

Issues: Misapplication of Hiring Policy, and Discrimination (Race); Hearing Date: 12/15/16; Decision Issued: 04/26/16; Agency: DCR; AHO: Carl Wilson Schmidt, Esq.; Case No. 10702; Outcome: Partial Relief; **Administrative Review**: **DHRM Ruling Request received 05/04/16; DHRM Ruling issued 06/02/16; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10702

Hearing Date:	December 15, 2015
Post Hearing Document Submission:	January 5, 2016
Decision Issued:	April 26, 2016

PROCEDURAL HISTORY

On July 10, 2015, Grievant filed a grievance alleging Ms. 1 was less qualified to be hired than Grievant for the position of Administration Business and Leasing Manager. Grievant alleged “[d]isparate treatment because of Grievant’s race, African American based upon her disqualification for a job posting for the position”

Grievant sought relief to be awarded the Administration Business and Leasing Manager position or the Executive Assistant to the Director position along with a retroactive pay increase.

On October 19, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 15, 2015, a hearing was held at the Agency’s office. The parties were permitted to submit additional documents and argument following the hearing.

APPEARANCES

Grievant
Grievant’s Representative
Agency Party Designee
Agency’s Counsel
Witnesses

ISSUES

1. Whether the Agency discriminated against Grievant because of her race?
2. Whether the Agency misapplied policy?

BURDEN OF PROOF

The burden of proof is on Grievant to show by a preponderance of the evidence that the relief she 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:

The Department of Conservation and Recreation employs Grievant as an Administrative and Office Specialist III. She has been employed by the Agency for approximately eight years. Her working title is Executive Secretary. The purpose of her position is:

Serves as secretary to the Division Director and support to Division Program Staff in providing a diversity of administrative, financial, and procurement functions involving extensive coordination of staff and the Virginia Soil and Water Conservation Board actions.¹

Grievant’s employment prior to working for the Agency included serving as an Executive Assistant to a Mayor. She was a Litigation Assistant in the tax division of a federal agency. Grievant is an African American female.

Grievant earned an A.A.S in Business Administration and Human Resources from a local college. She was enrolled at another local university.

Employee compensation for Classified State employees is distinguished by Pay Bands. A Pay Band provides the lower and upper compensation to an employee holding a position within a specific Pay Band. The salary range for Pay Band 4 was \$31,979 to \$92,042 per year. The salary range for Pay Band 5 was \$41,778 to \$119,465 per year.

¹ Agency Exhibit 5.

The Agency desired to fill the full time position of Administration Business and Leasing Manager. This position had a role title of Program Administration Specialist II and a position number of 204.² The salary was in Pay Band 5 and negotiable up to \$75,000 per year. The job description for position 204 was:

The Department of Conservation and Recreation is seeking an experienced business professional to help manage administrative functions in a geographically dispersed agency of multiple divisions. This position would manage the agency leasing activities which include employee housing and offices. This position would also manage special administrative projects and functions that involve human resources, procurement, finance, and budgeting functions as assigned by the Deputy of Administration and Finance. Responsibilities also include assisting with administrative support services that include facility maintenance, fixed assets, telephone, building and parking access. This position serves as the agency building safety coordinator and serves on a variety of committees led by the Administrative Division of the agency. This position works on policy interpretation, along with process development and implementation. This position is responsible for ensuring services are provided in a timely fashion and in accordance with all agency and state policies and procedures. This position demonstrates professionalism and provides guidance on business related activities within the Administrative Division of the agency.

The minimum qualifications for position 204 were:

Comprehensive knowledge of the principles, policies and best practices of state government business processes and policy. Demonstrated knowledge/experience as a manager independently performing program, administrative and business management functions. **Familiarity with state leasing processes.** Comprehensive administrative and business knowledge of payroll, human resources, procurement, financial management, budgeting, maintenance of fixed assets and facility management processes. Demonstrated ability to work in an administrative/business management role. Experience and/or educational background that demonstrates an ability to work with a broad spectrum of administrative activities. Ability to interact effectively with diverse constituencies. Knowledge and experience in Microsoft computer software programs, spreadsheets, and automated systems. Demonstrated ability to develop, interpret and implement processes and to prioritize and manage multiple priorities. Ability to work alone or as a team. Strong oral and written communication skills. Strong analytical skills, identifying solutions to problems and making recommendations. Ability to be detailed oriented. Strong interpersonal and customer services

² The Agency sometimes referred to this position as number 205 but that appears to be an error.

skills. Ability to work with minimal supervision, set priorities, and complete tasks in a thorough, accurate and timely manner. (Emphasis added).

