

Issues: Misapplication of Hiring Policy, and Discrimination (Race); Hearing Date: 05/04/09; Decision Issued: 05/06/09; Agency: DPOR; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9052; 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. 9052

Hearing Date: May 4, 2009
Decision Issued: May 6, 2009

PROCEDURAL HISTORY

The grievant is currently employed with the agency as an Administrative and Office Specialist III. In 2008, she was an unsuccessful candidate for one of three available positions as a regulatory investigator with the agency, failing to be selected as one of the eight candidates interviewed. On August 14, 2008, the grievant initiated a grievance to challenge this selection process, asserting that she is more qualified than at least one of the successful candidates. Having failed to resolve the grievance during the management steps, the grievant's grievance was qualified for a hearing.

On April 6, 2009, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on April 16, 2009. The hearing was scheduled at the first date available between the parties and the hearing officer, May 4, 2009, on which date the grievance hearing was held at the Agency's headquarters office.

The Agency submitted documents for exhibits that were, without objection from the grievant, admitted into the grievance record, and will be referred to as Agency's Exhibits. The grievant did not submit any additional documents. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Representative for Agency
Counsel for Agency

ISSUES

Was the hiring selection process misapplied? Was the selection process unlawfully discriminatory?

BURDEN OF PROOF

In grievances alleging misapplication of policy, the employee must present her evidence first and must prove her claim by a preponderance of the evidence. 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. EDR’s qualification of the grievance for a hearing does not satisfy the grievant’s burden of proof.

The hearing officer’s authority is limited to directing the agency to redo either the entire selection process, or that part of the process deemed to have been flawed. In a hearing involving the alleged misapplication of a hiring policy, the hearing officer’s role is to ascertain whether the hiring process was misapplied. The hearing officer is not expected to decide whether any grievant is more or less qualified than any other applicant. Rather, the hearing officer evaluates whether the hiring process was in compliance with agency policy and Department of Human Resource Management (“DHRM”) policy.

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.

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.” Agency Exh. 3. The Agency developed its Human Resources Policy #200-17, which establishes the recruitment and selection practices. Agency Exh. 2. In the job announcement for the regulatory investigator position at issue, the agency set forth these minimum qualifications:

Ability to analyze, verify, investigate and research information. Ability to interpret and appropriately apply facts to complex statutes, rules, and regulations. Ability to accurately document investigative findings. Strong oral and written communication skills. Excellent organizational skills and ability to handle multiple tasks. Excellent personal computer, word processing and proofreading skills. Ability to work independently with limited supervision. Commitment to customer service with the ability to interact with the general public, agency staff, and members of other departments and agencies.

In addition, the agency identified these “preferred” qualifications for the regulatory investigator position:

Graduation from a college or university with emphasis in Law, Paralegal, Criminal Justice or related field and/or equivalent investigative experience. Knowledge of DPOR and CID policies and procedures. Experience in a regulatory and/or detailed investigations environment with progressive responsibility is desirable.

While agencies and facilities may develop their own hiring policies, such policies must be in compliance with the policy established by DHRM. The facility has promulgated its own hiring policy that details procedures for solicitation of applicants, advertising of the position within and outside state government, screening of applications, and the interview process for screened applicants. The policy provides, in pertinent part:

A personnel representative, along with the hiring manager or supervisor will screen the applications based on established job related screening criteria which must be consistently applied to all applicants.

In screening candidates for interviews, the agency applied the following seven criteria, each weighted equally and evaluated on a scale of “Strong,” “Satisfactory,” “Weak,” or “None”: (1) “Ability to analyze, verify, investigate and research information received”; (2) “Ability to interpret and appropriately apply facts to complex statutes, rules, and regulations”; (3) “Ability to accurately document investigative findings”; (4) “Excellent word processing and proofreading skills”; (5) “Ability to interact with the general public, agency staff, and members of other departments”; (6) “Ability to Multi-task and handle large workloads”; and (7) “Graduation from a college or university with emphasis in criminal justice, law enforcement, or related field and/or equivalent investigative experience.”

The grievant states that she was told by the agency that she was not selected for an interview because of a large pool of qualified applicants. However, when the grievant compared her application with those of the candidates chosen for interviews, the grievant observed that her

qualifications made her more qualified than some. Among the Agency's exhibits were the applications of the eight individuals selected for interviews. Agency Exh. 9. The grievant testified that the applicant designated as "F" had lesser qualifications than she did, but received the top score of "7" compared to the grievant's score of "4". At the hearing, the grievant questioned the agency's witness, the human resources director, for example, regarding the higher screening score of candidate "F". The human resources director testified that candidate "F" had a master's degree in criminal justice, and that the thesis required for a masters degree was considered to satisfy all the applicable criteria. The grievant also compared her qualifications to candidates "B" and "C" and testified that her own application and qualification compared favorably. Candidate B's and C's qualifications differed from the grievant's to the extent that their higher screening scores are not so glaring as to show a decided, including

The agency's human resources director testified that the agency's hiring policy was followed, with the hiring supervisor approving the Employee Work Profile, completing the screening criteria worksheet, and with the human resource office approving the screening criteria. The director testified that the objective is not always to hire "best qualified"; it is the "best fit" for the open position. The director testified that the investigator's position had changed a lot over the last several years and she agreed with the hiring manager's screening. The director stated that the selection process gave no preference to agency employees, and the screening is based 100% on the submitted application. The director testified that she has, in the past, counseled the grievant on how to present her job applications to more successfully demonstrate her qualifications to match the screening criteria, and she credibly testified that she would gladly continue to do so.

The decision of whether to hire or promote employees within an agency is an internal management decision made by each agency. Va. Code § 2.2-3004.B states, in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government." As noted above, the hearing officer is not expected to conclude that one applicant is more qualified or less qualified than another. However, many of grievant's arguments focused on why she believes she is better qualified than other selected applicants. While the grievant's belief is sincere and understandable, her evidence did not sufficiently challenge the Agency's compliance with applicable policy. While there is room to conclude that the grievant has the qualifications to justify an interview, that, alone, is not enough to show that the policy was misapplied or applied unfairly. A hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *See, e.g., Rules for Conducting Grievance Hearings, § VI; DeJarnette v. Corning*, 133 F.3d 293,299 (4th Cir. 1988).

As an alternative theory, the grievant has also asserted that the agency discriminated against her on the basis of her race (African American) in failing to select her for an interview. An employee may demonstrate racial discrimination by showing direct evidence of intentional discrimination (specific remarks or practices), circumstantial evidence (statistical evidence), or disparate impact resulting from the event of which he complains. However, grievant has not presented any testimony or evidence of remarks or practices that would constitute racial discrimination.

DECISION

For the reasons stated herein, the grievant has not borne her burden of proving a misapplication of policy, an unfair application of policy, or discrimination. Consequently, the hearing officer has no authority to order any relief.

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, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)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 of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer