

Issue: Misapplication of selection process; Hearing Date: 10/23/02; Decision Date: 10/29/02; Agency: DJJ; AHO: David J. Latham, Esq.; Case No.: 5541; **Judicial Review: Appealed to the Circuit Court in Culpeper County on 11/15/02; Court's Ruling dated 12/31/02; Outcome: HO's decision upheld. Found not to be contradictory to law.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5541

Hearing Date: October 23, 2002
Decision Issued: October 29, 2002

PROCEDURAL ISSUES

Grievant requested as relief that "All parties [be] held accountable & penalized." A hearing officer may order that an agency comply with applicable policy.¹ However, a hearing officer does not have the authority to hold other employees accountable or issue discipline to them.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 selection policy, the hearing officer's role is to ascertain whether the process was misapplied. The hearing officer is not expected to decide whether any grievant is more or less qualified than any other applicant.

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

² § 5.9(b)5 & 7, *Ibid.*

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

The grievant alleged that the agency failed to respond to a grievance he filed on July 23, 2000. The EDR Director concluded that, for the reasons stated in her ruling, that grievance remains open.³ The Director advised the parties to proceed with that grievance and/or its closure within five days of receipt of the ruling issued on September 16, 2002. Since that date, neither party has contacted EDR about that grievance. The 2000 grievance must, by definition, refer to events that occurred on or prior to July 23, 2000. Because grievances must be initiated within 30 days of the event that formed the basis of the dispute, the event(s) in 2000 do not qualify as part of the grievance filed on September 14, 2001.⁴ In any event, the 2000 grievance has not yet been qualified for a hearing and, therefore, will not be addressed in this decision. If grievant wishes to pursue the July 23, 2000 grievance, and believes the agency has not complied with the EDR Director's ruling, he may proceed pursuant to the noncompliance rules in § 6.3 of the Grievance Procedure Manual.

APPEARANCES

Grievant
14 witnesses for Grievant
Superintendent
Assistant Attorney General for Agency
One witness for Agency

ISSUE

Was the selection process misapplied? Did discrimination, favoritism, or retaliation affect the process?

FINDINGS OF FACT

The grievant filed a timely appeal following a selection process in which he 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.⁵ Subsequently, the grievant requested the EDR Director to qualify the grievance for a hearing. In a qualification ruling, the EDR Director concluded that a statement by the superintendent that could have alluded to the age of some

³ Exhibit 10. Ruling Number 2001-198, *Qualification Ruling of Director*, August 14, 2002.

⁴ § 2.2, *EDR Grievance Procedure Manual*.

⁵ Exhibit 3. Grievance Form A, filed September 14, 2001.

employees raised a question of discriminatory intent, and therefore qualified this issue for a hearing.⁶ In the ruling, the Director further determined that the additional issues of retaliation, race discrimination and favoritism should likewise be qualified for a hearing.

The Department of Juvenile Justice (DJJ) (Hereinafter referred to as “agency”) has employed the grievant for 20 years. He is currently a sergeant. Grievant has a total of 28 years of service with the Commonwealth. The grievant is a 50 year-old, black male. His performance evaluations for 1999 and 2000 ranked him exceptional; his 2001 evaluation ranked him a contributor.⁷ He has an extensive law enforcement background including more than eight years with the sheriff’s department, training at criminal justice academies, training at the FBI Academy, and youth training.

Prior to June 2001, there had been a number of problems at the facility at which grievant is employed. Perhaps the most serious concern was alleged abuse or mistreatment of juvenile inmates. The current superintendent senior was selected and arrived at the facility in June 2001. He was given a mandate to end the mistreatment and improve morale. He characterized the facility as being a “war zone” at the time of his arrival. In meetings with all employees soon after his arrival he told them that the atmosphere would have to be changed and that “Some of you think you’re going to retire here but I’m going to weed out the dinosaurs.”

During the past three years, a number of factors have adversely affected morale at the facility. There have been three different superintendents, three changes of mission and two threatened closures of the facility. Employees have been placed on 12-hour shifts. Turnover of employees has been very high, in part because of the proximity of federal facilities that pay a significantly higher rate of pay, and in part because many employees are attracted to higher-paying jobs in a nearby, large metropolitan area. This facility houses juvenile offenders with the most serious offenses. Many officers resign soon after training ends because they cannot work with hardened juvenile offenders. Some officers have resented the superintendent’s comment to them that, “I’m the boss; that’s why I get paid the big bucks.”