Preferred qualifications for position 204 were:

Prefer practical experience in leasing activities. Knowledge and experience related to the Virginia Public Procurement Act (VPPA), eVA, Small Purchase Charge Card (SPCC) program and Small, Woman and Minority-owned (SWAM) program. Graduation from an accredited college or university with a degree in Business Management, Administration, or Public Administration, or equivalent training/experience.³

The Agency posted the position on the Commonwealth of Virginia's Central Job Board.⁴ Applicants were required to post a State Application for employment into the electronic database. Applicants were also required to answer several supplemental questions. One of those questions was:

Does your [application] demonstrate familiarity with state leasing processes?

On April 9, 2015, Grievant applied for the Administration Business and Leasing Manager Position. Grievant answered "no" to the supplemental question because her application for employment did not show familiarity with State leasing processes. Because Grievant was truthful in her answer, her application was denied immediately. The Central Job Board was set up to notify applicants automatically if they did not meet the minimum requirements of the position. When Grievant answered "no" to the supplemental question, she was notified by the automated system:

Thank you for your interest in this position. Based on your response to the questions on the employment application, you do not meet the minimum qualifications for this position. Please do not let this discourage you from applying for other positions that interest you.⁵

After her application was rejected, Grievant spoke with the HR Generalist about being considered for the position. He said he could modify the application if she had leasing experience and then asked her if she had any leasing experience. Grievant said "no". Grievant was not granted an interview.

Ms. 1 applied for the Administration Business and Leasing Manager Position. She is a white female. Her application did not demonstrate familiarity with State leasing

³ Agency Exhibit 7.

⁴ The Central Job Board is also sometimes referred to as the Recruitment Management System ("RMS").

⁵ Agency Exhibit 9.

processes. Nevertheless, Ms. 1 answered “yes” to the supplemental question. Because she answered “yes” to the supplemental question, the automated system permitted Ms. 1’s application to be further reviewed by the Agency. Had Ms. 1 been truthful in her answer to the supplemental question, she would not have been considered for an interview.

The Agency assembled a panel of three State employees – two white females and one African American female. The Deputy Director was the hiring authority because the selected candidate would report to her.

On May 8, 2015 and May 15, 2015, eight candidates were interviewed for the position. At the conclusion of the applicant interviews, Mr. M was selected for the position. Mr. M is a white male. Ms. 1 was the second choice. The Deputy Director believed Ms. 1 has sufficient leasing experience for the position because Ms. 1 was a property owner who negotiated leases and had prepared and reviewed leases as part of her duties as a paralegal.

The Interview Summary discussed each candidate’s answers and for Mr. M said:

Very knowledgeable on all administrative areas. Gave lots of specific examples and answers to questions. Well versed. Solid state experience in all administrative disciplines. Has implemented many projects with creation of forms, processes, and created databases. Has VCA certificate for procurement and experience with eVA. Knowledgeable about leasing processes and state systems with DRES.

The Interview Summary for Ms. 1 stated:

Prior experience as Assistant to [executive leader], Asst. to [university] president, and was the Executive Director of the [legislative committee for another state’s legislature.] She has a Bachelor of Science and certification in Paralegal studies where she worked with Real Estate as well as she is a leasing agent as a property owner. She served as staff to the [legislative bodies] and staffed task forces. She demonstrated broad level administrative experience in procurement, HR, and IT systems, and facility management. She has extensive experience in reviewing and drafting documents. She has worked with IT to implement processes and create efficiencies. She has abilities to work with statistics, tracking systems, and compiling data. She demonstrated abilities to balance highly diverse and complex job duties. She has had several years of experience with Virginia state systems. She has an ability to work independently as well as part of teams.

The Agency offered the position to Mr. M but he declined. It offered the position to Ms. 1 with an annual salary of \$75,000. Ms. 1 accepted the offer. On June 16, 2015, the Deputy Director sent Agency employees an email stating:

Please join me in welcoming [Ms. 1] to the Division of Administration as the Administration Business & Leasing Manager. *** Her position will be involved with every Division of the agency so hopefully you will get to meet [Ms. 1] soon.⁶

The Agency Head did not participate in the hiring of Ms. 1 for the Administration Business and Leasing Manager position. The Deputy Director did not know Ms. 1 prior to interviewing her for the vacant position.

