

Issues: Misapplication of hiring policy, discrimination and retaliation; Hearing Date: 05/26/04;
Decision Issued: 06/09/04; Agency: DOC; AHO: Joseph R. Lassiter, Jr.; Case No. 684/685

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of Department of Corrections Case Number 684/685

**Hearing Date: May 26, 2004
Decision Issued: June 9, 2004**

PROCEDURAL HISTORY

Grievant has been a Probation and Parole Officer with the Department of Corrections ("DOC") for approximately eight years, and prior to that with the Florida Department of Corrections for an additional eleven years, a total of nineteen years in corrections. In July, 2003, Grievant applied for five Psychologist I positions with DOC at facilities A (two positions), B, C and D. Grievant was interviewed but not selected for the position at Facility B. She was not interviewed for any of the other positions. Grievant filed a grievance ("Grievance 1") on August 11, 2003, claiming that DOC's actions connected to these recruitment postings constitute a misapplication of DHRM's Policy 2.10, Hiring. She also claimed that agency management engages in age and gender discrimination in its recruitment and hiring practices for Psychologist I positions. Grievance 1 has previously been resolved against Grievant and is not the subject of this hearing.

Subsequently, Grievant filed two more grievances ("Grievance 2" and "Grievance 3"), filed on October 21, 2003. Grievance 2 alleges that DOC retaliated against Grievant for participating in the grievance process when it failed to grant her an interview for the two positions at Facility A. She also raised again issues of misapplication of policy and age and gender discrimination, which additional claims were not allowed and were closed as being duplicative of the matters heard in Grievance 1. The issue of retaliation was not deemed duplicative and was allowed to proceed to hearing.

Grievance 3 alleges that Grievant was not selected to interview for Psychologist I and Psychologist II positions at Facility F. Grievant again alleges that DOC misapplied policy, discriminated against her on the basis of age and gender, and retaliated against her for using the grievance procedure.

Compliance and Qualification Ruling of Director issued on March 26, 2004 held that Grievant's claims of retaliation qualified for a hearing, and that Grievant's alternative theories related to the agency's decision not to interview her, including allegations that the agency misapplied state and agency hiring policy and engaged in age and gender discrimination, should also be submitted for adjudication by a hearing officer. Grievances 2 and 3 were consolidated for hearing, and on or about May 6, 2004, were assigned by the Department of Dispute Resolution for hearing before this officer.

A hearing was held on May 26, 2004, at the DOC regional office in the City of Suffolk. Admitted into evidence were Agency Exhibits 1 - 8 and 10 without objection, Grievant objecting to Agency Exhibits 9, 11 and 12. Agency Exhibits 9, 11 and 12 were subsequently admitted into evidence over the objection. Grievant's Exhibits A, B, C-1, C-2, C-3, and D were admitted into the evidence, the Agency objecting to Exhibits C-4, C-5, C-6, and C-7.

APPEARANCES

Grievant
Agency Party Designee
Legal Assistant Advocate
Psychologist Supervisor
Senior Psychologist
HR Manager
HR Customer Service Representative
HR Recruitment Supervisor

ISSUES

Whether DOC misapplied hiring policies and discriminated against Grievant because of her age?
Whether DOC retaliated against Grievant for exercising her rights under the grievance process?

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") Sec. 5.8. A preponderance of the evidence, also called the greater weight of the evidence, is defined as evidence which shows that what is sought to be proved is more probable than not. GPM Sec. 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 Virginia Department of Corrections has since 1996 employed Grievant as a Probation and Parole Officer. In that capacity she has worked primarily with juvenile probationers in Norfolk and sex offenders and violent mentally disorderly offenders at the Virginia Beach City Jail. Previously, while working for the Florida Department of Corrections, Grievant had similar employment and casework. See Ex. 5 beginning page 29. Grievant has received excellent performance evaluations, generally receiving high ratings as an "Extraordinary Contributor". See Ex. C-1.

Grievant has a B.A. in Social Science with a minor in Criminal Justice. She first attempted to obtain a Masters in Psychology from Norfolk State University, but was unable to complete the program while working full time, and subsequently transferred to a counseling program at Old Dominion University. There she was able to continue working full time and earned her Masters in Counseling. She has limited or no experience in clinical psychology and has never worked in a prison environment.

The Qualifications for the Psychologist positions at Facility A were advertised as requiring “Master’s degree in clinical or counseling psychology”, but stated that “Master’s degree in related human services field may be considered.” “Previous experience in a correctional, forensic, or mental services setting.” was listed as a Preferred Qualification. For Facility F, Qualifications for the Psychologist Senior stated that a Masters degree in clinical psychology was preferred, or other related Human Services Degree, and a Ph or Psy.D. in Clinical Psychology and licensed as a Clinical Psychologist or licensed eligible preferred. Post degree experience in diagnostic interviewing, assessment, psychological testing, crisis intervention, and providing psychotherapeutic services, and supervisory experience working in a correctional, forensic, mental health or other institutional setting was preferred.

DOC received five applications for the positions at Facility B, and referred three for interviews. DOC received seven applications for the positions at Facility F, and referred five for interviews. Grievant was not referred for an interview at either facility.

