

Issue: Misapplication of hiring policy; Hearing Date: 09/10/02; Decision Date: 09/12/02; Agency: Dept. of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esq.; Case No.: 5503



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5503

Hearing Date: September 10, 2002
Decision Issued: September 12, 2002

PROCEDURAL ISSUES

Although the hearing was initially docketed within 30 days of appointment of the hearing officer, the grievant indicated a desire to have the issue mediated, although she later decided not to mediate. Subsequently, unavailability of a witness resulted in further postponement. Therefore, the hearing was conducted on the 51st day following appointment.¹

During the hearing, the grievant indicated that she no longer wanted to work in the position for which she had applied. Grievant was under the mistaken impression that a hearing officer could award her a new role title and pay increase equivalent to the position applied for. However, under the circumstances herein, the hearing officer's authority is limited to directing the agency to redo either the entire selection process, or that part of the process

¹ § 5.1, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual* requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

deemed to have been flawed. Nonetheless, grievant maintains that the selection process has been misapplied and she wanted to continue with the hearing to prevent future similar misapplications.

It is important to emphasize that in a hearing involving the alleged misapplication of a hiring policy, the hearing officer's role is to ascertain whether the hiring process was misapplied. The hearing officer is not expected to decide whether any grievant is more or less qualified than any other applicant. Rather, the hearing officer evaluates whether the hiring process was in compliance with agency policy and Department of Human Resource Management policy.

APPEARANCES

Grievant
Human Resource Analyst
Legal Assistant Advocate for Agency
Two witnesses for Agency

ISSUE

Was the hiring selection process misapplied?

FINDINGS OF FACT

The grievant filed a timely appeal following a selection process in which she was not the successful applicant. Following failure to resolve the grievance at the third resolution step, the agency head declined to qualify the grievance for a hearing.² Subsequently, the grievant requested the EDR Director to qualify the grievance for a hearing. In a qualification ruling, the EDR Director concluded that application of the hiring criteria raised a sufficient question as to whether the agency misapplied the hiring policy, and therefore qualified this issue for a hearing.³

The Department of Mental Health, Mental Retardation and Substance Abuse Services (MHMRSAS) (Hereinafter referred to as "agency") has employed the grievant for 14 years. During the past two years she has been an office service assistant. Previously she had been a transcriptionist for seven years and an admissions clerk for four years.

In 2001, the facility's Medical Director learned that his secretary was retiring. He notified the Human Resources department, which followed routine

² Exhibit 14. Grievance Form A, filed August 31, 2001.

³ Exhibit 5. Ruling Number 2001-203, Qualification Ruling of Director, July 26, 2002.

policy and procedures to advertise the anticipated opening for the secretary's position. The text of the advertisement described the position's purpose and the qualification standards.⁴ The advertising generated 54 applications for the position of medical staff secretary. The purpose of this position is:

Provides secretarial and administrative services to the Medical Director by performing *with little guidance* clerical, stenographic, and administrative duties requiring the application of administrative and clinical polices. Serves as Medical Staff secretary dealing with sensitive and confidential medical personnel information and files.⁵ (Italics added)

The Medical Director's secretary must regularly work with hospital physicians, other hospital staff, and relatives of hospital patients. The secretary must be capable of effectively and confidently dealing with people who may be upset in highly charged situations. The Director's secretary must also be capable of producing high quality documents, often with only general guidance from the Director. The secretary handles scheduling and other administrative duties for the Medical Director. The secretary is also expected to maximize the use of computer software to streamline and enhance the department's work product, be innovative, creative and use initiative in solving daily problems.⁶

While agencies and facilities may develop their own hiring policies, such policies must be in compliance with the policy established by the Department of Human Resource Management (DHRM).⁷ The facility has promulgated its own hiring policy that details procedures for solicitation of applicants, advertising of the position within and outside state government, screening of applications, and the interview process for screened applicants. The policy provides, in pertinent part:

A personnel representative, along with the hiring manager or supervisor will screen the applications based on established job related screening criteria which must be consistently applied to all applicants.⁸

The hiring manager (Medical Director) was scheduled for vacation. If the screening had been delayed until he returned from vacation, it would have delayed the entire hiring process and would have left the secretary's job vacant for a period of time. The Medical Director therefore delegated his role as co-screener to a Human Resources administrative assistant whose position is similar in many respects to the position for which grievant was applying. This

⁴ Exhibit 17. Text of advertisement for Medical Staff Secretary position.

⁵ Exhibit 2. Employee Work Profile, *Medical Staff Secretary*, April 9, 2001.

⁶ The factors in this paragraph were gleaned from the Medical Director's testimony.

⁷ Exhibit 16. DHRM Policy No. 2.10, *Hiring*, revised March 1, 2001.

⁸ Exhibit 1. Facility Policy No. 6001, *Procedures for Filling Vacancies*, effective July 11, 2001.

administrative assistant and a Human Resources analyst conducted the screening process utilizing seven specific criteria derived from the advertising language.⁹ The seven applicants who scored highest in the screening were selected for interviews.¹⁰ One of the seven withdrew her application from consideration. Five of the six remaining applicants were interviewed on August 10, 2001. Grievant was unavailable on that date due to a medical appointment and was interviewed on August 13, 2001. After the last interview, the panel reconvened later that day to discuss the applicants. The panel chairperson (the Medical Director) asked the panel to list, in rank order, their top three recommended applicants. All three panelists independently listed the selected applicant as their top choice.

DHRM Policy 2.10 addresses interview questions and states, in pertinent part, "Questions should seek information related to the applicant's knowledge, skills and abilities to perform the job."¹¹ The final interview question was, "What is your interest in this position and why are you applying for it in particular? Grievant responded to the effect of, "I enjoy working alone. Sometimes it can get frustrating and complicated with all the people to deal with on my present job." The selected applicant said, "I'm organized. I enjoy my current position but would like an increase in salary and position and the job would be interesting. I enjoy meetings and working at the facility. I consulted with [incumbent secretary] about what is involved in the position."¹²

The first qualification standard states, "*Prefer an Associate Degree in Secretarial Science or demonstrated equivalent in education and experience.*" (Italics added). Grievant obtained an Associate Degree in data processing; the selected applicant also has two years of college credits but has not obtained a degree.

The second criterion seeks, "Experience as a professional secretary with extensive experience in multiple areas of general office procedures and administration." Grievant has been a unit secretary for two years, and an office services assistant performing primarily transcription duties for seven years. Previously she had worked part-time (10 hours per week) as a transcriptionist for four years. The selected applicant had been an office services assistant for two years, an office services specialist for two years, a part-time (28 hours per week) insurance agency secretary for one year, and a part-time (25 hours per week) auto dealership secretary for two years.

⁹ Exhibit 3. Screening Criteria for Executive Secretary position.

¹⁰ Exhibit 4. Applicant Screening Worksheet. The seven applicants selected for interviews are indicated by a checkmark on or just to the left of the leftmost border of the worksheet table. For example, on the first page two applicants (second and fourth) were selected for interviews.

¹¹ Exhibit 16. *Ibid.*

¹² This is an amalgam of the responses written by the three panel members.

The fifth qualification standard states, "Considerable skill in typing, use of a personal computer and word processing, database, spreadsheets, timekeeping/scheduling software and other automated office systems and equipment." The interviewees had been requested to take a typing test administered by the Virginia Employment Commission (VEC). Those test results were not received by the agency until August 15, 2001 - two days after the final selection had been made on August 13, 2001.¹³ The panel had decided not to use the VEC test results because the test is designed primarily to test speed and is therefore more suited to positions involving significant amounts of typing such as transcriptionist.

Instead, the panel relied on a typing work product test that was administered in conjunction with the interview process. The Medical Director had dictated a letter on cassette tape, dictating the first part verbatim, and giving a free-form instruction for completion of the second portion (to allow the applicant an opportunity to demonstrate initiative). The second part of the demonstration test required the applicant to develop a spreadsheet report using Excel computer software.¹⁴ The test was not timed; applicants were allowed to use a reasonable amount of time to complete both portions of the test. The hiring manager determined that this type of test is more applicable to the type of work performed by his secretary. The Medical Director is much more concerned with the quality and appearance of letters and reports, and the ability to compose correspondence, than with typing speed.

The seventh criterion states, "*Prefer* previous professional secretary experience in a medical office setting or professional secretary experience to a Hospital Medical Staff." (Italics added). Grievant had been a unit secretary for two years at the facility; the selected applicant had not been a secretary in a medical setting but had worked for four years with the facility's medical staff. It was agreed by the screeners that less weight was to be given to this criterion because of its similarity to the second criterion.