Prior to arrival of the current superintendent senior, the deputy director had heard rumors that there had sometimes been pre-selection of employees for promotions. The deputy director and the new superintendent made it clear that there would be no pre-selection. To help prevent that practice, the first interview panel includes two employees who work at other facilities. In addition, the

⁶ Exhibit 10. *Ibid.*

⁷ Exhibit 5. Grievant’s performance evaluations for 1999, 2000 and 2001. NOTE: The Commonwealth revised the performance evaluation scheme in 2001, and replaced the previous five ratings with three new ratings – Extraordinary Contributor, Contributor, and Below Contributor.

agency's deputy director himself participates in the second interview, and then discusses the final selection with the superintendent senior.

In April 2001, a vacancy for corrections lieutenant occurred at the facility in which grievant is employed. The position was advertised in the statewide RECRUIT system and was open only to DJJ employees.⁸ Eleven employees, including grievant applied for the position. A panel interviewed ten of the applicants on May 17, 2001 and selected three finalists, including grievant. The other two finalists were a white male and a Hispanic male. On June 5, 2001, a second panel interviewed the three finalists. The panel consisted of the agency's Deputy Director (black male), the detention superintendent (black female) and the assistant detention superintendent (white male). Following the interviews, the panel unanimously concluded that the white male was the most qualified applicant.

During this period, a new superintendent senior (62 year-old, white male) was being selected for the facility. As de facto chairperson of the panel, the agency's Deputy Director determined that the new superintendent senior should make the final selection. Upon his arrival at the facility, the superintendent senior interviewed the three finalists. Then the Deputy Director and the new superintendent evaluated the three finalists and unanimously concluded that the white male was the most qualified applicant.

While the above selection process was in progress, another vacancy for lieutenant occurred at the facility. The position was advertised in RECRUIT and was open to all state employees.⁹ Grievant did not apply for this position. A white male was selected from among 15 applicants. Grievant has not applied for any other lieutenant positions from June 2001 through September 2002.

The position of lieutenant is considered a significant step above sergeant because lieutenants are shift commanders. Lieutenants must be willing to work all shifts.¹⁰ During the night shift, the superintendents are normally not at the facility and the lieutenant is in charge of the entire facility. Should a problem occur (escape, riot, etc.), the lieutenant must make key decisions immediately. Because the job might also involve speaking with top state officials or the media, a lieutenant must be articulate, use good grammar and have good body language. Lieutenants must also be able to communicate well in writing in order

⁸ Exhibit 2. RECRUIT announcement for corrections lieutenant, posted April 17, 2001 and closed May 1, 2001. NOTE: RECRUIT is the automated personnel system that identifies and publicizes all positions covered under the Virginia Personnel Act for which the Commonwealth is actively recruiting. See Department of Human Resource Management (DHRM) Policy 2.10, *Hiring*, revised March 1, 2001.

⁹ Exhibit 4. RECRUIT announcement for corrections lieutenant, posted May 23, 2002 and closed June 7, 2001.

¹⁰ Grievant had indicated on his application that he would accept only day shift. When questioned about this during the interview, grievant said he would be willing to work all shifts and had only expressed a preference for day shift on the application; he amended his application accordingly.

to prepare various reports. During the promotion process, interviewers and the superintendent senior place considerable emphasis on the physical appearance (neatness, grooming, etc.) of applicants, how they express themselves verbally and in writing, and ability to handle themselves under questioning.

The security management team census as of November 30, 2001 included 25 people of whom 44% (11) are black.¹¹ During the period between July 1, 2000 and November 30, 2001, 22 employees were promoted into various management positions at the facility.¹² Of six promotions to lieutenant during this time, 33% (2) are black. Of 12 promotions to sergeant, 25% (3) are black. During this same period a black female was promoted to superintendent of detentions. All of the employees promoted (except superintendent senior) have been younger than grievant; all but two were under age 40.

