

Issue: Age discrimination: Hearing Date: 01/06/04; Decision Issued: 01/29/04;
Agency: Dept. of Criminal Justice Services; AHO: Carl Wilson Schmidt, Esq.; Case
No. 483



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 483

Hearing Date: January 6, 2004
Decision Issued: January 29, 2004

PROCEDURAL HISTORY

Grievant applied for a position advertised by the Agency and was not selected. On July 9, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 8, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 6, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Witnesses

ISSUE

Whether the Agency has discriminated against Grievant on the basis of his age, gender, and race.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief he 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 Criminal Justice Services employs Grievant as a Section Chief. Grievant has been employed by the Commonwealth for over 28 years, including 23 years with the Agency.

In August 2002, the Agency’s organizational chart reflected two divisions and seven sections reporting to the Chief Deputy Director who reported to the Agency Director.¹ Agency managers contemplated changing the Agency’s organization. The Agency Director selected a committee to solicit opinions from key staff and make a recommendation regarding how the Agency should be reorganized. The committee presented the Agency Director with several options. After reviewing the options, the Agency Director decided to change from having two divisions and several sections reporting to the Deputy Director, to four divisions with sections reporting to division heads.² One new division was called Program³ and Services and the other division was called Standards and Research. Each division head would report to the Deputy Director. The Agency Director’s choice of organizational structure was tentative. He wanted to see how it worked before making the new structure permanent.

In December 2002, the Agency Director asked several section heads whether they were interested in filling the new Division Director positions on an acting or interim basis. Several employees including Grievant⁴, Ms. FE, and Mr. LB were interviewed by

¹ The Agency Director considered the two division heads as part of his senior management team. He did not consider the section heads as part of that team.

² The Agency Director sent an email to all staff stating, “After considering a number of alternatives, including leaving things the way they are, I have decided to create 2 new division directors. One will supervise the Crime Prevention/Law Enforcement, Juvenile Services and Victims Services Sections; the other will supervise the Training & Standards and Private Security Services Sections and Research Center.” Agency Exhibit 2.

³ Sometimes the Agency refers to the division as Programs and Services and sometimes as Program and Services.

⁴ Grievant sent an email dated December 3, 2002 to the Agency Director asking to be considered for one of the proposed management positions. Agency Exhibit 1.

the Agency Director to serve in the acting positions. The Agency Director was not obligated by policy to interview employees for an interim position. Ms. FE and Mr. LB were selected as interim Division Directors and assumed their new duties effective January 1, 2003.⁵

In May 2003, the Agency decided to make the new organizational structure permanent and to advertise⁶ the two new division director positions. Only Agency employees were permitted to apply for positions 283 and 284.⁷ The advertisement for position 283 stated:

The Department of Criminal Justice Services is seeking a qualified individual to manage the Program and Services Division. The incumbent will provide management oversight of the following agency sections: Crime Prevention and Law Enforcement; Victim Services; Juvenile Services; and Correctional Services. Establish policies and procedures; delegate assignments and provide feedback and direction to staff as needed. Performs a leadership role in developing and implementing agency strategic plan. Develops and maintains relationships with constituent groups. Position requires occasional overnight travel. Employee will provide own transportation as required.

Knowledge, skills and abilities: Knowledge and/or experience in the following areas: supervisory and management principles and practices; state, federal and agency rules, regulations, and policies and practices affecting delivery of programmatic services; coordinating activities with senior government officials in both the executive and legislative branch and members of the General Assembly. Ability to handle complex, difficult and sensitive situations and to communicate effectively orally and writing.

The advertisement for position 284 stated:

The Department of Criminal Justice Services is seeking a qualified individual to manage the Standards and Research Division. The incumbent will provide management oversight of the following agency sections: Standards and Training, Private Security and Research. Establish policies and procedures; delegate assignments and provide feedback and direction to staff as needed. Performs a leadership role in developing and implementing agency strategic plan. Develops and

⁵ Agency Exhibits 13 and 14.

