

Issue: Misapplication of the hiring policy; Hearing Date: 06/10/05 and 06/17/05; Decision Issued: 06/30/05; Agency: VEC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8076; **Judicial Review: Appealed to the Richmond City Circuit Court in July 2005; Circuit Court Ruling No. CH05-1272-4 issued 11/22/05; Outcome: Affirmed HO's decision, but for different reasons; Appealed to Court of Appeals in December 2005; Outcome: Parties settled out of court (12/13/06) [Case No. 3119 05 2].**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8076**

Hearing Date: June 17, 2005  
Decision Issued: June 30, 2005

**PROCEDURAL HISTORY**

Grievant applied for the position of Chief of Tax with the Virginia Employment Commission. He was not selected for the position. On December 20, 2004, 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 May 12, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 17, 2005, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
Witnesses

**ISSUE**

Whether the VEC failed to comply with law or State policy when it selected a candidate for the position of Chief of Tax.

### **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 Virginia Employment Commission sought applications to fill an opening in the position of Chief of Tax. The position was advertised with a closing date of September 24, 2004 as follows:

**DUTIES:** Provide management direction and leadership to the statewide Unemployment Insurance (UI) Tax program and to units/staff engaged in providing delivery of the UI Tax services so that all areas are effectively and efficiently performed in accordance with federal and state laws, policies and procedures and that all quality and promptness standards are met as required by the U.S. Department of Labor. Assure proper interpretation of federal and state legislation and its communication and incorporation into procedures. Analyze impact of and make recommendations for legislation and rules and regulations. Monitor tax program to ensure quality performance and consistency of operations. Develop and implement training and other tools to support a quality workforce. Lead staff in the development and accomplishment of meaningful goals and objectives, and the continuous improvement of tax operations while effectively managing resources.

**QUALIFICATIONS:** Comprehensive knowledge of the Virginia Unemployment Compensation Act and related regulations, policies and procedures. Working knowledge of systems automation. Demonstrated ability to plan and direct the work of others; to lead a large staff; to communicate effectively orally and in writing; to interpret and apply unemployment compensation law, policy and procedure; and to lead the development and effective implementation of new methods and procedures for accomplishing the work of the Tax program. Skill at developing and presenting training programs and giving presentations to internal and external groups. Graduation from a college or university with

major course work in accounting, business administration, public administration, or another area related to the duties of the position; or an equivalent combination of training and experience. Progressively responsible experience that provided an in-depth understanding of the Virginia Unemployment Compensation Act, preferably in a supervisory or management position. **Successful candidate must pass a credit check and a criminal conviction investigation. Completion of Statement of Economic Interest form required for selected candidate.**<sup>1</sup>

Grievant and the Successful Candidate applied for the Chief of Tax position and were considered for initial interviews with a panel. Both were selected for follow-up interviews with the Hiring Authority.<sup>2</sup>

Grievant is employed by the Agency as a Manager of Accounts Receivable.<sup>3</sup> He has been employed by the VEC for approximately three years. He directly supervises six employees. Prior to this, Grievant worked as: a Coordinator for a community college; Senior Vice President for a realty finance company; Vice President of a bank; Vice President/Construction Manager of a financial institution; Vice President of a service corporation; Assistant Vice President of a financial institution; and Assistant City Manger for a city in Virginia.

Grievant is well-educated. He holds an A.A., B.S. in Public Administration, M.S.A in Administration, and is currently a Ph.D candidate in Public Policy.

Grievant is a veteran who received an honorable discharge from the United States Army. He enlisted as a private and ultimately attained the rank of Major. He served one year in the Vietnam Conflict and had limited active duty in Operation Desert Storm.

The Successful Candidate has worked for the VEC for over 32 years. She began as a Clerk Typist C in the Non-Monetary Debt Unit and then in the Benefits unit. She advanced to a Claims Examiner A in the Benefits unit. She then became a Tax Examiner A in the Delinquent Accounts section and later a Tax Examiner B in the Experience Rating section. She became a U.C. Supervisor A in the Experience Rating unit and then a U.S. Supervisor – BP/CU in the Benefits unit. She rose to Project Manager in the Tax and Wage Imaging section. Prior to becoming Chief of Tax, she was Manager of the Interstate Unit.<sup>4</sup>

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<sup>1</sup> Grievant Exhibit 2.

<sup>2</sup> The Hiring Authority is the "individual making the hiring decision." DHRM Policy 2.10.