After grievant was not selected for lieutenant, he asked the superintendent senior what he could do to improve his chances of being selected. The superintendent told him that whatever he could do to impress the interviewers would help, such as shaving and losing weight. Grievant has a full-face beard that is reasonably well trimmed. About 25 years ago, he obtained a medical waiver for the beard after his physician determined that shaving his face caused problems that could not be successfully treated. Grievant weighs about 260 pounds. He has weighed 225 pounds or more since high school and has not been able to reduce his weight significantly despite attempts to do so. Grievant has been an acting shift commander on several occasions when a lieutenant is not available. Those who assessed grievant's performance while acting as shift commander agree that he did a good job. The chief of security (captain) verified that grievant has very good attendance, does what is asked of him and works well with juveniles.

DHRM policy provides that agencies may provide temporary pay when an employee assigns an employee different key (essential) duties on an interim basis.¹³ Temporary pay is a noncompetitive management-initiated practice paid at the discretion of the agency. The effective date for beginning temporary pay is also at the agency's discretion. Generally, this agency provides temporary pay only if the employee remains in the temporary position for more than 120 days.

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

¹¹ Exhibit 3. Statistical analyses provided by Human Resources.

¹² The agency defines the management team to include: superintendent senior, superintendent, assistant superintendent, captain, lieutenant, and sergeant.

¹³ DHRM Policy 3.05, *Compensation*, revised March 1, 2001.

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.¹⁴

The decision of whether to 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." The management of each agency and facility is deemed to have the best knowledge of the knowledge, skills and abilities required for each position in its facilities. A hearing officer may not substitute his judgement for that of agency and facility management. The hearing officer is charged with assuring that the agency followed all applicable policies during the selection process.

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 he believes he is better qualified than the selected applicants. Accordingly, this decision will respond to grievant's contentions.

Grievant notes that in two instances, officers had been hired as corrections officers, promoted to sergeant and then promoted again to lieutenant in less than 12 months. The agency acknowledged this and pointed out that there is no rule prohibiting such rapid promotion. The agency selects the most qualified person for the position. When an individual has prior military or other

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

relevant experience, performs well, and appears to be the best-qualified applicant for a position, there is no rule that precludes rapid advancement through the ranks.

Some of grievant's witnesses alleged that they had seen favoritism or retaliation but none offered specific examples. Another alleged that two racial slurs had been used. One comment could legitimately be interpreted as a slur; the second referred to the employee and two friends as the "three amigos."¹⁵ The motion picture "Three Amigos" featured three white actors. Grievant was unable to demonstrate that the word amigo has any connotation to his race.

Grievant elicited considerable testimony from his witnesses regarding the character of the white male selected for lieutenant in the summer of 2001. The white male had been having an affair with the estranged and separated wife of a subordinate corrections officer. This relationship was widely known among inmates, employees and facility management at the time of the promotion. Grievant contends that the relationship was morally inappropriate and made the subordinate officer the subject of gossip among employees and inmates. Facility management recognized that the relationship was inappropriate but determined that it would be inappropriate to take any action because there was no apparent effect on the agency's mission or the ability of officers to perform their duties.

Grievant intimated that an assistant superintendent disapproves of grievant's relationship with a white female. However, there was no evidence that this adversely affected grievant's opportunity for promotion.

Grievant noted that he was allowed to remain in an acting shift commander capacity for only up to 120 days but that at least one other employee remained in the position for at least six months. The agency maintains that it often rotates the acting shift command so that several sergeants have the opportunity to gain such experience. However, it does have discretion to allow an officer to remain in the position for more than 120 days.

Age discrimination

To sustain a claim of age discrimination, grievant must show that: (i) he is a member of a protected age group (over 40 years old); (ii) he suffered an adverse job action; (iii) he was performing at a level that met his employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's age.¹⁶ Grievant has satisfied the first three prongs of this test because he is 50 years old, was not promoted, and was qualified for the position by virtue of being selected as a finalist for the position.

¹⁵ Amigo is the Spanish word for friend.

¹⁶ Cramer v. Intelidata Technologies Corp., 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).

However, for three reasons, the evidence is insufficient to conclude that the nonselection of grievant was based on his age. First, the agency has presented a legitimate, non-discriminatory reason for nonselection. The grievant's presentation during the final interview process was not deemed as good as the selected applicant. The criteria used to evaluate presentation (physical appearance, body language, bearing, poise, oral communication skill) can be rated both objectively and subjectively. However, the hearing officer is persuaded that the two decision makers (superintendent senior and the agency's Deputy Director) would not have used age as a criterion because both are substantially older than grievant. Both appear to have the extensive experience and knowledge to recognize that the grievant's age would not be a relevant factor to fill a lieutenant's position. Second, while the selected applicant was younger than grievant, there is no evidence to support a conclusion that age played any role in the decision process.

