

Issue: Misapplication of hiring policy and age/gender discrimination; Hearing Date: 02/12/04; Decision Issued: 03/29/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 468; **Administrative Review: HO Reconsideration Request received 04/09/04; Reconsideration Decision issued 05/03/04; Outcome: No newly discovered evidence or incorrect legal conclusions. Request to reconsider denied; Administrative Review: EDR Ruling Request received 04/05/04; EDR Ruling issued 07/22/04; Outcome: HO did not violate grievance procedure; Administrative Review: DHRM Ruling Request received 04/05/04; DHRM Ruling pending**



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 468**

Hearing Date: February 12, 2004  
Decision Issued: March 29, 2004

**PROCEDURAL HISTORY**

On August 11, 2003, Grievant timely filed a grievance to challenge the Agency's failure to act favorably on her applications for employment. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. EDR Rulings 2003-174 and 2003-415 qualified this matter for hearing. On January 21, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 12, 2004, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUE**

Whether the Agency misapplied policy and/or discriminated against Grievant on the basis of her age and gender.



## **BURDEN OF PROOF**

The burden of proof is on 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 Department of Corrections has employed Grievant for approximately 18 years as a Probation and Parole Officer. The purpose of her position is:

To provide high risk/high needs offenders placed on probation &/or parole with counseling, supervision and referrals to community resources; to provide comprehensive background reports to Circuit Court Judges for use in final adjudications of criminal charges/convictions.<sup>1</sup>

Grievant is a female, age 50. She earned an Associates degree with a major in speech/communication in 1983, a Bachelors degree with a major in Social Science in 1985, and a Masters of Science from a State university with a major in Counseling in May 2003.

Grievant applied for a vacant Psychologist I position at Facility P. Qualifications for the position included: "Master's degree in clinical or counseling psychology from a regionally accredited university or college preferred. Master's degree in related human services field may be considered." Grievant received a letter dated September 11, 2003 from Facility P thanking Grievant for applying for the Psychologist position and informing her that the position was being re-advertised with a closing date of September 26, 2003. Qualifications for the position were updated and Grievant was encouraged to re-apply. Qualifications for the position included: "Graduate degree in Psychology (clinical or counseling) or equivalent degree in related human services field from a regionally accredited university or college preferred."<sup>2</sup> Grievant reapplied for the position and was selected for an interview. She was not chosen for the position.

Grievant applied for a vacant Psychologist I position at Facility H with a closing date of July 7, 2003. Qualifications for the position included: "Master's degree in clinical or counseling psychology from a regionally accredited university or college preferred. Master's degree in related human services field may be considered." The position had to be re-advertised because the Facility did not receive enough applications. Grievant

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<sup>1</sup> Grievant Exhibit 4.

<sup>2</sup> Grievant Exhibit 7.

was selected for an interview. All candidates were asked to provide work samples and transcripts. Grievant mistakenly believed the Agency was singling her out to provide a work sample and transcript and she chose to withdraw her application for employment.<sup>3</sup> The Facility's first choice was a female applicant.

Grievant applied for a vacant Psychologist I position at Facility D with a closing deadline of July 4, 2003.<sup>4</sup> Qualifications for the position included: "Master's degree in clinical or counseling psychology from a regionally accredited university or college preferred. Master's degree in related human services field may be considered." Grievant interviewed for the Facility D position on July 16, 2003. She was not selected for the position. The Agency selected the person it believed was best suited for the position.

Grievant applied for two vacant Psychologist positions at Facility G with a closing date of July 11, 2003. Qualifications included, "Master's degree in clinical or counseling psychology from a regionally accredited university or college is preferred. Master's degree in related human services field may be considered."<sup>5</sup> Eight people submitted applications and six were interviewed.<sup>6</sup> Grievant was not selected for interview. Grievant was not selected to be interviewed because she had a degree in counseling and the Facility managers wanted a person with a degree or training in psychology. Grievant received a letter dated July 25, 2003 informing her that Facility G "received a large number of well-qualified applicants for this position, and it was not feasible to interview everyone."<sup>7</sup>

