

Issue: Misapplication of hiring policy and retaliation; Hearing Date: 12/16/04;
Decision Issued: 01/20/05; Agency: DEQ; AHO: Carl Wilson Schmidt, Esq.; Case
No. 7918



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7918

Hearing Date: December 16, 2004
Decision Issued: January 20, 2005

PROCEDURAL HISTORY

On May 26, 2004, Grievant filed a grievance alleging the Agency misapplied State and Agency policy and retaliated against him for previous protected activity. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On November 3, 2004, the EDR Director issued Ruling 2004-846 qualifying the matter for hearing. On November 10, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 16, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether the Agency misapplied State or Agency hiring policy and retaliated against Grievant.

BURDEN OF PROOF

discharge of hazardous substances. Demonstrated ability to organize and prioritize technical and other related work including budget, schedule, and manpower planning in a team environment and to develop effective work methods in accordance with established policies and procedures. Ability to manage and provide oversight to the implementation of cooperative agreements for the Superfund Site Assessment Program. Ability to manage and solve a variety of complex environmental problems. Demonstrated ability to communicate effectively verbally and in writing; ability to utilize computer software programs to improve production and efficiency as they relate to program and project management. Ability to analyze problems, decision making and interpersonal skills.²

The Department of Environmental Quality employs Grievant as an Environmental Engineer Consultant. On March 5, 2004, Grievant applied for the position of Site Assessment Manager, a position he considered a promotion. His application was screened to determine whether he had the appropriate knowledge, skill, and ability (“KSAs”) for the position. He was included among those scheduled for an interview by a panel of three Agency employees. Mr. RW was the hiring supervisor on the panel. Ms. KS was on the panel. Ms. PH, the Human Resource Director, was also on the panel.

Mr. RW asked the Human Resource Director to be on the panel because 8 of the 9 applicants to be interviewed worked in Mr. RW’s unit. He wanted someone with an independent perspective to assist with the selection. The Human Resource Director did not learn that Grievant was a candidate until after she had already agreed to serve on the panel.

The Agency developed 9 questions to ask candidates. Those questions were drawn from the position’s required knowledge, skill, and ability.

Before an interview, Mr. RW told each candidate that the panel would consider only the information contained in answers to questions. He advised them to assume the panel knew nothing about them so that they would give complete answers.

At the conclusion of each interview, the panel members would mark a check plus, check, or a minus next to the candidate’s question answer. After all of the interviews were finished, the panel met to discuss ranking the candidates. After their discussions, each panel member concluded that the Selected Candidate was the best suited for the position. Grievant was not among the top three candidates.

Grievant earned a B.S. in Civil Engineering, Geodetic and an M.S. in Civil Engineering, Water Resources. The Selected Candidate attended community college in 1983 and 1985 but did not earn a degree. He then obtained a B.S. in Environmental Science in 1995 while working a full time job.

² Grievant Exhibit 8.

CONCLUSIONS OF POLICY

Classified employees are to be selected “based upon merit and fitness, to be ascertained, as far as possible, by the competitive rating of qualifications ...” Va. Code § 2.1-111. Agency positions must be filled in accordance with Department of Human Resource Management (“DHRM”) Policy 2.10.

The State Hiring Policy 2.10 requires agencies to post job announcements, screen candidates based on their knowledge, skills, and abilities, conduct interviews, and select the person best suited for the position. A selection panel is a “group of individual (two or more) that interviews job applicants for selection or for referral to the hiring authority for selection.”³

Interviews are a required step in the selection process.⁴ Human Resource Office staff may serve on interview panels upon request of the hiring supervisor/panel chair.⁵ A set of questions must be developed to ask of each applicant. These questions should seek information “related to the applicant’s knowledge, skills, and ability to perform the job.” Questions that are not job-related or that are contrary to Equal Employment Opportunity standards are not permitted.⁶

The individual responsible for making the hiring decision is called the Hiring Authority.⁷ The result of the hiring process is the selection of the “applicant best suited for a specific position.”⁸

One of the initial steps necessary for an agency to hire an employee is to prepare a job announcement. Job announcements “must **not** specify a certain number of years or experience nor a specific educational requirement unless sanctioned by law.” (Emphasis added.) Job announcements **must** include “any educational qualifications required by law.”⁹ Job announcements **should** include, “any educational preferences not required by law, stated with a provision for substitution of equivalent applicable experience or training.”¹⁰

³ DHRM Policy 2.10, Page 4 of 21.

⁴ DHRM Policy 2.10, Page 9 of 21. DEQ Policy 3-1(D)(1) states, “Interviewing for all positions **except** those classified as office/clerical (EEO-4 Code F) shall be conducted by an interview panel.”

⁵ DEQ Policy 3-1(D)(D)(1)(b).

⁶ DHRM Policy 2.10, Page 10 of 21.

⁷ DHRM Policy 2.10, Page 2 of 21.

⁸ DHRM Policy 2.10, Page 4 of 21.

⁹ DHRM Policy 2.10, Page 5 of 21.

¹⁰ DHRM Policy 2.10, Page 6 of 21.

