

Issue: Misapplication of the hiring policy; Hearing Date: 09/11/02; Decision Date: 09/13/02; Agency: Dept. of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esq.; Case No. 5521



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5521

Hearing Date: September 11, 2002
Decision Issued: September 13, 2002

PROCEDURAL ISSUES

Grievant is under the mistaken impression that a hearing officer can award her a new role title and pay increase equivalent to the position applied for. A hearing officer may order that an agency comply with applicable policy.¹ However, a hearing officer does not have the authority to promote any employee.² 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 deemed to have been flawed.

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,

¹ § 5.9(a)5, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

² § 5.9(b)2, *Ibid.*

the hearing officer evaluates whether the hiring process was in compliance with agency policy and Department of Human Resource Management policy.

APPEARANCES

Grievant
Attorney for 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.³ 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.⁴

The Department of Mental Health, Mental Retardation and Substance Abuse Services (MHMRSAS) (Hereinafter referred to as “agency”) has employed the grievant for 10 years. During the five years before applying for the executive secretary position, she has been a secretary senior. Previously she had been an office services assistant 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 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.⁵ 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,

³ Exhibit 9. Grievance Form A, filed September 5, 2001.

⁴ Exhibit 10. Ruling Number 2001-198, Qualification Ruling of Director, August 14, 2002.

⁵ Exhibit 1. Text of advertisement for Medical Staff Secretary position.

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.⁶ (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.⁷

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).⁸ 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.⁹

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, who is a Certified Professional Secretary, and whose position is similar in many respects to the position for which grievant was applying. This administrative assistant and a Human Resources analyst conducted the screening process utilizing seven specific criteria derived from the advertising language.¹⁰ The seven applicants who scored highest in the screening were selected for interviews.¹¹ One of the seven withdrew her application from consideration. Five of the six remaining

⁶ Exhibit 11. Employee Work Profile, *Medical Staff Secretary*, April 9, 2001.

⁷ The factors in this paragraph were gleaned from the Medical Director's testimony.

⁸ Exhibit 13. DHRM Policy No. 2.10, *Hiring*, revised March 1, 2001.

⁹ Exhibit 12. Facility Policy No. 6001, *Procedures for Filling Vacancies*, effective July 11, 2001.

¹⁰ Exhibit 5. Screening Criteria for Executive Secretary position.

¹¹ Exhibit 15. 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.

applicants were interviewed on August 10, 2001; one 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."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 Secretarial Science; 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 secretary senior for five years, an office services assistant performing primarily transcription duties for four years, and a medical secretary for five 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.

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

¹² Exhibit 13. *Ibid.*

¹³ Grievant's score on the VEC test was 60 words per minute (wpm) with 8 errors; See Exhibit 4.

¹⁴ Exhibit 19. Instructions for demonstration typing test.

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 secretary senior for five 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.

All three panelists signed a form certifying that they had no conflict of interest with any of those interviewed. 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 applicant handled the interview, computer skills, and creativity in organization. The panel members were unanimous in their selection. 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.

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).

¹⁵ Exhibits 6 & 17. Interview documentation and evaluation forms for grievant and selected applicant, respectively.

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.

The Medical Director has provided a logical reason for delegating his responsibility for screening applicants 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 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

¹⁶ § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

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

It is undisputed that grievant had worked at the agency's facility 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 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. As reflected in the preceding paragraph, the selected applicant's long and varied computer experience and other secretarial experience were deemed to be a reasonable equivalent. 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 had, the panel concluded that the selected applicant had acquired sufficient exposure to medical terminology and procedures during four years at the hospital.

Grievant took exception to the answer recorded by the Medical Director on interview question number three. However, a review of the answers written by the other two panelists corroborates the Director's note. All three panelists appear to have recorded the same essence of grievant's response to the question.¹⁸

Grievant contrasted her interview non-selection form to the summary evaluation form of the human resource assistant, suggesting that the two documents contain conflicting information. The non-selection form states that grievant "gave little evidence in the interview of her ability to prioritize."¹⁹ The human resource assistant noted in her summary evaluation that grievant "demonstrated ability to prioritize."²⁰ The human resource assistant's testimony on this point lacked clarity but it appears that her summary evaluation comment was a reflection of grievant's responses to other questions. She testified that grievant's answer to question three did lack evidence of ability to prioritize

¹⁷ The supervisor is no longer at the facility.

¹⁸ Exhibit 6. Interview Documentation and Evaluation forms for grievant's interview.

¹⁹ Exhibit 7. Interview Selection Form for grievant, August 13, 2001.

²⁰ Exhibit 6. *Ibid.*

because her answer did not include an attempt to ascertain which of the two meetings was more important.

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, although the selected applicant did not have an Associate Degree in Secretarial Science, she was 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 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 believes that she is more qualified than the selected applicant, and that the selected applicant should have been screened out prior to the interview phase of selection. However, grievant acknowledged that she has never worked in human resources and has never been involved in a screening process. Therefore, her lack of expertise in this area must be weighed against the testimony of two trained and experienced human resources professionals who have screened applicants for hundreds of positions. The grievant has not shown that either of the screeners was biased in favor of any applicant. Therefore, the screeners had no reason to qualify the selected applicant for an interview if they did not reasonably conclude that she met at least the minimum qualifications for the position. Moreover, the interview panel reviewed in detail

the application, reference letters, work product test and interview results of each interviewee. The panel's review resulted in two additional people with detailed knowledge of the position concluding that the selected applicant met the required qualifications for the position. Thus, four well-qualified people concluded that the selected applicant met the criteria; grievant is the only person who concluded otherwise.

Grievant's ability to assess whether her own qualifications exceed those of a rival are, of course, affected by her own self-interest. As an example, grievant testified that she had 18 years of experience as a "professional secretary." However, under cross-examination, grievant acknowledged that she had been a professional secretary for only 10 years.²¹ During her testimony, grievant stressed the fact that she had experience supervising employees, and that she has shorthand skill. However, neither supervisory experience nor shorthand skill were requirements for the executive secretary position. Thus, grievant's objectivity is questionable when assessing her own experience.

The two interview panelists who testified during the hearing noted that grievant's interview was "not good" and "among the worst I have seen." Both observed that grievant's demeanor, body language and attitude suggested that grievant thought she "had the position in her pocket," or that it was a "foregone conclusion." Her answers were remarkably short and failed to provide the kind of elaboration one typically provides during an interview in order to "sell" oneself to the interviewers. The third interviewer reportedly expressed the same observations.

Grievant correctly observed that the screening process is not an exact science. The screening methodology utilized is unable to fully assess an applicant's skill in using proper grammar, and relies on the applicant's own statement of typing speed. However, 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 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

²¹ Exhibit 2. Grievant's Application for Employment. Grievant's secretarial positions were from January 1997 through the present, and from March 1987 through August 1992.

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.

Finally, it must be noted that grievant is under the misconception that the filling of this position vacancy was simply a "promotion."²² In fact, the filling of this vacancy was not a promotion. Promotions are earned by fulfilling specific work requirements and/or by being recognized by superiors as meriting advancement. Further, promotions are only for employees working within the agency. Here grievant had applied for another position and therefore was in direct competition with 53 other applicants from within and outside state government. It was no different than if grievant had applied for a job vacancy with another state agency.

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

²² Exhibit 9. Grievance Form A. Issues section. See *a/so*, Relief section wherein grievant states that she is entitled to an upgrade (apparently because she considers herself qualified for the position).

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** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.²³

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

David J. Latham, Esq.
Hearing Officer

²³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.