

Issues: Misapplication of the hiring policy and age discrimination; Hearing Date: 06/28/05; Decision Issued: 06/29/05; Agency: Dept. for the Blind and Vision Impaired; AHO: David J. Latham, Esq.; Case No. 8093



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8093

Hearing Date: June 28, 2005
Decision Issued: June 29, 2005

PROCEDURAL ISSUES

Grievant requested as relief that she be given the job she applied for. A hearing officer does not have the authority to hire, promote, transfer, or assign any employee.¹ In a case such as this, the authority of the hearing officer is limited to issuing an order that the agency comply with applicable law and policy, if it is determined that there was unfair application or misapplication of the law or policy.² Thirteen days prior to the hearing, grievant advised the agency representative that she wanted to amend her request for relief to include a salary increase retroactive to October 2004. A hearing officer does not have authority to award damages, or to establish or revise compensation.³ Moreover, a grievant may not amend her grievance or add claims to the grievance after it has been filed with the agency.⁴ Therefore, the hearing officer is without authority to direct these two forms of relief requested by grievant.

During the hearing, grievant also attempted to add a claim of reverse discrimination to her grievance. Because grievant did not include that claim on her written grievance, it cannot be added to the grievance ex post facto.

¹ § 5.9(b)3. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, August 30, 2004.

² § 5.9(a)5. *Ibid.*

³ § 5.9(b)1 & 4. *Ibid.*

⁴ § 2.4. *Ibid.*

APPEARANCES

Grievant
Assistant to Grievant
Five witnesses for Grievant
Deputy Commissioner for Services
Representative for Agency
Two witnesses for Agency

ISSUES

Did the agency unfairly apply or misapply policy during a selection process? Did the agency discriminate against grievant on the basis of age?

FINDINGS OF FACT

The grievant filed a timely grievance asserting that the agency unfairly applied or misapplied policy and discriminated on the basis of age during a selection process.⁵ The Virginia Rehabilitation Center for the Blind and Vision Impaired (Hereinafter referred to as agency) has employed grievant for a total of 11 years as a rehabilitation counselor.

The agency's policy requires that the agency provide equal employment opportunity to all employees and applicants without regard to, inter alia, age or handicap.⁶ Agency policy provides that voluntary transfers are available to classified employees if the hiring manager grants such a transfer.⁷ Employees interested in a transfer must submit a completed Request to Transfer form to both the hiring manager and their current manager. The hiring manager also has authority to decide if the pool will consist only of persons interested in transfer, or whether to recruit competitively. If the recruitment is competitive, the employee interested in voluntary transfer must submit an application before the recruitment deadline.

Grievant learned that the incumbent in a vocational rehabilitation counselor position would be vacating the position in the near future. She spoke with the hiring manager about the possibility of transferring to the position, but did not submit a transfer request form. The hiring manager was receptive to the idea of grievant transferring to the position but said she would first discuss the idea with her supervisor – the Deputy Commissioner of Services. After discussion, the Deputy Commissioner and the hiring manager decided that the position should be opened to competitive recruitment. The hiring manager prepared an advertisement for the position and applicants were solicited.⁸ Grievant did not

⁵ Agency Exhibit 15. Grievance Form A, filed April 27, 2005.

⁶ Grievant Exhibit 1. *Equal Employment Opportunity Policy*, July 1, 2004.

⁷ Grievant Exhibit 1. Policy 106, *Voluntary Transfers*, effective July 20, 2001.

⁸ Grievant Exhibit 2. E-mail directing the first posting for position, November 24, 2004.

apply for the position.⁹ Human Resources provided a qualified applicant pool to the hiring manager but she was dissatisfied with the quality of the applicants. The position was then readvertised and, on this occasion, grievant applied.¹⁰

The second advertisement generated a pool of about 16-18 applicants. Human Resources screened the initial pool for compliance with the minimum job experience and educational requirements.¹¹ The requirements included, *inter alia*, a Masters degree in Rehabilitation Counseling or closely related field and/or certification as a Certified Rehabilitation Counselor (CRC). It has been a long standing practice of the agency to permit applicants who are within six months of obtaining the requisite degree to be considered a qualified applicant.¹² Human Resources found that five applicants met the minimum requirements for the position and they were scheduled for interviews with an interview panel. The applicant who was ultimately successful was scheduled to receive her Master's degree in May 2005.¹³

The hiring manager selected the interview panel, which included the regional manager of an office in another city (the panel chairperson), the agency's Vocational Rehabilitation Director, and a vocational rehabilitation counselor. The hiring manager also prepared the interview questions and preferred answers.¹⁴ Interviews were conducted on March 25, 2005. The panel concluded that two of the applicants (grievant and the successful candidate) were significantly more qualified than the other three applicants. Following the interviews, the panel concluded that while grievant had a good interview, the other applicant had a very good interview and was the best qualified candidate.¹⁵ Grievant is 57 years of age; the successful candidate is in her early 30's. Grievant is sighted; the successful candidate is blind. In its deliberations, the panel did not use age, visual impairment, or starting salary as factors to make its selection. The members of the panel were not directed or indirectly influenced by agency management to use age, visual impairment, or starting salary as factors to make the selection. The panel met with the hiring manager and unanimously recommended the applicant who was ultimately chosen for the position.

