belief that Grievant did not perform as well as other candidates during the interview process.

<sup>8</sup> It is certainly possible that the Agency made a mistake and that Grievant actually was the best-suited candidate for the positions. From this mistake, however, the Hearing Officer would not infer evidence of a pretext for discrimination. Rather, the Hearing Officer would simply infer the Agency made a mistake.

<sup>9</sup> During the ADA interview, Grievant informed the panel that he supervised one employee during the previous three years. It is not clear from the record whether that employee directly reported to Grievant. For example, Grievant's application for employment does not show he directly supervised an employee. It only shows he directly supervised employees over 20 years ago.

<sup>10</sup> See Grievant's Exhibit 16.

Both Grievant and the successful candidates had experience implementing budgets but not developing budgets.

Grievant contends the Hiring Manager for the EM position downgraded him in the interview summary for lacking budget development experience, but did not downgrade the successful candidate for also lacking budget development experience. Although Grievant's argument has substance, the Hearing Officer concludes that the distinction is not material. The Hiring Manager refers to the successful candidate as having "budget experience" but does not say budget development experience. In addition, the budget experience of the successful candidate is different from Grievant's budget experience. The successful candidate has experience making "cost vs. benefit" decisions regarding selecting contractors and other budget dilemmas.

*Conclusion.* The Hearing Officer considered all evidence presented by Grievant and the Agency and the Hearing Officer cannot conclude that Grievant was better suited for the positions than the successful candidates.

Grievant's demonstrated experience make him an extraordinary candidate for employment. His frustration at being rejected is understandable. Unfortunately, the candidates against whom Grievant was competing were also extraordinary. The Hearing Officer cannot discern any material flaws in the qualifications of the selected candidates that would lead the Hearing Officer to conclude that Grievant must have been better suited than the candidates selected. Consequently, there is no basis for the Hearing Officer to conclude that the Agency's representation of a legitimate, non-discriminatory reason was inaccurate.

## DECISION

For the reasons stated herein, Grievant's request for relief based on age discrimination is **denied.**

## APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

Section 7/2(d) of the Grievance Procedure Manual provides that a hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq., Hearing Officer