

Issue: Qualification/age discrimination; Ruling Date: January 15, 2004; Ruling #2003-068; Agency: Virginia Department of Transportation; Outcome: not qualified



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

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation/ No. 2003-068  
January 15, 2004

The grievant has requested a ruling on whether his grievance with the Virginia Department of Transportation (VDOT or the agency) qualifies for a hearing. The grievant claims that the agency has discriminated against him based upon his age. For the following reasons, the grievance does not qualify for a hearing.

FACTS

The grievant is 50 years old and has been employed by VDOT for over 30 years. Currently, his job title is Transportation Operator II. In March of 2002, the grievant applied for a position as a Transportation Operations Manager I (Maintenance Supervisor) within his VDOT District and Residency, but at a different headquarters. Six VDOT employees, including the grievant, were selected to interview for the position. All but one of the applicants was over 40 years old. The successful candidate was 29 years old.

From April 15, 2002 through December 10, 2002, the grievant performed the duties of Maintenance Supervisor at his headquarters while that position was vacant. The position was advertised in October of 2002. The grievant applied and was selected to interview. The position was filled in December of 2002, however, he was not offered the position. The successful candidate was 32 years old. The two hiring panel members were 51 and 57 years old.

Upon learning he had not been selected for promotion, the grievant spoke with his immediate supervisor, questioning why he was not the successful applicant. His immediate supervisor indicated he had no knowledge about the selection because he was not part of the hiring panel, but that he would discuss the matter with his manager. Subsequently, the grievant's supervisor advised him that it appeared he lacked sufficient computer training, specifically in the Financial Management System (FMSII). Shortly thereafter, the grievant initiated this grievance challenging his non-selection for the

second Maintenance Supervisor position (filled in December 2002), alleging that the agency had discriminated against him based upon his age.<sup>1</sup>

A few months after accepting the Maintenance Supervisor position, the successful candidate elected to return to his prior VDOT position. The position was re-advertised and the grievant was selected to interview, but, once again, he was not the successful candidate.<sup>2</sup> This time, however, the individual selected for the position was over the age of 40.

The grievant expresses concern that his qualifications and experience were not considered during the selection process for the position of Maintenance Supervisor, and that the agency instead relied on age. Additionally, he notes that during the grievance process the agency never specifically answered his questions regarding why he was not selected for the position, but instead responded with generalities. Further, during the investigation for this ruling, the grievant claimed that a manager told his immediate supervisor that the successful candidate was hired because he was “young and ambitious.”

The agency claims that age was not a factor in its selection decision. VDOT states it did not discriminate against the grievant, noting that a review of positions filled within that Residency from January 1, 2002 through February of 2003 shows six positions filled, with half the positions being offered to individuals under 40 years of age and the other half offered to those over 40. Additionally, the agency notes that both the interview panel members for the position were over fifty years old. Furthermore, during this Department’s qualification review, VDOT indicated that the grievant was not chosen for a promotion because the successful candidate had excellent qualifications and provided exceptional answers to the interview questions.

#### DISCUSSION

For a claim of age discrimination in the hiring or selection context to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, an employee must be forty years of age or older and must present evidence raising a sufficient question as to whether: (1) he was a member of a protected class;<sup>3</sup> (2) he applied for an open position; (3) he was qualified for the position, and (4) he was

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<sup>1</sup> The grievant did not timely initiate a grievance challenging his non-selection for the March 2002 position. Thus, it is not a separate claim for which relief may be granted. However, while an employee must initiate a claim challenging discrete acts within the appropriate time period, prior discrete discriminatory acts can be used as background evidence in support of a timely claim. *See* National Railroad Passenger Corporation v. Morgan, 122 S.Ct. 2061, 2072 (2002). Thus, the grievant may raise the agency’s failure to select him for the March 2002 position as evidence in support of his claim regarding the October 2002 position.

<sup>2</sup> Prior to this interview, the grievant had received training in FMSII.

<sup>3</sup> It is unlawful for an employer to discriminate against an employee on the basis of age. *See* 29 U.S.C. 621 et seq. (ADEA). The ADEA’s protections extend only to those who are at least forty years old. Such discrimination is also a violation of state policy. *See* the Department of Human Resources management (DHRM) Policy 2.05.

denied promotion under circumstances that create an inference of unlawful discrimination.<sup>4</sup> Where the agency, however, presents a legitimate, non-discriminatory reason for the employment action taken, the grievance should not qualify for a hearing, unless there is sufficient evidence that the agency's stated reason was merely a pretext or excuse for age discrimination.

The grievant is 50 years old, is qualified for the position of Maintenance Supervisor, but was not selected while a 32 year old candidate was. As noted above, however, the agency has stated a non-discriminatory reason for selecting another individual: the successful candidate had excellent qualifications and provided exceptional answers to the interview questions. In response, the grievant claims he has evidence that raises a question of pretext. Specifically, he claims that his immediate supervisor was told by his manager (the Resident Engineer) that the successful candidate was selected because he was "young and ambitious." This statement was allegedly made during a meeting, the minutes of which were sent at a later date via email to the grievant's supervisor.<sup>5</sup> As additional evidence of pretext, the grievant notes that the successful candidate returned to his prior position with VDOT shortly after he was hired. Thus, the grievant claims the successful candidate may not have been able to perform the duties of Maintenance Supervisor, but was selected because the agency did not want an older employee. Furthermore, the grievant notes that in March 2002, when he applied for the same position at a different location, the successful candidate was also under the age of 40.

During the investigation for this ruling, the grievant's supervisor provided a copy of the email to the investigating consultant. The only statement in the email that referenced age in any manner was an assertion by the Resident Engineer that "[the successful candidate] is young and is not being treated right."<sup>6</sup> This statement, in the context of the entire conversation, is insufficient to raise a question of discriminatory intent on the part of the agency. Additionally, the fact that the successful candidate elected to leave the position does not establish that the grievant was not selected because of his age.<sup>7</sup> Furthermore, with respect to the grievant's non-selection for the March 2002

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<sup>4</sup> See *Dugan v. Albemarle County School Bd.*, 293 F.3d 716, 720-721 (4<sup>th</sup> Cir. 2002). Note: proof of selection of a substantially younger worker is required; not selection by someone entirely outside of the ADEA's protected class. *Dugan* at 721.

<sup>5</sup> The meeting was apparently held by the Resident Engineer to clarify the duties of the successful candidate and to correct any miscommunication that may have occurred.

<sup>6</sup> The grievant's immediate supervisor confirmed that the e-mailed minutes presented an accurate summary of conversations that took place during the meeting.

<sup>7</sup> In this case, the successful candidate resided a significant distance from the site and had agreed to relocate to the area if offered the position. However, after commencing work and commuting to the site, he determined he did not want to move and requested a return to his prior position with VDOT, which was closer to his residence. Even if there were some issues with his performance in the position of Maintenance Supervisor, that alone is insufficient to find that the hiring panel failed to select the grievant because of his age. During the investigation for this ruling, the investigating consultant reviewed the applications submitted by the candidates and the Interview Summaries and Evaluation Worksheets completed by the hiring panel. It appears the successful candidate was well qualified and responded thoroughly to the panel's questions. Furthermore, both panel members, like the grievant, were over the age of 50 themselves.

position, while the successful candidate was under the age of 40, he had already held the position of Transportation Operator Manager I at a different location and was seeking to transfer to a different headquarters. In consideration of all the above, the grievant has not put forward sufficient evidence of pretext to qualify the issue of age discrimination for hearing.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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Claudia T. Farr  
Director

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