Ms. 2 is a white female. Ms. 2 held position 680 with the Agency. Her Employee Work Profile was effective January 1, 2015. Her Role Title & Code was "Gen Admin Coordinator I/Super, 19221." She was compensated under Pay Band 4. While she worked in the Director's Office, the purpose of her position was:

This position is responsible for the operation of the day-to-day activities of the Director's Office through efficient administrative management of the administrative functions within the office and to provide professional, efficient, organized administrative management and program support to the Director.

Ms. 2 had some leasing experience prior to July 10, 2015. She worked in the State Parks division and handled leasing duties relating to employees who lived in State parks. She performed these duties for approximately two years. She was not familiar, however, with the system administered by the Division of Real Estate Services. In addition, before the Agency decided to fill the Administration Business and Leasing Manager position, Ms. 2 performed some of the leasing duties of that position.

Ms. 2 did not apply for the Administration Business and Leasing Manager position when it was first advertised. Ms. 2 earned a salary of approximately \$39,000 per year before and after the July 10, 2015 changes were made.

The Agency Head and Deputy Director discussed the Agency's staffing needs and decided to make several changes. One of the staffing changes involved the elimination of an administrative position held by Ms. M and reporting to the Deputy Director. The Agency Head decided to move Ms. M into another position. The Agency Head was satisfied with Ms. 2's work performance as Executive Assistant. The Agency Head recognized Ms. 1's skills such as excellent scheduling abilities and he wanted to have her begin performing duties for the Directors' Office as a "better fit". He wanted to "bring [Ms. 1] over as my executive assistant." Ms. 1's duties were "pretty much what [Ms. 2] did" according to the Agency Head. The Agency Head approached Ms. 2 and asked if she was interested in performing leasing duties as leasing manager. Ms. 2 said she was interested in making the change.

⁶ Agency Exhibit 10.

They “brought” those changes to Human Resources staff according to the HR Generalist. The Agency Head relied on the advice he received from his HR staff that he did not need to have recruitments to make the staffing changes he wanted.

On June 30, 2015, the Agency Head sent employees an email stating:

This email is being sent to share some of the upcoming personnel changes taking place in the Director’s Office and Administrative Division effective July 10. We have taken time to assess all the skill sets available among the staff and look to these changes to help meet the agency’s changing needs. We are confident these changes will improve work flow and communications agency wide and keep the agency initiative moving forward. These personnel changes are later re-assignments that involve some modification of duties but do not involve any classification role changes.

[Ms. H] with her years of experience in many aspects of the Division of State Parks will be moving to be Executive Assistant to the State Parks Director [name]. She has a great deal of knowledge and organizational ability that will enhance operations.

[Ms. 1] who started in the Administrative Division with specialized skills in managing high level activities and legal documents will be moving to the Director’s Office as Director’s Office Coordinator. She will be assisting with special and legislative projects of the Director’s Office and supporting the Agency Head, [name] and the Deputy of Operations [name].

[Ms. 2] will be using her demonstrated abilities to handle many administrative tasks and lead committees as she moves to the Administrative Division to work on business management projects, special committees, and Leasing Activities.

[Ms. M] has many years working within different Division areas of the agency and knowledge of the diverse personnel and activities. She will be moving to the Director’s Office to provide administrative and reception activities support to guide to many visitors to the agency. She will also continue to do special projects for the Administration Division that have statewide impact.

[Ms. L] will be moving over to the Administrative Division in her role as Workforce Development Coordinator where she will continue to work with One DRC, the workplace diversity committees, and other agency wide training and employee development initiatives.

Policy Office – The Policy Office will not report to the Deputy of Administration and Finance but will continue to [be] physically located in

the Director's Office. DCR is now recruiting for a Policy Director to replace [name].⁷ ***

As a result of the changes, Ms. 1 moved to the Director's Office and began reporting to the Agency Head with her new title. The Agency did not change her position number or role title or role code. Ms. 1's salary remained unchanged. Ms. 2 moved to the Administration Division and began reporting to the Deputy Director. The Agency did not change her position number or role title or role code. Ms. 2's salary remained unchanged.