Third, grievant relies on one comment made by the superintendent senior (the "dinosaur" statement) as being the basis for age discrimination. While grievant believes the superintendent senior meant that he was going to get rid of older employees, the superintendent has denied any such intent. He has explained that he intended to purge the staff of those employees who had been abusing inmates and who were resistant to change. While the superintendent may have made a poor choice of words by using the term "dinosaur," grievant has not shown that older employees have been forced out of their jobs. Given the high turnover among younger employees, the agency values grievant's longevity, reliability, and experience.

Racial discrimination

An employee may demonstrate racial discrimination in promotions by showing direct evidence of intentional discrimination (specific remarks or practices), circumstantial evidence (statistical evidence), or disparate impact resulting from the selection process. In this case, grievant has not presented any testimony or evidence of remarks or practices that would constitute racial discrimination in the selection process. The statistical evidence submitted by the agency's equal employment opportunity manager supports a conclusion that a significant number of blacks have been promoted to management team positions. Grievant contends that the breakdown is skewed if one breaks down the statistics between those officers working in the detention area and those employed in the corrections area. The agency did not dispute grievant's contention. However, since both detentions and corrections both fall under the superintendent senior's authority, it is not logical that he would permit discrimination against blacks in one area but not in the other area. Thus, it appears that the difference between the two areas is coincidental.

It must again be noted that the agency's Deputy Director is black and has been very actively involved in the promotion of all employees to the management team. From his testimony, it appears that the Deputy Director is passionate and determined that the selection process will be fair to all involved, regardless of their race.

Favoritism

Favoritism can be defined as the unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees. The testimony of the Deputy Director established that, prior to May 2001, he had heard rumors of preselection of employees for promotions. If true, such preselection could lend itself to favoritism. Effective in May 2001, the Deputy Director advised all involved that preselection or favoritism would not be allowed or tolerated. The changes he implemented in the selection process helped assure that selections were made based on qualifications, not favorites. By retaining final authority over all promotions, he also assured that the process was fair and equitable.

Hostile work environment harassment

To establish a claim for racial harassment, grievant must prove that: (i) the conduct was unwelcome; (ii) the harassment was based on race; (iii) the harassment was sufficiently severe or pervasive to create an abusive work environment; and (iv) there is some basis for imposing liability on the employer. The grievant has not presented evidence that there was any unwelcome conduct. Rather, the evidence suggests that the work environment may be oppressive due to low morale. The factors causing low morale have been cited in the Findings of Fact, and it is entirely understandable that grievant and others find the work environment less than ideal. The uncertainty of whether one's facility will remain open, the high turnover among newly trained employees, the low rate of pay and other factors all result in unhappiness among employees. However, these factors do not meet the definition of hostile work environment harassment.

Retaliation

Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.¹⁷ To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Based on grievant's testimony and evidence, his only basis to claim participation in a protected activity was his filing of a grievance in July 2000. In order to establish retaliation, grievant must show a nexus between his filing of the July 2000 grievance and his

¹⁷ EDR *Grievance Procedure Manual*, p.24

nonselection as lieutenant one year later. Grievant has not established any such connection between the two events. However, even if such a nexus could be found, the agency has established nonretaliatory reasons for selecting an applicant other than grievant. For the reasons stated previously, grievant has not shown that the agency's reasons for selecting a different applicant were pretextual in nature.

Summary

The grievant has not shown that his nonselection for lieutenant was attributable to his age, his race, favoritism, or retaliation. By all accounts, he is a good employee with an excellent attendance and performance record. He obeys instructions and works well with juvenile inmates. He has helped train many new corrections officers. However, the key management decision-makers have concluded he has not been the most qualified applicant on those occasions when he has applied for promotion.

DECISION

The grievant has not demonstrated by a preponderance of evidence that the selection process was misapplied or that his nonselection was attributable to discrimination, favoritism or retaliation.

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** 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.¹⁸

[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

¹⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.