

Issue: Misapplication of hiring process; age discrimination; Hearing Date: January 28, 2002; Decision Date: April 5, 2002; Agency: Department of Transportation; AHO: Carl Wilson Schmidt, Esquire; Case No.: 5361



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5361

Hearing Date: January 28, 2002
Decision Issued: April 5, 2002

PROCEDURAL HISTORY

Grievant applied for the position of Human Resource Practitioner II in District C. She was denied the position. On September 4, 2001, Grievant timely filed a grievance to challenge the hiring decision. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 2, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 28, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Legal Assistant Advocate
Senior Employee Relations Consultant
Administrative and Program Specialist
EEO Manager
Two HR Generalists
HR Consultant
Acting Assistant Commissioner

ISSUE

Whether the Agency misapplied hiring policies and discriminated against Grievant because of her age.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she seeks should be granted. Grievance Procedure Manual ("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 a Human Resource Practitioner II in District F. She applied for the position of Human Resource Practitioner II in a neighboring residency, District C. The job announcement¹ stated:

Provide comprehensive range of complex Human Resource services in a variety of functional areas of human resources management. Resolve complex issues related to classification & compensation management, employment, performance management, internal & external human relations; benefits & employee grievances; investigate/analyze legal employment issues; conduct human resource management training & development, including coaching.

Requires considerable current knowledge of a broad range of human resource programs, i.e., employment, benefits, classification, compensation, employee relations; knowledge of theories, principles & practices of human resource management, & of related federal & state policies & laws, i.e. EEO, affirmative action, etc. Knowledge of basic educational principles, primarily adult education. Ability to communicate orally & in writing with all levels of employees, management, & external customers to provide consultation & problem resolution services; to create & write technical reports; to deliver instructional materials; to analyze & interpret data/information, & formulate conclusions. Ability to work independently & exercise judgment; to resolve issues/problems; & to interview & counsel individuals; identify & recommend alternatives & actions. Ability to use personal computer, preferably MS Word, &

¹ Grievant Exhibit 1.

spreadsheets. Valid Virginia Operator's license is required. Selected candidate subject to DMV driving record review.

Applicants were instructed to respond by December 15, 2000. Grievant submitted her State application on December 14, 2000.

On January 3, 2001, Grievant sent the Acting Human Resource Manager at the C District office a letter² stating:

I would like to transfer to the [District C] and am submitting a Request for Lateral Transfer and current Virginia State Application. I live in [District C area] and need to work closer to my family and home. I would greatly appreciate your consideration of my lateral transfer request.

Grievant did not get a response to her letter. She was not transferred.

The Agency selected a three-person panel to conduct interviews of candidates. The panel consisted of the HR Manager, HR Consultant, and HR Generalist. The HR Manager and Generalist worked in District C while the HR Consultant worked in the Agency's central office.

On April 24, 2001, Grievant interviewed for the Human Resource Practitioner II position. Two days later, the HR Manager called Grievant and told her that the Agency had decided to re-advertise the position because of the lapse of time and that Grievant would be considered for the position without having to reapply. The position was re-advertised with a closing date extension of May 14, 2001. Additional candidates, including the selected candidate, were interviewed in July. Following the July interviews, the panel also considered all of the candidates who interviewed in April. On August 7, 2001, the HR Manager called Grievant and told her that someone else had been selected for the position.

During their interviews, Grievant and the successful candidate were asked most of the same questions. Some of the questions were different. For example, Grievant and the April interviewees were asked:

Question: Tell us about any relevant experience you have in the development, implementation and/or administration of various HR policies, programs of pay, and performance systems?

The successful candidate and the July interviewees were asked:

Question: Tell us about any relevant experience you have in the development and/or administration of pay and performance systems?

² Grievant Exhibit 1.

Question: Our Human Resources is extremely busy and handling/juggling multiple priorities is a daily routine. Describe a job you have had that is most like this HR situation. How have you handled any stress that has arisen from this type of situation?

Question: In Human Resources, we frequently have to step outside of our individual program areas and responsibilities and put on a “new hat” in order to assist other team members with an important project or initiative. Tell us about a time when it was necessary for you to do this.

Grievant described part of her interview as follows:

During the interview, the questions were divided among the three interviewers. While [the HR Generalist] was asking her set of questions, [the HR Consultant], who was seated to my left, started making muttering noises and was flipping through the pages of a copy of my application. He stopped the interview and stated that he was confused about my employment history with VDOT. He was counting with his fingers how many months I had been in my current position. He also asked me if I had been an Hourly employee. He appeared to have an urgent need to “count up” my VDOT time, so I asked [the HR Generalist] if we could stop the interview, while I tried to walk [the HR Consultant] through my VDOT history. ***

After the interview was over, I was leaving the conference room and stopped to speak with [the HR Generalist]. Since we had history interviewing many times together, I teased her about the number and difficulty of the interview questions. I also mentioned that I really missed the [District C] HR Team. To this [the HR Generalist] replied, “Well, the grass isn’t always greener, is it?” I interpreted this comment as a way of letting me know that I would not be coming back to [District C].