None of the July 10, 2015 changes described in the Agency Head's June 10, 2015 email resulted from a recruitment for a vacant position.

Prior to the July 10, 2015 changes, the Administrative Coordinator position was "essentially operated" by Ms. 2 before Ms. 1 "got there" according to the HR Generalist.

On November 23, 2015, Ms. 1 signed an Employee Work Profile for position 204. The Role Title & Code was "Program Admin. Spec II 19212". The Working Title was, "Director's Office Administrative Coordinator." The position was full time with Pay Band 5. The effective date of the EWP was July 10, 2015. The purpose of the position was:

This position is responsible for the operations of the day-to-day activities of the Director's Office and coordinates and performs a variety of administrative, fiscal, planning, and staff support activities. Serves as primary point of operational and administrative contact for internal and external constituencies, often on complex and confidential issues. Coordinates and provides complex administrative assistance. May serve on a variety of committees in a support capacity. Interacts professionally with all internal and external customers using strong customer service skill.

CONCLUSIONS OF POLICY

Grievant alleged that the Agency discriminated against her because of her race and failed to comply with State policy by selecting lesser qualified employees for the positions held by Ms. 1 and Ms. 2. Because Grievant did not seek relief with respect to the other position changes made by the Agency Head, the Hearing Officer will only address changes relating to Ms. 1 and Ms. 2.

Racial Discrimination

Grievant argued that the Agency discriminated against her because of her race. No credible evidence was presented to show that any Agency employee acted based

⁷ Agency Exhibit 11.

on race. The Agency Head testified that his actions were not based on any consideration of race and his testimony was credible. Other Agency employees involved in the decision-making acted with the objective of improving the Agency's operations by placing employees in positions for which they were believed to be better suited. It is clear that the Agency's decision to change the positions of Ms. 1 and Ms. 2 was motivated by many factors – race was not one of those factors.

Grievant was denied an opportunity to interview for the position because she was truthful when she answered the supplemental question regarding leasing experience. The computer system rejected Grievant's application automatically without any human considering race. Ms. 1 was permitted to interview for the position because she answered "yes" to the supplemental question on leasing even though her answer should have been "no." It was unfair that Ms. 1 was granted an interview while Grievant was denied an interview, but that unfairness did not arise from consideration of race or a misapplication or unfair application of policy. It arose because of the independent decisions made by different applicants for the same position.

Grievant was not discriminated against because of her race when she was denied an interview by the Agency. The automated system was designed to consider an applicant's response to a supplemental question and did not consider Grievant's race when denying her opportunity for further advancement.

Violations of Policy

State agencies have discretion to conduct their business operations within certain limitations. In particular, State agencies must comply with the policies of the Department of Human Resource Management. When agencies take actions that are not in accordance with DHRM policy, those actions must be reversed.

The Agency failed to comply with DHRM Policy 2.10, Hiring, and DHRM Policy 3.05, Compensation. Position 204 existed before the Agency selected Ms. 1 to fill the position. Before posting the position the Agency should have "[u]pdate[d] the Employ[ee] Work Profile to reflect current duties and responsibilities."⁸

The Commonwealth's job organization structure consists of seven Occupational Families. The Occupational Families are divided into Career Groups. Career Groups are comprised of Roles. An Occupational Family is a broad grouping of jobs that share similar vocational characteristics. A Career Group is a sub-group of an Occupational Family. A Career Group identifies a specific occupational field common to the labor market. A Role describes a broad group of occupationally related positions that

⁸ See, DHRM Policy 2.10. This significance of this conclusion is that the Agency knew Grievant's allegations at the time it drafted the EWP. The job posting for position 204 was materially different from the November 2015 EWP for position 204. If the Agency had updated the EWP for position 204 prior to advertising for the position that EWP would have been materially different from the November 2015 EWP.

represent different levels of work or career progression.⁹ A work title is a specific title used by an agency to describe a specific position.

Agencies distinguish positions using position numbers. Each position has a specific number to identify that position for payroll and other human resource reasons.

The Agency claimed it was authorized by DHRM policy to change the duties of Ms. 1 and Ms. 2 by making a reassignment within a Pay Band.¹⁰

DHRM Policy 2.10, Hiring, provides that [a]nnouncements for all positions an agency intends to fill must be listed in the RMS ... **except** for the following situations:

Positions to be filled through Agency Internal Recruitment, if there are procedures in place to inform all agency employees of such openings; ***

Positions to be filled by agency-initiated demotions, employee-requested demotions, reassignments within the Pay Band, non-competitive voluntary transfers or temporary assignments (NOTE: Approval of employees' request for non-competitive voluntary demotions or non-competitive transfers is at the discretion of the agency).¹¹

DHRM Policy 3.05 defines Reassignment Within the Pay Band as:

Action of agency management to move an employee from one position to a different position in the same Role or Pay Band.

From time-to-time agency business (staffing or operational) needs may require the movement of staff. Reassignment Within the Pay Band is the management-initiated action that is used for this purpose. Under Reassignment Within the Pay Band:

- Employees may be moved (reassigned) to different positions within the same assigned Salary Range.
- The position to which an employee is reassigned may be in the same or a different Role within the same Salary Range.
- The employee's base salary is not changed as a result of the reassignment.

⁹ A Role Title is the formal State title assigned to an employee's position. A Role Code is a unique number assigned to each Role for tracking purposes.

¹⁰ The Agency did not assert its action was intended to be a lateral role change where there would be no change in position number.

¹¹ DHRM Policy 2.10.

The substance of the Agency's action was to move an employee in Pay Band 5 (Ms. 1) into a position in Pay Band 4 and to move an employee in Pay Band 4 (Ms. 2) into a position in Pay Band 5 without switching the position numbers. By not acknowledging a change of position numbers, the Agency was able to ignore that the transaction occurred between different Pay Bands and not between the same Pay Band as required by DRHM policy.¹²

The Agency's action was not a Reassignment Within the Pay Band. Because the action was not a Reassignment Within the Pay Band, the Agency was not authorized to circumvent DHRM policy requiring competitive recruitment. Grievant was affected by this violation of policy because she was denied the opportunity to compete for the positions in which Ms. 1 and Ms. 2 were placed.

Grievant's Remedy

Grievance Procedure Manual § 5.9 provides, part:

Hearing officers may order appropriate remedies but may not grant relief that is inconsistent with law, policy, or the grievance procedure. In granting relief, the hearing officer should consider the relief requested in the written grievance.

Grievance Procedure Manual § 5.9(a) provides, in part:

Examples of relief which may be available to the grievant: Relief may include, but is not limited to: *** 5. An order that the agency comply with applicable law and policy

Section VI(C) of the Rules for Conducting Grievance Hearings provides, in part:

1. Misapplication or Unfair Application of Policy: If the issue of policy misapplication is qualified for hearing, and the hearing officer determines that a policy mandate has been misapplied or applied unfairly, the hearing officer may order the agency to reapply the policy from the point at which it became tainted. However, in cases where the hearing officer concludes that written policy requires a particular result without the exercise of agency discretion (i.e., no other outcome under policy), the hearing officer may order the agency to implement those particular policy mandates.

Remedies that conform to law and policy for misapplications or unfair applications of policy may include: ***

¹² Even if the Agency were to assert its actions were voluntary transfers, DHRM Policy requires voluntary transfers to occur between positions in the same Pay Band. The fact that Ms. 1 and Ms. 2 were in different Pay Bands is fatal to the Agency's justification for its decision.

- A repeat of the selection process by the agency in accordance with policy (not the selection of any particular employee for the job, unless such a selection is the only possible result under a written policy mandate).

Based on the foregoing policies, the Hearing Officer will order that the Agency return Ms. 1 to the position of Administration Business and Leasing Manager that she held prior to July 10, 2015 and return Ms. 2 to her position in the Director's Office prior to July 10, 2015. Returning these employees to their former positions means restoring the duties and reporting relationships they held prior to July 10, 2015 and removing any duties and reporting relationships that were changed effective July 10, 2015. If the Agency wishes to make changes to the duties of Ms. 1 and Ms. 2, it must do so in accordance with DHRM Policy. This will ensure that Grievant has the opportunity to compete for the positions if she chooses to do so.

DECISION

For the reasons stated herein, the Agency is **Ordered** to return Ms. 1 to the position of Administration Business and Leasing Manager that she held prior to July 10, 2015 and return Ms. 2 to her position in the Director's Office prior to July 10, 2015.

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 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 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.¹³

[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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.