The hiring manager knew all five interviewees prior to the initiation of the selection process. She had known grievant for 15 years, the successful candidate for eight months, and the other three for varying amounts of time. Before the interviews began, the hiring manager had contemplated interviewing whichever candidates the panel recommended following the first round of interviews. However, because the hiring manager knew all of the applicants to one degree or another, she changed her mind after the panel made its

⁹ Grievant Exhibit 2. E-mail from hiring manager to grievant, December 14, 2004.

¹⁰ Grievant Exhibit 3. Grievant's application for position, signed February 23, 2005.

¹¹ Agency Exhibit 1. Section B.3.c, Policy 115, *Recruitment/Selection*, effective October 1, 1997.

¹² If the applicant subsequently fails to obtain the requisite degree within six months, he or she will be removed from state employment.

¹³ The applicant was awarded her Master's degree on May 22, 2005.

¹⁴ Agency Exhibit 7.

¹⁵ Agency Exhibit 14. Panel Interview Summary Report, March 25, 2005.

unanimous recommendation. She wanted to remain as neutral as possible, and because she knew and trusted the panel members, she decided to accept the panel's unanimous recommendation without conducting a second interview, even though policy requires such an interview.¹⁶ She checked the references of the panel's recommended choice, found them acceptable, and hired the successful candidate.

The Panel Interview Summary Report rated the successful candidate's relevant work experience and education Good.¹⁷ However, the Hiring Supervisor's Interview Summary Report lists the rating as Very Good.¹⁸ It is unknown why the rating was changed when it was transferred from the panel's report to the hiring supervisor's report.

The recruitment/selection policy requires that, following initial interviews, the entire selection package, including the Interview Evaluation Report for each interviewed applicant must be sent to Human Resources.¹⁹ While the panel forwarded the reports from two of the panelists, the panel chairperson did not forward his notes. The panel chairperson is visually impaired and takes his notes on an electronic notetaker. Because he keyed his notes so rapidly during the interviews, the notes contained many typing errors. Accordingly, the panel chairperson read his notes after the interview and then composed a synopsis that contains primarily impressions and observations rather than the actual responses of the applicants.²⁰ The original notes are no longer available in his electronic device.

In recent years, at the behest of federal agencies and other organizations such as the State Rehabilitation Council, the agency has made an effort to recruit blind and visually impaired persons. This is done primarily by assuring that interested organizations are notified when positions are advertised so that the blind and visually impaired can submit applications for positions for which they feel qualified. The agency does not give any hiring preference to the blind or visually impaired – only equal opportunity to apply.²¹

¹⁶ Agency Exhibit 1. Section B.4.b.4, Policy 115, *Recruitment/Selection*, effective October 1, 1997, requires that the hiring manager must recommend at least three qualified applicants to the hiring manager for final interview and selection. The hiring manager may elect to forego a second interview and accept the consensus opinion of the panel only if the hiring manager is a member of the panel.

¹⁷ Agency Exhibit 14.

¹⁸ Grievant Exhibit 3.

¹⁹ Agency Exhibit 1. Section B.7.a.2.e, *Ibid*.

²⁰ Agency Exhibits 8 & 9. Panel chairperson's synopses of interviews with grievant and with the successful applicant, respectively.

²¹ Agency Exhibit 5. *Quarterly Meeting Minutes*, June 12, 2004. See also Agency Exhibit 6, *Workforce Plan*, 7/2004 – 7/2009.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as a claim of misapplication of policy or age discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.²²

Grievant argues that the agency did not allow her to transfer and instead decided to open the position to competitive recruitment. However, grievant never submitted a written request for transfer,

Grievant also objected to the fact that the hiring manager called references only for the successful candidate. However, the hiring manager testified that, if the successful candidate had not accepted the position, she would then have called grievant's references before offering her the position. The hearing officer takes administrative notice that, in most situations, references generally give positive information since they have been hand-picked by the applicant. Thus, references are usually not determinative of whether a candidate will be hired unless the reference discloses negative information that might preclude hiring.