<sup>3</sup> As a VEC employee, Grievant made recommendations regarding the Agency's computer systems that resulted in savings of over \$340,000 per year.

<sup>4</sup> The Successful Candidate attended college for one year but did not obtain a degree. She is not a military veteran.

Four members made up the first interview panel. After considering each candidate's answer to their questions, all four panel members rated Grievant as "Moderate." Two of the four panel members rated the Successful Candidate as "Extensive" and two rated her as "Moderate." A rating of Moderate means, "Possesses more than minimum level, but does not demonstrate 'extensive' level." A rating of Extensive means, "Greatly exceeds minimum level requirements."<sup>5</sup>

Following a second interview, the Hiring Authority gave Grievant a Moderate Rating and wrote:

[Grievant] gave a good strong answer to interview questions. His responses lack depth of knowledge of tax operations in most instances except those he currently deals with in collection. He has a strong educational background and good overall knowledge of tax. Was clear and articulate in expressing ideas for change.

The Hiring Authority gave the Successful Candidate an Extensive Rating and wrote:

[Successful Candidate] gave well thought-out responses to interview questions. She has 10 years of experience in tax, and although she does not have detailed knowledge of all tax operations, she has detailed knowledge in several important areas including experience rating. She has also been involved in significant project work involving tax, primarily on the Imaging project, and has had additional exposures in work that crossed between tax and benefits. She has developed a high level of knowledge and experience in systems development and has a great deal of experience in staff management. She is the most suited candidate for the position.<sup>6</sup>

Grievant was not selected for the Chief of Tax position.

## **CONCLUSIONS OF POLICY**

Department of Human Resource Management Policy 2.10 governs the hiring of executive branch employees.<sup>7</sup> Once applications for employment are submitted, the Agency screens those applications and advances to an interview those applicants possessing at least the minimum qualifications for the position. A group of two or more individuals may interview job applicants for selection or for referral to the hiring authority

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<sup>5</sup> Agency Exhibit 4.

<sup>6</sup> Agency Exhibit 2.

<sup>7</sup> The Agency has adopted Recruitment and Selection Guidelines and Procedures governing its hiring process. See Agency Exhibit 7.

for selection.<sup>8</sup> A set of interview questions must be developed and asked of each applicant. Interviewers must document applicants' responses to questions to assist with their evaluation of each candidate's qualifications. Selection is "the result of the hiring process that identifies the applicant best suited for a specific position."<sup>9</sup>

### Veteran Status

The Commonwealth of Virginia recognizes the achievements of veterans and provides additional consideration to their applications for employment. DHRM Policy 2.10, *Hiring*, defines Veteran as:

Any person who has received an honorable discharge and has (i) provided more than 180 consecutive days of full-time, active-duty service in the armed forces of the United States or reserve components thereof, including the National Guard, or (ii) has a service-connected disability rating fixed by the United States Department of Veterans Affairs. (See Va. Code § 2.2-2903(D).)

Grievant is a veteran under DHRM Policy. With respect to veterans, DHRM Policy 2.10 requires:

the veteran's military service shall be taken into consideration by the Commonwealth during the selection process, provided that such veteran meets all of the knowledge, skill, and ability requirements for the available position.

The Agency took into consideration Grievant's veteran's status when making its selection decision. Grievant's status was considered as part of the screening process and by the Hiring Authority when she evaluated the relative merits of the candidates. Va. Code § 2.2-2903 does not require a specific weight to be given to a veteran's status; it merely required an Agency consider that status. By considering Grievant's veteran's status, the Agency has satisfied the requirements of Va. Code § 2.2-2903. In other words, an Agency may give little weight to a veteran's status yet comply with Va. Code § 2.2-2903.

Va. Code § 2.2-2903 is not the only authority governing the Agency's selection of candidates when a candidate is a veteran. Governor Warner set forth the Commonwealth's policy for improving services for veterans in Executive Order 40. Governor Warner ordered "I hereby direct all state agency heads to renew their commitment to veterans' **preference** in hiring."<sup>10</sup> (Emphasis added). By referring to

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<sup>8</sup> Under the Agency's procedures, an interview panel must be used for all positions in pay band 4 or higher.

<sup>9</sup> Under the Agency's procedures, the Hiring Authority in most cases should not serve on the initial panel.

<sup>10</sup> Grievant Exhibit 1-G.

veteran's preference the Executive Order 40 addresses the weight that must be given to a veteran's status.

