

Issues: Misapplication of Recruitment/Selection Policy, Age Discrimination, Race Discrimination; Hearing Date: 11/01/07; Decision Issued: 11/07/07; Agency: Va. Community College System; AHO: John R. Hooe, III, Esq.; Case No. 8691; Outcome: No Relief, Agency Upheld in Full.

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

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of : Case No. 8691

Hearing Date: November 1, 2007
Decision Issued: November 7, 2007

PROCEDURAL ISSUE

The pre-hearing conference was conducted by telephone on September 25, 2007 during which conference the parties agreed for the grievance hearing to be conducted on October 8, 2007. Subsequently, the parties requested the Hearing Officer to reschedule the hearing to be conducted on November 1, 2007.

APPEARANCES

Grievant
Attorney for Grievant
Representative for Agency
Eleven Witnesses

ISSUE

Was the Grievant a victim of age and/or race discrimination on or about May 11, 2007 when he was not hired for a position for which he applied?

EXHIBITS

The Grievant's Exhibits were contained in a notebook with tabs numbered 1-8. The Agency's Exhibits were in a notebook with tabs numbered 1-25, with an additional exhibit introduced at hearing and designated exhibit 26.

FINDINGS OF FACT

The Grievant filed a grievance under the state employee grievance procedure claiming race and age discrimination as a result of not being hired for a position for which he applied. The grievance was qualified for a hearing.

The Grievant's representative at hearing conceded that there was no evidence of "overt" discrimination. However, he asserted that the fact that the Grievant, a black male, was not hired for the position was in fact age, race or gender discrimination.

The position for which the Grievant applied was recruited by the Agency on March 21, 2007 with a closing date of April 6, 2007. The applicant pool for the recruitment consisted of ninety-eight applications. Fifty-two applicants were deemed minimally qualified and were considered for additional consideration. The Grievant was one of five candidates, from the total applicant pool of ninety-eight, chosen for an interview.

The Grievant and each of the other four applicants interviewed were interviewed by a panel of Agency representatives. Each applicant, including the Grievant, were asked the same questions. The questions asked were developed before the identity of the applicants to be interviewed was known. At the conclusion of the hiring process, the Dean forwarded a recommendation to the Vice President for review and finalization. The hiring recommendation received endorsement on May 7, 2007 and was referred to Human Resources on May 7, 2007 for an equal employment opportunity assessment. Human Resources then recommended that the President approve the hiring of the recommended candidate. The recommended candidate who was hired was a white female.

The evidence demonstrated that each witness who testified and was involved in the hiring process held the Grievant in high regard. However, each witness who was involved in the interview and hiring process believed that the person who was hired was better qualified for the position than the Grievant and was in fact the best-suited candidate. The Agency demonstrated that its hiring procedures comply with all applicable agency, state and federal non-discrimination requirements. The agency established through its witnesses that in the Grievant's case, as with all hiring decisions, a compliance review is conducted to assure that the hiring process is fair and non-discriminatory.

APPLICABLE LAW AND OPINION

The Code of Virginia § 2.2-2901 sets out requirements for appointments, promotions and tenure based upon merit and fitness. The law provides in part that all appointments and promotions to and tenure in positions in the service of the Commonwealth shall be based upon merit and fitness, to be ascertained, as far as possible, by the competitive rating of qualifications by the respective appointing authorities.

The Department of Human Resource management policies and procedures manual for the Commonwealth of Virginia sets out policy number 2.05-Equal Employment Opportunity, effective date of September 25, 2000, revision date May 16, 2006. The policy provides that all aspects of human resource management be conducted without regard to race, sex, age, and other factors as set out in the policy statement in accordance with state and federal laws.

Department of Human Resource management policies and procedures manual policy number 2.10-Hiring effective date September 25, 2000, revised May 16, 2006 provides guidelines for an efficient and consistent competitive hiring process that promotes equal employment opportunity. The Agency notebook of exhibits at tab 7 sets out the Agency's procedures for the employment of full-time and part-time employees, which procedures were last revised November, 2006. In addition, at the same location in the agency's notebook of

exhibits, written procedures are set out titled “supervisors procedures full-time classified recruitments” and “interview committee responsibilities classified recruitments”.

When the nature of a grievance is a claim of discrimination in hiring, the Grievant must show by a preponderance of evidence that the discrimination occurred.

The Grievant did not demonstrate by a preponderance of the evidence that any discrimination took place in the hiring process of which he complained. The evidence demonstrated that all applicable laws, policies and procedures were followed and every effort was made to avoid discrimination in the hiring process. The evidence demonstrated that in this case the best suited candidate was hired for the position for which the Grievant applied.

DECISION

The Grievant’s request for relief is denied. No discrimination occurred.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has 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 Resources 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. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.
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. Requests should be sent to the EDR Director, One Capital Square, 830 East Main, Suite

400, Richmond, Virginia 23219 or faxed to (8-4) 786-0111.

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 **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-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 15 days; the day following the issuance of the decision is the first 5 days). A copy of each appeal must be provided to the other party.

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

1. The 15 calendar day period for filing requests for administrative review has expired and neither 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.

John R. Hooe, III
Hearing Officer