In July 2004, Grievant called Agency staff and indicated that she had been screened in at one facility but screened out at others. On July 24, 2003, Grievant received an email from the Agency's Mental Health Program Director stating, "This was based on the review of the previous qualifications which found to be in need of revision, primarily because we have found that graduate programs in areas other than psychology typically do not include elements essential to the duties of the position, e.g., the ability to minister, score and interpret psychological tests. Based on what you told

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<sup>3</sup> Grievant states, "it is an attempt to hold me to a higher standard than other applicants, and appears to be a retaliatory effort as it is obvious that policy and procedure has not been followed." See Grievance Form A.

<sup>4</sup> Grievant Exhibit 1.

<sup>5</sup> Grievant Exhibit 1.

<sup>6</sup> Grievant points out inconsistencies in the documents given to her during the hearing process. For example, the application of applicant 7 appears to have been received on June 10, 2003 with the original position number redacted and then new position numbers hand-written on the application. Grievant speculates that the application is from a prior advertisement for a Senior Psychologist position. The inconsistencies identified by Grievant support a basis for speculation, but the Hearing Officer cannot rely on speculation. The evidence is insufficient to reach any conclusions regarding the documentation discrepancies Grievant has identified.

<sup>7</sup> Grievant Exhibit 6.

me yesterday, and because your degree is not in psychology, you do not meet the minimal educational requirements that have been set"<sup>8</sup>

Virginia law does not require any of the positions for which Grievant applied to hold a Master's of Psychology.

### **CONCLUSIONS OF POLICY**

DHRM Policy 2.10 provides that job "[a]nnouncements must not specify a certain number of years of experience nor a specific educational requirement unless sanctioned by law." Moreover, job announcements should also include "any educational preferences not required by law, stated with a provision for substitution of equivalent applicable experience or training." Based on the evidence presented, the Agency did not act contrary to DHRM Policy 2.10.<sup>9</sup>

Grievant was selected for an interview with Facility P. Her objections to the process prior to her selection for an interview are moot. Grievant has not been able to establish any violations of policy as part of the interview or selection process. Merely because Grievant was qualified but not chosen for the position is not a basis to grant relief.

Grievant was selected for an interview with Facility D. Her objections to the process prior to her selection for an interview are moot. Grievant has not been able to establish any violations of policy as part of the interview or selection process. Managers at Facility D selected the candidate they believed was best suited for the position. Thus, there is no basis to grant relief to Grievant based on her application to Facility D.

Facility G job announcement mentions that a Master's degree in clinical or counseling psychology from a regionally accredited university or college was preferred and that a Master's degree in related human services field may be considered. This announcement states a preference, not a requirement. Moreover, the Agency selected applicants without a Masters in Psychology to be interviewed.<sup>10</sup> Although Grievant was not selected to be interviewed, the qualifications of those in the applicant pool were so strong as to justify the Agency's position that Grievant should be excluded from the interview process.

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<sup>8</sup> Grievant Exhibit 5.

<sup>9</sup> Although the announcement does not consider "a provision for substitution of equivalent applicable experience or training", Grievant did not object to the Agency's actions on that basis.

<sup>10</sup> Candidates 4 and 6 had Masters in counseling. They also had additional attributes that enabled them to receive interviews from the Agency. See Grievant Exhibit 19.

Grievant contends she was held to a different standard than other applicants when she applied for a position at Facility H. The evidence showed, however, that all applicants for the Facility H position were required to submit work samples. Grievant could not identify any policy prohibiting this practice. There is no basis to conclude that the Agency acted improperly in any respect in its selection of a Psychologist at Facility H.

On July 24, 2003, Grievant received an email from the Agency's Mental Health Program Director stating that because her degree was not in psychology, she did not meet the minimal educational requirements to work as a psychologist.<sup>11</sup> Although the Agency may have at one point considered a Master in Psychology as a minimum requirement, that requirement was changed because Grievant pointed out the error<sup>12</sup> and without the error having any effect on Grievant's ability to be selected for job interviews. Despite this email, the Agency granted interviews to two applicants who had Masters degrees in counseling. Thus, Grievant has not established a misapplication of policy even if the Agency expressed an intention to do so.