⁶ The position announcements referred to the positions as Deputy Director but the Agency changed that name to Division Director once candidates were chosen.

⁷ By making the new positions available only to Agency staff, the hiring process (for the most part) would be budget neutral. In other words, once the Agency filled a division director position, it could abolish the position formerly held by the selected Division Director.

maintains relationships with constituent groups. Position requires occasional overnight travel. Employee will provide own transportation as required.

Knowledge, skills and abilities: Knowledge and/or experience in the following areas: supervisory and management principles and practices; state, federal and agency rules, regulations, and policies and practices affecting delivery of programmatic services; coordinating activities with senior government officials in both the executive and legislative branch and members of the General Assembly. Ability to handle complex, difficult and sensitive situations and to communicate effectively orally and writing.

Interested employees were expected to submit State applications for these positions no later than 5 p.m., May 12, 2003. The job announcements were listed in RECRUIT for five consecutive workdays as required by DHRM Policy 2.10.

The Agency selected three executive managers to serve on a panel interviewing the applicants. Grievant and four other Agency employees submitted applications. Grievant only applied for position 284. The other four employees applied for both positions.⁸ All five applicants were granted interviews. Because the knowledge skills and abilities were the same for both positions, the Agency conducted one set of interviews and then chose two candidates to fill the positions. Each candidate was asked 13 questions. These questions addressed general management principles and were intended to address the suitability of each candidate for both available positions. Since Grievant applied for position 284, his answers were directed toward standards and training, private security, and research. The other applicants directed their responses towards both positions. When evaluating Grievant's interview, the panel did not expressly consider that Grievant's answers were focused on position 284. The panel selected Ms. FE and Mr. LB as the permanent Division Directors.

Grievant is age 52. Ms. FE is age 46. Mr. LB is age 48. Prior their selection as interim Division Directors, Ms. FE and Mr. LB were Grievant's peers.

On July 10, 2003, a panel member met with the Executive Director⁹ of a constituent group to introduce a newly selected Division Director. The Executive Director asked about the Agency's reorganization because she was concerned about how it might affect her organization. The panel member described the reorganization and said that the Division Director had been selected for the position but that Grievant

⁸ Ms. FE's application cover letter shows she applied only for position 283 (the position she held on an interim basis), but she testified that she applied for both positions. Mr. LB's application cover letter suggests he applied for position 284 (the position he held on an interim basis), but he testified that he applied for both positions.

⁹ The Hearing Officer finds the Executive Director's credibility to be impeccable. Her account of events was accurate, logical, and persuasive.

was not selected for the position.¹⁰ The panel member then explained, “[Grievant] is in his twilight years.”¹¹ The Executive Director is an attorney with knowledge of employment law. She was shocked at the panel member’s statement because she believed the panel member’s comment indicated that the panel member believed Grievant was too old for the Division Director position or that Grievant was too close to retirement for the position.

Although the Agency did not intend to do so¹², it created the impression that the decision to select Ms. FE and Mr. LB as permanent Division Directors had been made long before the positions were advertised. For example, the Agency Director sometimes introduced Ms. FE and Mr. LB to external groups and to the Agency’s Board as Division Directors without mentioning “Acting” or “Interim.” At a Community Partnerships Conference, an Agency brochure listed Ms. FE as “Director, Division of Programs & Services”. Mr. LB exhausted his supply of business cards and needed new business cards. Without any other Agency manager’s knowledge, Mr. LB ordered new business cards describing his position as Division Director and omitting the word, “Acting” or “Interim.” He did so because he felt confident he would be selected the permanent Division Director.

CONCLUSIONS OF POLICY

Executive Order Number One declares that it is the firm and unwavering policy of the Commonwealth of Virginia to assure equal opportunity in all facets of state government. Discrimination on the basis of age is prohibited. Policy 2.05 of the Department of Human Resource Management “(DHRM)” prohibits employment discrimination in all aspects of the hiring process.¹³

¹⁰ The Executive Director did not mention Grievant’s name or raise any question regarding why he was not selected for the Division Director position. It was the panel member who volunteered that Grievant was not selected.

