

Issue: Misapplication of the Hiring Policy; Hearing Date: 11/29/07; Decision Issued: 12/05/07; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 8730; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 8730

Hearing Date: November 29, 2007  
Decision Issued: December 5, 2007

**PROCEDURAL HISTORY**

On March 6, 2007, the Grievant initiated a grievance to challenge the selection process for a position at one of the Agency's facilities. The Agency did not qualify the grievance for a hearing and the Grievant appealed to the EDR Director for a qualification Ruling. On September 29, 2007, the EDR Director issued Ruling 2008-1784, qualifying the matter for a hearing. On October 31, 2007, EDR assigned this appeal to a Hearing Officer. On November 29, 2007, a hearing was held at the Agency's location.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUE**

1. Whether the Agency misapplied State or Agency hiring policies by hiring someone that did not meet the stated minimum qualifications stated in the job announcement?
2. Whether the Agency showed favoritism in the hiring process?
3. Whether the Grievant was more qualified than other successful candidates and should have been hired based on the fact that he was more qualified.

**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. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not.<sup>1</sup>

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<sup>1</sup> Grievance Procedure Manual ("GPM") Section 5.8 and Section 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 Agency decided to hire six (6) individuals to fill the position of Buildings and Grounds Supervisor A. The purpose of this position is:

Provides professional level repair and maintenance services by performing, supervising and assigning work according to building codes and standards. Conducts routine inspections, requisitions supplies for mechanical, heating, air conditioning, plumbing, electrical systems and buildings and grounds maintenance.

The Agency advertised this position as follows:

**Minimum Qualifications:** Completion of high school or equivalent and training in related trades. Progressively responsible work in one or more trades specialties, a part of which included supervisory or lead responsibilities. Employees should be proficient in the operation of computer programs as related to maintenance operation.

**Preferred Qualifications:** Working knowledge of installation, repair, maintenance practices, equipment and materials used in skilled trades including carpentry, masonry, plumbing, electrical, painting, HVAC and groundskeeping and some knowledge of other trade areas. Demonstrated skill in the use of hand and power tools and other equipment to complete work assignments. Demonstrated ability to perform a wide variety of skilled repair and maintenance tasks in the trades and utilities area; to perform heavy manual labor, to work from heights, to assign, inspect and lead the work of others; to understand and follow oral and written instructions. Demonstrated ability to comprehend and follow building code practices and safety. Demonstrated ability to organize and complete work assignments with minimal guidance from others.<sup>2</sup>

The Grievant has earned a high school diploma and has completed sixty-eight (68) credit hours at a Community College.<sup>3</sup> One of the people who was hired for this position did not have either a high school diploma or its equivalent.<sup>4</sup>

Each applicant for these six (6) jobs submitted an Application for Employment which listed their relevant experience and education and each applicant was questioned pursuant to an Applicant Evaluation Form regarding their skills to perform this job. The Application for

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<sup>2</sup> Agency Exhibit 1, Tab 2, Page 1

<sup>3</sup> Agency Exhibit 1, Tab 3, Page 1

<sup>4</sup> Agency Exhibit 1, Tab 9, Page 1

Employment and the Applicant Evaluation Form for the Grievant and the six (6) people who were successfully hired for these positions are found in Agency Exhibit 1, Tabs 3 through 9.

### **CONCLUSIONS OF POLICY**

There appear to be two (2) sections of Policy Rules that apply to this issue. Agency positions must be filled in accordance with Department of Human Resource Management (“DHRM”) Policy 2.10. This Agency also has a Procedures Manual dealing with these issues and it is Department of Corrections Procedure Manual Chapter 5: Employee Relations and Training (“DOC”) Policy 5-7.7.

DHRM Policy 2.10 provides that an “Agency must screen positions according to the qualifications established for the position and must apply these criteria consistently to all applicants.”<sup>5</sup>

The minimum qualifications stated in the job posting regarding education were, “Completion of high school or equivalent and training in related trades.”<sup>6</sup> Further, the Agency does not dispute that one of the successful candidates did not possess either a high school diploma or its equivalent.