The panel asked the same nine questions of all applicants.¹⁵ The questions were prepared jointly by the Medical Director and a human resources analyst. The answers of each applicant were recorded contemporaneously by each of the three panelists. Each applicant was given the opportunity to complete a work product sample at his or her own pace in conjunction with the interview. The panel reviewed the applications, reference letters, work product samples and interview answers of all applicants prior to making their final selection. Each panel member provided input to the discussion before the panel settled on the final choice. The panel considered English language skills, how an

¹³ Grievant's score on the VEC test was 70 words per minute (wpm) with 7 errors; the selected applicant's score was 62 wpm with 25 errors. See Exhibits 8 & 9.

¹⁴ Exhibit 18. Instructions for demonstration typing test.

¹⁵ Exhibits 11 & 13. Interview documentation and evaluation forms for grievant and selected applicant, respectively.

applicant handled the interview, computer skills, and creativity in organization. The panel members were unanimous in their selection.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹⁶

The decision of whether to hire or promote employees within an agency is an internal management decision made by each agency. Section 2.2-3004.B of the Code of Virginia states, in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

As noted in the Procedural Issues at the top of this Decision, the hearing officer is not expected to conclude that one applicant is more qualified or less qualified than another. However, many of grievant's arguments focused on why she believes she is better qualified than the selected applicant. Accordingly, this decision will respond to grievant's contentions.

¹⁶ § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

Grievant objects that the hiring manager was not involved in the screening process. The Medical Director has provided a logical reason for delegating this responsibility to a human resource assistant who was very familiar with the screening criterion as well as with the position to be filled. The grievant has not shown that this substitution made any difference in the screening process. Her sole objection to the screening is that the selected applicant should not have passed the screening phase. However, grievant has not demonstrated that the selected applicant would have failed the screening process if the Medical Director had participated in the screening.

Grievant also contends that it was unfair that one of the three interview panelists was the supervisor of the person who was ultimately selected to fill the position. Neither DHRM nor facility policy prohibits the supervisor of a candidate from serving on an interview panel. In this case, two of the interviewees were subordinates of that supervisor. The record does not reflect, and grievant has not shown, that the supervisor improperly or unfairly influenced the choice of the selected applicant. The Medical Director testified that, if anything, the supervisor appeared cautious in her comments during the post-interview discussion so as not to be perceived as inappropriately touting either one of her subordinates.¹⁷

Grievant questioned the authenticity of the photocopies of her interview documentation/evaluation forms that were supplied by the agency for this hearing. It appears from these photocopies that the summary evaluation portion *could* have been cut and pasted. When this issue was raised during the hearing, the hearing officer immediately requested that human resources produce the original forms. The photocopies were compared to the original and found to be accurate in all respects. The cause for the appearance anomaly remains unknown. However, the substance of the photocopies is identical to the original.

Grievant implied that the former facility director might have unduly influenced the panel's decision. Grievant learned that father of the selected applicant is a friend of the former facility director. The two panel members available for this hearing both testified under oath that neither the former facility director nor anyone else had attempted to influence the panel's selection.

It is undisputed that grievant had worked at the agency's facility significantly longer than the selected applicant had. However, the interview panel was more impressed with the selected applicant's variety of office experience (hospital, insurance agency, auto dealership) and the knowledge and skills she had acquired over 15 years, particularly in word processing programs, multiple database programs, multiple spreadsheet programs, presentation software, and browser programs. The Medical Director was desirous of hiring someone who could streamline the workflow and implement innovation in computer usage within the Medical Department. The selected applicant's varied

¹⁷ The supervisor is no longer at the facility.

experience with multiple types of software held the promise of fulfilling the Medical Director's goals for the department.

Grievant correctly notes that her qualifications appear to exceed those of the selected applicant with respect to the first and seventh screening criteria. However, it must be noted first that both of these criteria are expressed only as *preferences* – not as requirements. While grievant has an Associate Degree, it is in data processing – not the stated preference of secretarial science. As reflected in the preceding paragraph, the selected applicant's long and varied computer experience is functionally equivalent to grievant's degree. Further, the selected applicant had also completed the same amount of college work as grievant but had not obtained an Associate Degree. Similarly, while grievant had worked at the hospital for a longer time than the selected applicant, the panel concluded that the selected applicant had acquired sufficient exposure to medical terminology and procedures during four years at the hospital.