Grievant graduated from high school and received her B.S. degree in social work from a university in 1975. Her work history is as follows:

<u>Time Period</u>	<u>Title</u>	<u>Location</u>
7/00 to present	Human Resource Practitioner II	District F
8/99 to 7/00	Right of Way Agent	District C
2/99 to 7/99	Temporary employment at Agency	District C
3/97 to 2/99	Personnel Practices Analyst	District C
6/96 to 3/97	Personnel Practices Analyst Senior	District C
9/92 to 6/96	Personnel Practices Analyst	District C
10/90 to 9/92	Equal Employment Manager – Marine Corp. Base	Northern Virginia
3/89 to 10/90	Employee Relations Specialist – Marine Corp. Base	Northern Virginia

11/88 to 3/89	Personnel Staffing Spec. – Dept. of Navy	Northern Virginia
9/87 to 1/88	Consumer Protection Investigator Prince William County Consumer Affairs	Northern Virginia
8/86 to 9/87	Homemaker	
5/84 to 8/86	Deputy EEO Officer – Marine Corp.	Washington D.C.
9/83 to 5/84	EEO Investigator – Dept. of Navy	Northern Virginia
5/77 to 9/83	EEO Specialist – Dept. of Treasury	Washington D.C.

Grievant is 48 years old. The successful candidate was age 39. Seven of the ten human resource and development staff in District C are age 40 or older. The average age is 46.³

CONCLUSIONS OF LAW

Classified employees are to be selected “based upon merit and fitness, to be ascertained, as far as possible, by the competitive rating of qualifications” Va. Code § 2.2-2901(A). Agency positions must be filled in accordance with Department of Human Resource Management’s Policies and Procedure Manual (“P&PM”) Policy 2.10. The Agency also has a companion Hiring Policy entitled VDOT Policy 2.10. For the purpose of this decision, these policies are collectively referred to as the Hiring Policy.

The State Hiring Policy 2.10 requires agencies to post job announcements, screen candidates based on their knowledge, skills, and abilities, conduct interviews, and select the person best suited for the position. Agencies may conduct interviews by (1) the hiring authority, (2) persons designated by the hiring authority, and/or (3) a panel. The hiring authority is the “individual making the final hiring decision.” A selection panel is the “group of individuals that interview job applicants for selection or referral to the hiring authority for selection.” “Panel members shall make a recommendation regarding their choice of applicant(s) to the hiring authority.”

Interviews are a required step in the selection process. “A set of interview questions should be developed and asked of each applicant.” These 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 violate EEO standards are not permissible.”

The individual responsible for making the selection decision is called the Hiring Manager.⁴ The Hiring Manager must select the candidate who is “best suited for the

³ Agency Exhibit 2.

⁴ VDOT Policy 2.10(II)(C).

position applying fair hiring practices (i.e. VDOT/DPT policies, EO/AA goals, and employment laws).”⁵

Applicant Pool

Grievant contends that the applicant pool was no longer viable at the time the successful candidate was chosen. At the time Grievant was interviewed, more than 120 days had passed since the deadline for submission of applications. VDOT policy states, “Applicant pools are active for ninety days from the closing date for the position.”⁶ The Agency interprets this language to mean that another individual in the pool may be selected for a period of 90 days. For example, if the Agency advertises for a policy analyst’s position and during the 90 days another analyst position becomes vacant within the Agency, the Agency can fill the newly vacant position from the existing applicant pool without having to go through the expense of another recruitment. Or if the Agency hires a candidate from the pool and the candidate quits shortly after beginning work, the Agency can select another candidate from an active pool without having to recruit again. The Agency’s interpretation appears reasonable. Even if Grievant’s interpretation is upheld, the consequences of having an aged applicant pool are not specified by the Hiring Policy.

Panel Selection

Grievant alleges the Agency violated policy because one of the panel members drafted the job announcement, screened applicants, and was a friend of Grievant. The panel member was also a candidate for the position but withdrew before the interviews began. Although this practice may seem unusual, the Hearing Officer does not conclude that it is contrary to the Hiring Policy. Since Grievant was screened into the applicant pool and received an interview, any policy violations regarding drafting the job announcement and screening applicants would not have harmed her. In addition, having a friend on the panel would not necessarily be detrimental to her chances for selection.

Grievant’s Interview

Grievant contends she was asked written questions that differ from the written questions asked of the July candidates. Grievant’s contention is correct and shows that the Agency failed to follow the Hiring Policy. In order to compare all of the applicants appropriately, the Hiring Policy requires each candidate to be asked the same set of questions. The Hearing Officer’s authority is limited to ordering the Agency to comply with policy. In order to comply with the Hiring policy, the Agency must take one of two actions: (1) re-interview all applicants using the same questions or (2) reconvene the panel. If the Agency reconvenes the panel, the panel must first disregard those

⁵ VDOT Policy 2.10(IV)(I)(c).