The Agency relies on DOC Policy 5-7.7(B)(4) which states that, “Care should be taken not to overstate educational requirements. Educational requirements should not be so absolutely stated or used as to preclude from consideration applicants who possess equivalent or sufficient applicable experience or training that would reasonably predict an applicant’s ability to perform the job satisfactorily.”<sup>7</sup>

When reading the minimum education requirements, the clear language indicates that there is a minimum education requirement and there is an experience requirement. The way the job posting is written does not, in any way, lend itself to an interpretation that job experience is a substitute for the minimum education requirement of a high school diploma or its equivalent. The Hearing Officer does not find that the Agency can attempt to subvert the clear meaning of its language by relying on a Policy interpretation of its own Procedure Manual which was not a part of the job posting language.

However, the Hearing Officer notes that DHRM Policy 2.10 is controlling in this matter and that Policy states that job announcements must not specify a certain number of years of experience nor a specific educational requirement in a job announcement unless sanctioned by

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<sup>5</sup> DHRM Policy 2.10, Hiring. The policy further defines “screening” as, “[T]he process of evaluating the qualifications of the individuals in an applicant pool against established position qualifications to determine; which applicants in the pool meet minimum qualifications; and which of the qualified applicants an Agency wishes to interview.”

<sup>6</sup> Agency Exhibit 1, Tab 2, Page 1

<sup>7</sup> Agency Exhibit 1, Tab 10, Page 5

law. Job announcements must include any educational qualifications required by law.<sup>8</sup> Job announcements should include any educational preferences not required by law, stated with a provision for substitution of equivalent applicable experience or training.<sup>9</sup>

Pursuant to this Policy, the Agency did not have the authority to independently require an applicant to have a high school degree. Accordingly, the Agency has not automatically violated State policy when it hired an applicant who did not have a high school degree. When an Agency is selecting the best suited candidate, it is free to conclude that an applicant's experience makes him more suited for a position than an applicant with more education.<sup>10</sup>

Regarding the other issues, the Hearing Officer notes that the evidence presented to him indicates that all of the six (6) people hired for this position and the Grievant had varying levels of education and/or skills. Regarding skills, the Hearing Officer can find no meaningful way to differentiate whether one had more or less regarding skills. The Hearing Officer simply is not in a position to make a determination that one applicant knew more about the skill set required for this job than any other applicant.

Finally, the Hearing Officer finds that there is no evidence to indicate that favoritism was a part of the hiring process. There was evidence that the Hiring Authority did, in fact, interview various supervisors of the applicants and that the Hiring Authority was a friend of the person interviewed regarding the Grievant. Further, that person did not speak positively of the Grievant. However, the Hearing Officer cannot find sufficient evidence that that person so tainted the Hiring Authority's opinion that favoritism was involved.

### **DECISION**

For the reasons stated herein, the Grievant's request for relief is denied. The Hearing Officer notes that if the DHRM Director were to determine that the Hearing Officer has misstated the job announcement requirements of DHRM Policy 2.10 and that an Agency does have the authority to require as a minimum qualification a high school diploma or its equivalent, then the Hearing Officer's decision would be that the Agency misapplied Policy by failing to screen a candidate who did not meet the published minimum qualifications of the job and, accordingly, improperly denied selection to the Grievant.

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<sup>8</sup> DHRM Policy 2.10, Page 5 of 21

<sup>9</sup> DHRM Policy 2.10, Page 6 of 21

<sup>10</sup> See Decision of Hearing Officer in EDR Case 7918, Pages 5 and 6

## 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> Street, 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 Street, 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 and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>11</sup> 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>12</sup>

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<sup>11</sup>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).

<sup>12</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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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William S. Davidson  
Hearing Officer