Age discrimination

To sustain a claim of age discrimination, grievant must show that: (i) she is a member of a protected age group (over 40 years old); (ii) she suffered an adverse job action; (iii) she was performing at a level that met her employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's age.²³ Grievant has satisfied the first three prongs of this test because she is 57 years old, was not selected for the position, and was qualified for the position by virtue of being selected as a finalist for the position. However, grievant has not provided adequate evidence to create an inference that age was a factor in the final selection. In essence, her allegation of age discrimination is only speculative based on the fact that the successful candidate is significantly younger than grievant.

Unfair application or misapplication of policy

There were two technical errors in the completion of the Hiring Supervisor's Interview Summary Report. First, none of the panelists signed the form. The form provides a space for the *signature* of each interviewer. It is obvious that one person wrote in all the panelists' names and did not obtain their signatures. This error was purely administrative and did not result in a substantive unfair application or misapplication of policy. The second error involved changing the experience/education rating of the successful candidate from Good to Very Good on the Hiring Supervisor's Interview Summary Report. One cannot automatically conclude that this error was harmless. If the form had been correctly completed it would have given both grievant and the successful candidate one Good rating and one Very Good rating (the Reference rating must be discounted because references were called only after the hiring manager decided to choose the successful candidate). Under this circumstance, it would have been a closer call between the two applicants and would certainly support the need for the hiring manager to conduct a second interview. Accordingly, this error *may* have resulted in an unfair application of policy.

In general, the agency complied with most of the requirements of its Recruitment/Selection policy. However, the agency failed to comply with policy

²³ *Cramer v. Intelidata Technologies Corp.*, 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).

in two specific respects. First, the panel chairperson failed to retain and forward to Human Resources his notes (Interview Evaluation Report) for each interviewed applicant. The panelist's notes must be retained by Human Resources for just such exigencies as this – a grievance challenging the panel's selection. However, in this case, there is no evidence that the chairperson's original notes would change the outcome because he testified during the hearing about his recollections of the interviews. Grievant produced no evidence to rebut the chairperson's testimony and, therefore, it is presumed that his original notes would be consistent with his recollections. Accordingly, while the unavailability of these notes was a failure to comply with policy, there is no evidence that it resulted in either an unfair application of policy or a misapplication of policy. In the future, the agency should direct all interview panelists to forward their notes to Human Resources for retention.

Second, policy requires that the hiring manager conduct a final interview after the selection panel recommends at least three qualified applicants. In this case, the hiring manager did not conduct second interviews. Instead, she accepted the panel's consensus opinion – a procedure that is permitted only if the hiring manager is a member of the panel. The agency has offered no explanation or evidence that permits the hiring manager to ignore the policy requirement. The policy language is unambiguous in permitting the hiring manager to accept a panel's opinion **only** "If the hiring manager is a member of the panel." The presumed reason for this requirement is that, if the hiring manager sits on the panel, she can hear the candidates' answers for herself. If the hiring manager is not on the panel, she has to rely on hearsay as to what the applicants' answers were.

In this case, two of the panel members felt that the successful candidate was the better applicant. However, the third panelist felt that the interviews and both candidates were "very close." Although he ultimately agreed with the other two panelists in order to make a unanimous decision, his initial assessment indicates that the two top applicants may have been closer than the unanimous decision suggests. Because policy required a second interview, and because there is a reasonable justification for such a requirement, the agency's failure to comply with its own policy constitutes a misapplication of policy.

Summary

It is concluded that the agency misapplied its Recruitment/Selection policy by failing to require that the hiring manager interview both of the top two recommended candidates. It is further concluded that the incorrect rating placed on the Interview Summary Report *could* have resulted in an unfair application of policy. For these reasons, the selection process was sufficiently flawed that corrective action is required. Accordingly, the agency must redo the selection process from the point at which the misapplication occurred, viz., the hiring manager must conduct an interview with the top two candidates (including grievant). After that interview, the hiring manager may select the most qualified candidate for the position. This decision does not conclude which of the top two

candidates should be selected for the position. It only orders that the selection process be conducted according to the agency's established applicable written policy.

DECISION

Grievant failed to demonstrate that the agency discriminated against her on the basis of age.

Grievant has shown that the agency unfairly applied or misapplied its Recruitment/Selection policy by failing to require the hiring manager to interview the top two candidates recommended by the interview panel. Therefore, it is ORDERED that the agency direct the hiring manager to interview both of the top two candidates and thereafter fully comply with policy in making the final selection.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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.²⁴ 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.²⁵

[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]

David J. Latham, Esq.
Hearing Officer

²⁴ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.