⁶ VDOT Policy 2.10(III)(B)(3)(a).

questions not asked of all the interviewees and then determine if the remaining questions will enable it to distinguish between the candidates such that it can select the best suited candidate. If the panel believes it can appropriately distinguish between the interviewed candidates, then the panel must reconsider all interviewed candidates based on the remaining questions and reach a decision regarding which candidate is best suited for the position.

Grievant contends that the HR Consultant acted contrary to policy by interrupting the interview with questions about her experience with VDOT. Grievant's argument is untenable. Policy 2.10 states, "The interviewer(s) may ask additional questions ... to **clarify** information provided by the applicant." (Emphasis added). In this example, the HR Consultant was asking Grievant to clarify her employment history with VDOT. His questioning was in accordance with policy and reflected good judgment. Without asking for Grievant's comments, the HR Consultant would have been left to speculate on Grievant's work history without knowing her explanation or whether some fact existed that would explain away his concerns.

Grievant argues that the HR Generalist's statement about the grass not always being greener revealed the panel had prejudged her application. The HR Generalist testified that her comment was light-hearted and actually reflected some of her personal concerns about working in District C. This evidence is insufficient for the Hearing Officer to conclude that the panel prejudged her application.

Best Suited Candidate

Grievant contends she was the best suited candidate for the position and the Agency failed to follow its policy by not selecting her for the position. The Hearing Officer will not address this contention because the Agency did not rely on the same questions for all interviewed candidates. By failing to ask the same questions of all candidates, the Agency may not have fully evaluated all applicants. It should be noted, however, that it is not the role of the Hearing Officer to substitute his judgment for that of the Agency when evaluating who is the best suited candidate. For example, one person may consider Grievant's work history to reflect a well-rounded capable employee whereas the HR Consultant felt that Grievant's work history "raised a red flag." The HR Consultant suggested that Grievant's history of approximately 13 different jobs in 23 years with only two promotions shows Grievant was "job hopping" and had undefined career goals.

Grievant contends the selected candidate was chosen because of her friendship with one of the panel members. The evidence did not support this conclusion. In addition, the Hiring Policy does not prohibit individuals who have friendships with applicants from serving on panels.

Lateral Transfer

The Agency has a policy governing lateral transfers of its employees. This policy states, “The hiring manager may, at any time during a recruitment process, elect to review requests for lateral transfers and interview any number of the employees applying for lateral transfer as long as similarly qualified employees are treated consistently.” The hiring manager has the authority to stop the recruitment process at any time and fill the position with an employee by lateral transfer.

Grievant contends the Agency should have granted her request for lateral transfer. Her argument is unsupported by the policy. Although the Hiring Manager could have stopped the process and filled the position with an employee by lateral transfer, nothing in the policy requires the Hiring Manager to do so. Indeed, the policy states, “The hiring manager determines whether he/she will fill a vacancy through lateral transfer or competitive recruitment.” This language shows the Hiring Manager has discretion as to whether to grant Grievant’s request. There is no basis for the Hearing Officer to conclude that Grievant must be transferred to a position within District C.

Age Discrimination

The Governor’s Executive Order on Equal Opportunity 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. 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.⁷

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.

⁷ 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).

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.

Grievant has offered no credible evidence showing the Agency discriminated against her because of her age. If the Hearing Officer assumes for the sake of argument that Grievant established a *prima facie* case of age discrimination, the Agency has established that it did not discriminate against Grievant because of her age.

DECISION

The Agency failed to comply with the Hiring Policy by not asking the same questions of all interviewed applicants. In order to comply with the Hiring Policy, the Agency must either (1) re-interview all applicants using the same questions or (2) reconvene the panel. If the Agency reconvenes the panel, the panel must first disregard those questions not asked of all the interviewees and then determine if the remaining questions will enable it to distinguish between the candidates such that it can select the best suited candidate. If the panel believes it can appropriately distinguish between the interviewed candidates, then the panel must reconsider all interviewed candidates based on the remaining questions and reach a decision regarding which candidate is best suited for the position. GPM § 5.9(a)(5).

Grievant's request for an administrative transfer is denied. Grievant's request for relief under age discrimination is denied.⁸

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.

⁸ Grievant also sought relief of a written assurance from the Agency that there would be no retaliation. The Hearing Officer lacks the authority to order the Agency to draft such an assurance. No such assurance is necessary, however, because the Grievance procedure already expressly prohibits retaliation. GPM § 1.5; See also, *Va. Code § 2.2-3004(A)*. Grievant asked to be awarded attorneys fees. No evidence was presented regarding attorneys' fees and the Hearing Officer cannot award attorneys fees. GPM § 5.9(b)(1).

Administrative Review – This decision is subject to three 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 Resource 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.

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.

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 DHRM, 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