Requiring an agency to give preference to veterans **exceeds** merely requiring an agency to "consider" a candidate's veteran's status. Webster's New Universal Unabridged Dictionary defines preference to include, "a practical advantage given to one over others." In order to comply with Executive Order 40, an Agency must give weight to veteran's status such that the weight given serves as a practical advantage to the veteran. Giving a veteran's status a cursory review and little weight does not serve to create a preference for that veteran as expected under Executive Order 40. This does not mean an Agency must automatically select a veteran over a non-veteran. It means the Agency must evaluate a veteran's status so that it serves as a practical advantage and then compare the veteran's candidacy with the competing applicants to determine the best suited candidate.

In this case, the Hiring Authority knew of Grievant's veteran's status but gave it little weight. For example, the Hiring Authority did not include any discussion of Grievant's veteran's status in her "Overall review of second interview." She testified at the hearing that she understood veteran's status to be a deciding factor only if the candidates were otherwise equal. She did not evaluate Grievant's candidacy with the assumption that Grievant's veteran's status entitles him to preference in hiring as required by Executive Order 40. In essence, the Hiring Authority reversed the analysis. She should have given appropriate weight to Grievant's veteran's status prior to determining whether the candidates were equal or one was better than the other. By first determining whether the candidates were otherwise equal, the Hiring Authority did not give Grievant's veteran's status appropriate weight.

By any objective standard, Grievant and the Successful Candidate are substantially equal in their knowledge, skills, and abilities. For example, Grievant's lack of institutional knowledge of the organization is countered by his substantially greater level of education. The Successful Candidate's lack of higher education is countered by her extensive institutional knowledge. If the Agency finds that giving weight to Grievant's veteran's status (along with his knowledge, skills, and abilities) makes him the best suited candidate, then the Agency should offer the job to Grievant. If the Agency gives weight to Grievant's veteran's status but concludes that the additional weight does not make Grievant the best suited candidate, then the Agency need not select Grievant. The Agency has the obligation to consider all of the factors necessary to choose between two highly qualified candidates and, ultimately, has the discretion to choose the candidate who best suits the Agency's needs.

### Gender Discrimination

Grievant contends he was improperly discriminated against on the basis of his gender. DHRM Policy 2.05:

Provides that all aspects of human resource management be conducted without regard to race, color, religion, gender, age, national origin, disability, or political affiliation according to the Governor's Executive Order on Equal Opportunity and state and federal laws. (For the purpose of this policy "disability" is defined in accordance with the "Americans With Disabilities Act.")

The Governor's Executive Order on Equal Opportunity includes the following provisions:

Prohibits employment discrimination on the basis of race, gender, color, national origin, religion, age, or political affiliation, or against otherwise qualified persons with disabilities.

An employee can establish discrimination by presenting evidence of disparate treatment or disparate impact.

*Disparate Treatment.* Grievant may establish gender discrimination by presenting evidence<sup>11</sup> that: (1) he is a member of a protected class; (2) he is qualified for the position and his performance was satisfactory; (3) in spite of his qualifications and his performance he was rejected; and (4) he was rejected in favor of a female. If the Agency presents credible evidence of a nondiscriminatory reason for its actions, then Grievant has not established he was discriminated against because of his gender, 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 his *prima facie* case, the Agency has presented credible evidence of a nondiscriminatory reason for its failure to select Grievant, namely that it believes it selected a more experienced and better qualified applicant.

*Disparate Impact.* Grievant may establish gender discrimination by presenting evidence of an unlawful employment practice based on disparate impact.<sup>12</sup> Grievant must establish either (1) the specific employment practice<sup>13</sup> that causes a disparate impact on the basis of 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.

No credible evidence was presented showing the Agency had established an unlawful employment practice having a disparate impact. Grievant argues that the

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<sup>11</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.

<sup>12</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>13</sup> For example, a pre-employment test that favors females.



Agency has hired more women than men in key positions within the Agency. That evidence alone is insufficient to establish disparate impact.

### Hiring Policy

The Hearing Officer has reviewed DHRM Policy 2.10 and the Agency's internal hiring policy. Other than addressing Grievant's veteran's status, the Agency has complied with all provisions of the hiring policy.

## **DECISION**

The Agency is ordered to repeat the selection process beginning at the point where it failed to comply with Executive Order 40. The Agency must evaluate Grievant's veteran status so that his status serves as a practical advantage. After doing so, the Agency should compare the Grievant's candidacy with the competing applicants to determine the best suited person for the Chief of Tax position.

## **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  
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 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.<sup>14</sup>

[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

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<sup>14</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.