¹¹ The panel member recalled using the phrase “twilight” with comments about Grievant but believed the Executive Director took his comments out of context. The Hearing Officer finds that the Executive Director’s account was more complete and accurate and that she did not take the panel member’s words out of context.

¹² In a memorandum dated January 28, 2003, the Agency Director informed selected staff that, “[Mr. LB] will serve as interim director of the *Division of Regulation and Research*, and [Ms. FE] will serve as interim director of the *Division of Programs and Services*.” Agency Exhibit 5.

¹³ DCJS Policy 12 governing Recruitment and Selection has the purpose of ensuring that “all applicants for positions in the Department of Criminal Justice Services (DCJS) have a fair and equal opportunity for employment and advancement and that positions are filled by the applicant best suited for the job.” Agency Exhibit 12.

Grievant is age 40 or older.¹⁴ He suffered an adverse employment consequence because he was not selected as a Division Director. He was qualified for the job based on his demonstrated experience and training and because he was selected for an interview by the Agency based on its evaluation of Grievant's knowledge, skills, and abilities. A younger worker with comparable qualifications was selected for the position instead of Grievant.

Grievant has presented direct evidence that the Agency discriminated against him based on his age. The panel member's statement reflected his state of mind on July 10, 2003. Because only approximately five weeks had passed since Grievant was interviewed and the panel member raised Grievant as a topic of discussion, the Hearing Officer finds that the panel member's statement on July 10, 2003 reflected his state of mind when Grievant was being interviewed and evaluated for selection as a Division Director.

The Agency contends that it complied with all human resource policies and did not discriminate on the basis of age. The testimony of the Executive Director is fatal to the Agency's assertion. There are many factors involved in selecting the most suited candidate as Division Director. Whether Grievant's age was the primary factor denying him selection for the position is not clear from the evidence. What is clear from the evidence, however, is that Grievant's age played some role in the decision-making process and because it played some role, the Agency discriminated against Grievant based on his age.

The Agency presented evidence to support its contention that it selected the two best suited candidates and, therefore, its selection should not be reversed. The Hearing Officer makes no finding regarding whether or not the Agency selected the two best suited candidates. If the Hearing Officer assumes for the sake of argument that the Agency selected the two best suited candidates, the assumption would not change the outcome of this case. It is the selection process that is of significance in this grievance, not the selection outcome. The Agency's selection process included an impermissible consideration of age.

The Hearing Officer's authority is limited to ordering the Agency to "comply with applicable law and policy."¹⁵ Accordingly, the Hearing Officer will not order the Agency to comply with specific steps to correct its misapplication of policy. The Hearing Officer has authority to make recommendations and chooses¹⁶ to do so. The Hearing Officer recommends that the Agency select three new panel members to interview the five

¹⁴ Grievant may still show age discrimination even though the Agency selected candidates who were also over age 40.

¹⁵ GPM § 5.9(a)(5).

¹⁶ In order for the Division Directors selected at a later date to have legitimacy in the eyes of Agency employees, it is important that their selection process not be influenced by the previous selection process and the appearance of pre-selection.

applicants and make a recommendation of the best suited candidate to the Hiring Authority. Since the responsibilities of position 283 and position 284 are different and Grievant applied for only one position, the panel should conduct separate interviews for each position.¹⁷

Grievant contends the Agency discriminated against him based on his race and gender. No credible evidence was presented suggesting the Agency discriminated against Grievant based on his race or gender.

DECISION

For the reasons stated herein, the Agency is Ordered to refrain from discriminating against Grievant because of his age. The Agency is Ordered to comply with human resource policy by repeating the Division Director interview and selection process and then choosing the most suited candidate without regard to age.

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 14th St., 12th 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:

¹⁷ Grievant seeks “financial compensation commensurate with the future earnings potential of the newly created positions” The Hearing Officer lacks the authority to grant such relief. Grievant’s request for such relief is denied.

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.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].

Carl Wilson Schmidt, Esq.
Hearing Officer

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