Grievant contends that the final interview question was improper. The panel had prepared eight questions in advance but just before the first interview added a ninth question – “What is your interest in this position and why are you applying for it in particular?” This is a standard question commonly asked during interviews and is intended to explore an applicant's motivation for seeking the position. While DHRM policy states that interview questions should seek information related to an applicant's knowledge, skills and abilities, it further states the only questions considered impermissible are those “that are not job related or that violate EEO standards.”¹⁸ A question that explores an applicant's motivation for seeking the position is inherently job related and, therefore, proper and in compliance with policy.

Grievant also avers that she did not answer the ninth question by saying, “I enjoy working alone.” However, all three panelists recorded this answer on the documentation form. Grievant has not shown that any of the panelists were biased against her, or that they had any reason to fabricate grievant's response to the question. It is simply not credible that all three panelists would record the same answer from grievant if she had not made such a response. Therefore, the preponderance of evidence demonstrates that grievant did state that she enjoys working alone. The interview selection form mentions this as a basis for grievant's non-selection.¹⁹ Grievant also disputes the comment on the selection form that states grievant has most often chosen to work in positions that minimize interactional situations. This statement was an opinion as to grievant's apparent predilection to work in jobs such as transcriptionist and clerical assistant where most of her work was performed alone. Given the environment in which the Medical Director's secretary works, these were reasonable bases for non-selection of the grievant.

¹⁸ Exhibit 16, page 7, *Ibid.* See also Exhibit 1, page 2, *Ibid.*

¹⁹ Exhibit 10. Interview Selection Form for grievant, August 13, 2001.

The panel found that the selected applicant's work product test was significantly better than grievant's test based on presentation, appearance, errors, ability to use initiative, and spreadsheet chart creation.²⁰ Because both this type of correspondence and the report presentation are a significant part of the secretary's job, the work product test was among the important factors utilized in selection of the top applicant.

Grievant was not selected for the position because the selected applicant was considered to have been the most qualified given the specific goals and needs of the Medical Director. While grievant had good experience at the facility, the other applicant's more varied experience, extensive computer skills, and demonstrated ability to work in charged interpersonal situations were deemed by the interview panel to be the best fit for the position. Based on the evidence presented, it appears that the panel is satisfied that they selected the most qualified applicant for this particular position.

In any case, the focus of this hearing is not whether the panel selected the most qualified applicant, but whether the agency correctly applied the hiring policy. For two reasons, the hearing officer concludes that the policy was correctly applied. First, the screening of applicants met the requirements of both DHRM policy and facility policy. When screening criteria are expressed as preferences, it is only preferred – not required – that the applicant possess the preferred criterion. In this case, neither grievant nor the selected applicant had an Associate Degree in Secretarial Science. However, both were deemed to have equivalent education or experience sufficient to satisfy the screening criterion. The criterion of professional secretarial experience in a medical or hospital setting was also expressed only as preference – not a requirement. The grievant met the preference; the selected applicant marginally met the preference. Based on the extensive testimony about how the screening process, it is concluded that the process was conducted fairly and in compliance with policy.

Second, the interview process was also conducted in accordance with policy. As indicated in the Findings of Fact, all applicants received the same questions, and completed a work sample at their own pace. The panel's review of all relevant information was complete and fair. All panel members provided input and each independently concluded that the selected applicant was their first choice. Therefore, it is concluded that the agency correctly applied the hiring policies.

Grievant's complaint appears to stem from her belief that factors other than the screening criteria should not have been utilized in selecting the top applicant. Screening criteria are used for the primary purpose of screening out those applicants who do not have the minimum qualifications to perform the job. However, once unqualified applicants have been eliminated, the interview panel

²⁰ Exhibits 15 & 18. Work product tests of grievant and selected applicant, respectively.

must choose from among the remaining applicants the single person who will best fit the specific position advertised. It is presumed that grievant and the other four unselected applicants meet at least the minimum knowledge and skills qualifications to perform the job. If the selected applicant had not applied for this position, grievant or one of the other four might have been selected.

However, the interview portion of the hiring process goes beyond knowledge and skills to more fully explore an applicant's abilities to handle the specific position being applied for. The abilities required in a specific position may vary depending upon the goals and objectives of the hiring manager. It is possible that a different medical director might have emphasized different abilities and might have hired someone other than the selected applicant. In this case, the panel concluded that the selected applicant possesses the necessary knowledge and requisite skills for the job. Equally importantly, the panel decided that the selected applicant has the best abilities to handle interactions with physicians and relatives of patients, to remain unflappable, and to work effectively with the incumbent Medical Director.

DECISION

The grievant has not demonstrated by a preponderance of evidence that the hiring policy was misapplied.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final**