Because an Agency cannot independently require an applicant to have a college degree, an Agency has not automatically violated State policy when it hires an applicant without a college degree instead of an applicant with a college degree. When an Agency is selecting the best suited candidate, it is free to conclude that an applicant's experience makes him or her more suited for a position than an applicant with extensive education.

In this case, Grievant's technical educational background is dramatically superior to that of the Selected Candidate. The Site Assessment Manger position, however, is primarily a managerial position for which managerial experience and interpersonal skills are of primary importance.¹¹ Each panel member believed the Selected Candidate's managerial experience and interpersonal skills exceeded those of the other candidates. No credible evidence was presented to suggest the panel's conclusion was inaccurate.

Grievant questions the selection of panel members. He contends the panel members were all aware of his previous protected activities. No credible testimony was presented to support this conclusion. Grievant contends the panel members had personal relationships with the Selected Candidate. No credible evidence was presented to suggest any panel members had relationships with the Selected Candidate other than usual working relationships. Grievant contends the Human Resource Director should not have been on the interview panel. This argument fails because DEQ Policy 3-1(D)(b) specifically permits Human Resource Office staff to sit on interview panels.

Grievant asserts the interview questions were simplistic, superficial, and not designed to address technical competencies. The evidence showed, however, that the position was primarily a management position and the questions addressed both management and technical competencies. When the interview questions are compared to the KSAs of the position, the Hearing Officer finds that the interview questions fairly address the KSAs necessary for the position.¹²

Grievant objects to some of the interview questions because "there truly were no wrong answers, inviting responses that could only be evaluated based on the subjective opinions of the panel." To the extent Grievant's assertion is true, DHRM and DEQ policy does not prohibit such questions.

¹¹ For example, the job announcement requires:

Ability to manage and provide oversight to the implementation of cooperative agreements for the Superfund Site Assessment Program. Ability to manage and solve a variety of complex environmental problems. Demonstrated ability to communicate effectively verbally and in writing.

¹² For example, the question, "Please describe how your work experience and educational background (both technical and managerial) qualifies you for this position." is a simple question, but one designed to elicit information regarding KSAs.

Grievant contends the scoring was blatantly wrong. He objects to the panel members giving him a minus score but giving the selected candidate a check score on the answer to question 3.¹³ Grievant failed to present sufficient evidence to illustrate what answer was expected by the panel and how Grievant's answer failed to meet that standard and how the selected candidate met that standard. The evidence presented does not afford the Hearing Officer any way to determine whether or not Grievant's assertion is correct.¹⁴ In addition, based on the testimony of the panel members and review of the interview answers, no credible evidence was presented suggesting the panel members ranked the candidates inaccurately based on their respective opinions.

Grievant asserts the Agency failed to properly check the references of the Selected Candidate. DEQ Policy 3-1(E)(1) provides that:

Reference checks are required before a job offer can be made, except in cases where the hiring supervisor would be the person providing the reference. Initially, only references on the selected candidate are required.

Mr. RW did not check the references of the Selected Candidate because Mr. RW had worked with the Selected Candidate and knew of his abilities. No evidence was presented suggesting that the Selected Candidate actually listed Mr. RW as one of his references or that he was the Selected Candidate's only reference. State Applications for employment typically require three references. Accordingly, the Agency must contact all of Selected Candidate's references in order to comply with policy.

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual 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 (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;¹⁵ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity.

¹³ Question 3 asked, "With Brownfields Redevelopment, there is a need to streamline site assessment and characterization practices. Please describe some methods to accomplish a streamlined site characterization." Grievant was not the only candidate receiving a minus score in response to question 3.

¹⁴ How questions were scored suggests panel members acted independently to reach their conclusions. For example, at least one panel member differed from the other two when evaluating Grievant on questions 5 and 9. A panel member differed on questions 2, 4, 7 and 8 for the selected candidate.

¹⁵ See Va. Code § 2.2-3004(A)(v). Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

Grievant contends the Agency retaliated against him when denying his selection as Site Assessment Manager. No credible evidence was presented suggesting the Agency retaliated against Grievant in denying him the position of Site Assessment Manager. In particular, Grievant did not present any testimony showing to what extent the panel members knew of his prior protected activities and to what extent they may have considered such activities.

Grievant argues a panel member, Ms. KS, showed retaliatory bias against him. A question arose about a case Grievant had written a report about. Ms. RS instructed another employee to find out some general information about the case and specifically instructed her not to talk to Grievant about the case. Grievant contends that Ms. RS should have included Grievant as part of gathering information about the case since he knew more about it than anyone else. Ms. RS testified that she wanted to exclude Grievant because she only wanted a brief overview of the main points and did not want a detailed assessment. She added that she knew Grievant would provide more information than she needed and wanted. The Hearing Officer finds Ms. RS's explanation logical and credible. Her actions do not establish a basis for retaliation against Grievant.¹⁶

DECISION

For the reasons stated herein, Grievant's request for relief is denied except that the Agency is ordered to check the references of the Selected Candidate to ensure he should be offered employment.

APPEAL RIGHTS

You may file an administrative review request within **15 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

¹⁶ In addition, no evidence was presented suggesting Ms. KS knew of Grievant's prior protected activities.

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 15 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 15-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.¹⁷

[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

¹⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.