

Issues: Age discrimination, racial discrimination, retaliation; Hearing Date: 01/30/04;
Decision Issued: 02/13/04; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case
No. 538



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 538

Hearing Date: January 30, 2004
Decision Issued: February 13, 2004

PROCEDURAL HISTORY

Grievant applied for a position with the University and was not selected. On April 30, 2003, Grievant timely filed a grievance to challenge the University's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. EDR issued Ruling No. 2003-148 qualifying the matter for hearing. On January 12, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 30, 2004, a hearing was held at the University's regional office.

APPEARANCES

Grievant
Grievant's Counsel
University Party Designee
University Counsel
Witnesses

ISSUE

Whether the University discriminated against Grievant on the basis of her age or race and whether the University retaliated against her.

BURDEN OF PROOF

The burden of proof is on the 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 University of Virginia employs Grievant as an Administrative and Office Services Specialist III. She reports to the Division Chief and has done so for approximately two decades. She has been employed by the University for approximately 30 years. She is age 59.

On February 26, 2003, the University posted the position of Financial Services Specialist I (Grants Specialist) and invited the general public to apply.¹ No closing date was specified and the vacancy remained open until filled. The position was within the Department of Medicine and provided a salary range of \$26,722 to \$54,842 in Pay Band 4.²

Grievant applied for the Grants Specialist position. She was separately interviewed by the Division Chief, Dr. B, and the Former Grants Specialist. The Division Chief did not prepare questions in advance of the interview and it is not clear whether he asked the same questions of all candidates. The Division Chief was the hiring authority and relied on the recommendations of Dr. B and the Former Grants Specialist.

Grievant was not selected for the position. The successful candidate is 47 years old and is of a different race than Grievant. The Division Chief felt Grievant was not the most suited candidate for the position based on the answers she gave during the interview, his observation of Grievant over the many years he has worked with her, Grievant’s lack of experience in managing grants, and her lack of response to suggestions from the Division Chief or others to help others within the division. The Division Chief felt the selected candidate had adequate grant experience and had a

¹ The Former Grants Specialist retired, creating the vacancy.

² Had Grievant been selected for the position, her position Pay Band would have increased from 3 to 4.

reputation as an enthusiastic hard-worker who was willing to take on any task that needed doing.

After being denied the position, Grievant complained to the University's human resource staff. The Human Resource Officer held a meeting including Grievant and the Division Chief. Grievant expressed that she was the most qualified person for the Grants Specialist position and should have been selected for that position by the Division Chief. The Division Chief turned to Grievant and said "we, you and I, are too old to learn new things." Grievant construed the Division Chief's statement to mean that he believed her age prevented her from being able to perform the duties of a Grant Specialist and that he denied her the position, in part, because of her age. The Human Resource Officer interpreted the statement as being inappropriate and later admonished the Division Chief. The Division Chief's supervisor also later admonished the Division Chief. The Division Chief testified that he regretted making the statement but that he did not consider Grievant's age when deciding who to select for the vacancy.

On February 29, 2000, Grievant filed a grievance requesting "proper grade with supervising privileges", "that patient appointments should no longer be my responsibility" and that she be moved to an office closer to the Division Chief.³

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.

Grievant has presented direct evidence that the University discriminated against her based on her age. The Hearing Officer finds that the Division Chief's statement that Grievant was too old to learn new things reflected his state of mind when he interviewed Grievant⁴ and evaluated her suitability for the Grants Specialist position.

The University contends that it complied with all human resource policies and did not discriminate on the basis of age. The testimony of the Division Chief, however, is fatal to the University's assertion. There are many factors involved in selecting the most suited candidate. Whether Grievant's age was the primary factor denying her 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

³ Grievant Exhibit 12.

⁴ The statement was made in the context of a meeting addressing why Grievant was not selected for the Grants Specialist position.

because it played some role, the University discriminated against Grievant based on her age.

The Division Chief testified that he made the statement to Grievant because he did not wish to tell her directly that she was not capable of performing the Grants Specialist position. The Hearing Officer finds the Division Chief's explanation insufficient to reverse the discriminatory meaning of his "too old" statement. There is no material difference (in terms of harshness) between telling Grievant that she is not able to perform a job and that she is too old to perform the job.

The University contends it selected the most suited candidate for the position and that the Supervisor's comment would not affect the outcome of the selection process. Grievant contends she was better qualified than the successful candidate and should have been granted the position based on her seniority, qualifications, and the division's practice of promoting employees internally.⁵ It is not the role of the Hearing Officer to select the best candidate for a position. The Hearing Officer makes no finding regarding whether Grievant was the most suited candidate for the position.

Grievant contends the University discriminated against her on the basis of her race and gender. No credible evidence⁶ was presented suggesting the University discriminated against Grievant on the basis of her race or gender.

Grievant contends the University retaliated against her because she filed a grievance in 2000.⁷ No credible evidence was presented suggesting the University retaliated against Grievant.

DECISION

For the reasons stated herein, the University is Ordered to refrain from discriminating against Grievant because of her age. The University is Ordered to repeat the Grants Specialist interview and selection process and then choose the candidate without regard to age and in accordance with University hiring policies.

⁵ Grievant has not established that the University is obligated to promote her based on seniority or practice of promoting from within the organization. No University policy requires this.

⁶ Grievant presented a report purporting to be "An Examination of the University's Minority Classified Staff." The Hearing Officer gives little weight to this report since it was prepared in June 1996 and its current applicability is questionable.

⁷ Grievant stated that the Division Chief asked her why he should promote her when she had gone to the hospital and reported him. The Division Chief denied making any statements of that nature. His denial was credible. Accordingly, Grievant has not met her burden of proving that the University retaliated against her for filing the 2000 grievance.

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:

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.⁸

[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].

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer