

Issue: Misapplication of hiring policy; Hearing Date: 06/08/05; Decision Issued: 06/15/05; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8078



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8078

Hearing Date: June 8, 2005
Decision Issued: June 15, 2005

PROCEDURAL HISTORY

Grievant was selected for the position of Equipment Service & Repair Manager I. The Agency later rescinded its offer of employment after Grievant had already accepted and was working in the position. On March 24, 2005, 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 16, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 8, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUE

Whether the Agency may rescind its offer of employment after it has been accepted and Grievant is working in the position.

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:

Grievant applied for the position of Equipment Service & Repair Manager I, position number 01068, at one of the Virginia Department of Transportation's facilities. The Agency complied with DHRM Policy 2.10, *Hiring*, by screening Grievant's application for employment and selecting him for an interview. Grievant and five other candidates were interviewed for the position. Grievant was identified as the best suited for the position and the Agency decided to hire him for the position. The Hiring Authority realized that Grievant did not possess a State Police Certified Safety Inspector License at the time of hire but decided to permit Grievant to obtain that license within six months. The Hiring Authority made this decision because the position did not involve conducting safety inspections but rather the requirement was intended to ensure that Grievant had the same knowledge of safety as would an inspector who actually made vehicle safety inspections.

In accordance with the Agency's practice, the Human Resources Generalist sent Grievant a letter dated February 9, 2005 stating, in part:

Congratulations on your selection for the above stated position in our [Residency]. Below you will see information related to your new assignment:

Effective date of employment: 2/10/05

Actual first day of work: 2/10/05

Report to: [Supervisor]

Semi monthly salary: [monthly salary amount] (projected annual income of [annual income] is based on 24 pay periods.)

Required successful probationary period: None

Other conditions of employment: (licenses/certifications, equipment, physical, etc.)

- Passing a physical examination/ drug screen (when applicable)

- Satisfactory driving record/CDL status with the Division of Motor Vehicles
- Clearance level of previous twenty-four (24) month drug/alcohol records check
- Refrigerant, Recovery and Recycling Certifications
- State Police Certified Safety Inspector License
- Criminal History Records Check¹

Grievant informed the human resource staff and his prospective supervisor that he accepted the offer of employment.

Grievant began working at his new job on February 10, 2005. Grievant completed paperwork to attend training offered by the Virginia State Police so that Grievant could become a State Police Certified Safety Inspector. As Grievant's paperwork was being reviewed within the Agency, an Agency employee questioned why Grievant had to attend training to obtain a license he was supposed to have possessed prior to obtaining the position. Agency managers decided to rescind Grievant's offer of employment and remove him from the position. On February 24, 2005, the District Human Resources Manager sent Grievant a letter stating:

In reviewing the applicant pool for this position, it has been determined that a State Police Safety Inspector License, Refrigerant Recovery, and Recycling Certification is required.

This position was advertised with the closing date of December 3, 2004 stating these requirements. We regret to advise you that based upon this requirement, you can not be selected to fill this position because the requirement must have been met by the closing date (12/3/04).

Therefore, the job offer which was extended on February 9, 2005 must be rescinded effective immediately. The proposed salary of [dollar amount] will be reduced back to your original salary of [dollar amount] for the pay period February 10, 2005 thru today. In addition, you will be reappointed to your original position number [number], as a Transportation Operations Manager I.

We value you as a VDOT employee and we trust that you will continue to apply for future positions.²

He continued to work in his new position until February 24, 2005.

¹ Grievant Exhibit 1. No probationary period was set forth by the Agency because Grievant was an existing employee of the Agency who had previously endured a probationary period.

² Grievant Exhibit 2. Grievant had obtained his Refrigerant Recovery and Recycling Certification prior to December 3, 2004.

Agency managers decided to use a new panel to re-interview four of the six employees in the original applicant pool who possessed the Virginia State Police license at the time of application for employment. Grievant was not permitted to re-interview. Second interviews were held on March 24, 2005. Grievant obtained his State Police Certified Safety Inspector License on March 29, 2005.³

CONCLUSIONS OF POLICY

It is undisputed that Grievant was (1) offered the position of Equipment Service & Repair Manager I, (2) Grievant accepted the position, (3) the Agency placed Grievant in the position, (4) Grievant worked in the position with all duties and responsibilities of the position, and (5) the Agency paid Grievant at the rate appropriate for the position. Grievant's status when he was removed on February 24, 2005 was no different from what his status would have been had he held the position for 30 years -- Grievant was a full time classified non-probationary employee working as an Equipment Service & Repair Manager I. Grievant could only be removed from that position in accordance with DHRM policy.

Department of Human Resource Management policy permits an employee to be removed from a position pursuant to DHRM Policy 1.60, *Standards of Conduct*. DHRM Policy 1.60(IV)(A) authorizes removal of an employee who is not able to meet working conditions as follows:

An employee unable to meet the working conditions of his or her employment due to circumstances such as those listed below may be removed under this section. Reasons include: ***

3. loss of license or certification required for the job;

Following his assumption of duties as an Equipment Service & Repair Manager I, Grievant did not lose any license or certification. He could not lose what he did not yet have. No basis exists to remove Grievant pursuant to DHRM Policy 1.60(IV)(A).

DHRM Policy 1.60(V) authorizes demotion of an employee after that employee has received sufficient disciplinary action. Grievant has not received any disciplinary action, and, thus, DHRM Policy 1.60(V) does not authorize his demotion.

No policy exists authorizing the Agency to issue its February 24, 2005 letter to Grievant rescinding Grievant's officer of employment. Accordingly, the Agency's rescission letter is without effect.

The Agency argues it advertised the position with the requirement of having a State Police Certified Safety Inspector License but mistakenly permitted Grievant to

³ Grievant Exhibit 11.

assume the duties of the position even though he lacked the necessary license. The Agency contends it is simply correcting a mistake. The Hiring Manager is the one who set forth the requirement of the State Police Certified Safety Inspector License and asked that the requirement be specified in the advertisement. The Hiring Manager testified that he knew Grievant did not have the necessary license when Grievant was offered the position. The Hiring Manager did not believe it was necessary for Grievant to have the license immediately.⁴ He felt it was reasonable to permit Grievant to obtain the license within six month of hire because that was how other employees holding similar positions had been treated in the past.

Whether the Agency mistakenly offered the position to Grievant is not the deciding factor in this grievance. After the Agency's offer of employment was accepted and Grievant assumed the full duties of the position, Grievant held the position. Mistakes made in the selection process became moot. Grievant could only be removed from the Equipment Service & Repair Manager I position in accordance with DHRM policy. The Agency has not presented any policy justifying its action.

DECISION

For the reasons stated herein, the Agency is ordered to reinstate Grievant to his former position of Equipment Service & Repair Manager I, or, if occupied, to an objectively similar position. The Agency is ordered to pay Grievant full back pay from which interim earnings must be deducted. The Agency is ordered to restore Grievant to his full benefits and seniority. The Agency is ordered to comply with applicable law and policy.

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:

⁴ Only a few VDOT residencies require the position of Equipment Service & Repair Manager I to have the Virginia State Police Certified Safety Inspector license prior to being hired. Most of those residencies requiring the license permit the successful candidate to obtain the license within six months of hire. Granting Grievant six months to obtain his license was not unusual.

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 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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.