A Regional Supervisor was responsible for the screening and interviewing for the positions advertised at Facility B. He was assisted by the Psychologist Supervisor onsite at that facility. The onsite supervisor testified that Facility B has 3,000 inmates, lots of beds in its prison hospital, and lots of those beds are devoted to mental health patients. Any inmates in the DOC system with medical and psychological problems end up at Facility B, and many of them go directly to mental hospitals when they are discharged from the prison system. Facility B has many and varied needs that must be addressed by anyone hired as a Psychologist at that facility. He receives applications from Ph.D. licensed clinical psychologists who treat the mentally ill and do full psychological testing. Applicants holding masters degrees can do the job if they have clinical experience and testing experience. However, most M.A.’s in Psychology do not have the skills. He elaborated that lots of clinical experience allows some applicants to compete with applicants who might have higher degrees. He testified that Grievant was not interviewed for the position because she had no experience clinically, her degree was not in psychology, and her counseling degree was not loaded with psych courses.

A Mental Health Clinical Supervisor testified as to the process used in interviewing for the position at Facility F. DHRM Policy 2.10 (Ex A) provides guidelines for the hiring process. DOC Policy 5-7 (Ex. A-1) defines agency procedures to implement DHRM Policy 2.10. Sec. 5-7.11(A) provides that the Employee Relations Unit Recruitment Officer assigned the position shall screen applications to the best qualified group of applicants and forward them to the organizational unit. . . . For technical positions, such as medical or those in MIS, the unit may be asked to assist in the screening.” Sec. 5-7.11(D) states that “All applicants referred by the Employee Relations Unit should be interviewed unless an exception is approved by the Employee Relations Unit.” She explained that in the past, applications for positions to be filled

were submitted to a central location, screened, and then sent to the institution for interviews. Now, applications are sent directly to the institution, and the Recruitment Officer travels to the institution to review the applications and to interview the applicants chosen for interviews.

In regard to the positions at Facility F, there was a notification of vacancy, an advertisement that complies with the Code of Virginia, a deadline for the selection process, applications were sent to the institution, the applications are reviewed and discussed by meeting or conference call, and four or five applicants are chosen for interview.

There is little or no testimony to support Grievant's claim that she was the victim of age or gender discrimination. In essence, her allegations appear to be based on her claims that there are very few older women who hold positions as psychologists in the Agency, and that a large number of younger women hold psychologist positions. Grievant's bare allegations would not support a claim for discrimination. However, the Mental Health Clinical Supervisor offered evidence that mental health services positions at DOC are diversely staffed (Ex. 11), and an explanation that the influx of women into the field of psychology in recent years helps explain why there might appear to be more younger women and fewer older women in the subject positions. (Ex. 10, pg. 4).

There is no testimony to support Grievant's claim of retaliation. All witnesses who were asked testified that they were not aware who the applicants were, they were focused on credentials and training while evaluating the applicants.

CONCLUSIONS OF LAW

Classified employees are to be selected "based upon merit and fitness, to be ascertained, as far as possible, by the competitive rating of the qualifications . . ." Va. Code Sec. 2.2-2901(A). Agency positions must be filled in accordance with DHRM Policies and Procedure Manual 2.10. DOC also has companion hiring procedures, 5-7, Recruiting, Selection and Appointment. DOC has published a Division Operating Procedure, 707.1 et seq (Ex. 12), which further elaborates on the Employment Process (Ex. 12, see Attachment 2, pg. 2). DOC followed the hiring procedures mandated by the Commonwealth and DOC.

Grievant's complaint mainly arises from the fact that she was not screened in for interviews for positions as a psychologist at various state prisons. In the private sector, applicant would not be eligible for such positions, because of the fact that she is, by definition, not qualified or licensed as a psychologist. The Commonwealth uses "Psychologist" as a job title rather than a professional title, and Grievant would be permitted to hold a position as a psychologist in one of the subject institutions. Nevertheless, education, training, licensing and experience as a clinical psychologist are stated qualifications and/or preferences for being hired as a psychologist at the institutions. The qualifications state that a master's degree in a related human services field may

be considered. Grievant contends that DOC has read that permissive qualification out of the description. In reality, Grievant is demanding that DOC be required to accept the permissive requirement as mandating that she be interviewed for the psychologist positions. The clinical supervisors who served as recruitment officers in filling the subject positions exercised their discretionary judgment to screen in applicants who had clinical experience, experience working in institutional settings, or degrees in psychology. Grievant met none of these criteria, and was accordingly not selected for interviews.

Grievant has offered no credible evidence that DOC discriminated against her because of her age or gender. If the Hearing Officer were to assume for the sake of argument that Grievant did establish a prima facie case of age or gender discrimination, DOC has established that it did not discriminate against Grievant because of her age or gender.

Grievant has offered no credible evidence of retaliation. None of the witnesses who participated in screening the applicants for interviews were aware of the fact that Grievant had exercised her rights under the grievance process at the time that the decisions were made not to interview her.

DECISION

Grievances 2 and 3 are denied.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has been concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review - This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and either party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Joseph R. Lassiter, Jr., Esquire
Hearing Officer