Grievant contends that the Agency could permit her to attend a course at the Academy to enable her to increase the chances of her selection as a Psychologist. For example, the Academy offers a course on testing that would add to Grievant's skills. Grievant has not identified any policy requiring the Agency to provide her with requested training. It is within the Agency's discretion to determine which employees should receive training. The Agency is not obligated to provide Grievant with training at the Academy.

Grievant contends that the course work she took in her Master's program is similar to the course work at Radford University and that Radford University graduates are held in high regard by the Agency. The Agency has discretion to determine whether Grievant's assertion is true and how to include that consideration in its selection process.

### Discrimination

Grievant contends she was improperly discriminated against on the basis of her gender and/or age. An employee can establish discrimination by presenting evidence of disparate treatment or disparate impact.

*Disparate Treatment.* Grievant may establish age and/or gender discrimination by presenting evidence<sup>13</sup> that: (1) she is a member of a protected class; (2) she is

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<sup>11</sup> Grievant Exhibit 5.

<sup>12</sup> A copy of the original job announcement for Facility B was not submitted as an exhibit. Grievant contends the Agency's job announcement at that facility listed a Masters in Psychology as a requirement and not as a preference.

<sup>13</sup> Disparate treatment discrimination is the *intentional* discrimination against an individual because of that person's race, color, religion, sex, nation origin, age, or disability.

qualified for the position and her performance was satisfactory; (3) in spite of her qualifications and her performance she was rejected; and (4) she was rejected in favor of a substantially younger candidate on the basis of age<sup>14</sup> or in favor of a male. If the Agency presents credible evidence of a nondiscriminatory reason for its actions, then Grievant has not established she was discriminated against because of her gender or age, unless there is sufficient evidence that the Agency's stated reason is merely a pretext or excuse for improper discrimination.

If the Hearing Officer assumes for the sake of argument that Grievant has met her *prima facie* case, the Agency has presented credible evidence of a nondiscriminatory reason for its failure to select Grievant, namely that it selected more experienced and better qualified applicants. For example, one applicant for the Facility G position held a Psy. D in Clinical Psychology and a Masters in Psychology and had substantial testing experience. At Facility D, the top candidate was a female in her mid-40s who the interview panel considered the most suited candidate based on her education, training, experience, and interview.<sup>15</sup>

*Disparate Impact.* Grievant may establish age and/or gender discrimination by presenting evidence of an unlawful employment practice based on disparate impact.<sup>16</sup> Grievant must establish either (1) the specific employment practice<sup>17</sup> that causes a disparate impact on the basis of age and/or gender and the Agency fails to establish that the practice is job related and consistent with business necessity or (2) the Agency refused to implement an effective alternative practice that would have had a lesser adverse impact.

Grievant has not identified a specific employment practice that may create a disparate impact. Unless a specific employment practice is identified, it is unnecessary to make statistical comparisons to try to establish a disparate impact.<sup>18</sup>

## DECISION

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<sup>14</sup> See, Reeves v. Sanderson Plumbing, Inc., 530 U.S. 133 (2000) and O'Connor v. Consolidated Coin Caters Corp., 56 F.3d 542 (1995), *rev'd on other grounds*, 517 U.S. 308 (1996).

<sup>15</sup> Insufficient evidence was presented by either party for the Hearing Officer to reach any conclusion regarding the Facility P selection process. Since the burden of proof is on Grievant, the Hearing Officer finds that Grievant has not established a claim for relief regarding her application for employment at Facility P.

<sup>16</sup> To prevail with a claim of disparate impact discrimination, Grievant need not provide evidence of the employer's subjective intent to discriminate on the basis of his membership in a protected class.

<sup>17</sup> For example, a pre-employment test that favors males or a lifting requirement that is not necessary to perform the job.

<sup>18</sup> Merely because an Agency employs more males or more females in a particular position, does not show discrimination.



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

### **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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

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.<sup>19</sup>

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<sup>19</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer