Issue: Qualification/age discrimination; Ruling Date: January 12, 2005; Ruling #2004-889; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation and Substance Abuse Services/ No. 2004-889
January 12, 2005

The grievant has requested a ruling on whether her July 21, 2004 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) qualifies for a hearing. The grievant claims that the agency discriminated against her on the basis of her age and employs an arbitrary hiring process. For the following reasons, the grievance is not qualified for hearing.

FACTS

The grievant is a Developmental Aide with the agency. She is over the age of forty. She applied for an Active Treatment Specialist (ATS) position at the facility where she works but was not the successful applicant. She states that she is older than the successful applicant and has more education and experience than the successful candidate. In addition, she asserts that her attendance record is better than the successful applicant and that the successful applicant did not show up for her scheduled interview.

The grievant claims that the Unit Manager, who was one of the three members of the interview panel, made the comment that "new blood" was needed for the unit, a statement that the grievant perceived as potentially indicative of bias for younger workers. The Unit Manager denies that age was a factor in the selection decision. He notes that he is over the age of forty as are approximately half of the ATS workers at the facility. During this Department's investigation for this qualification ruling, the Unit Manager stated that the primary reason that grievant was not chosen for a promotion was because the successful candidate performed better during the interview.

DISCUSSION

By statute and under the grievance procedure, management has the authority to determine who is best suited for a particular position by determining the knowledge, skills, and abilities necessary for the position and by assessing the qualifications of the candidates. Accordingly, claims relating to a selection process do not qualify for a

hearing unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced the process, or whether policy may have been misapplied.[1] The grievant claims that the agency has discriminated against her on the basis of her age and has misapplied policy by employing an arbitrary hiring process.

Age Discrimination

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 she: (1) was a member of a protected class; (2) applied for an open position; (3) was qualified for the position, and (4) was denied promotion under circumstances that create an inference of unlawful discrimination.[2] 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.

As stated above, the grievant is over the age of forty and was qualified for the ATS position for which she applied. She claims that the Unit Manager authority made a comment to the effect that "new blood" was needed for the ATS position and that the individual hired for the position was well under the age of forty. The Unit Manager counters that this comment, to the extent that he ever made it, was taken out of context and had nothing to do with the grievant's age.[3] The comment was purportedly made when the Unit Manager was talking with the grievant about things she could do to improve her chances for advancement in the future. He noted that during this conversation he offered the grievant training on improving her interview skills and observed that she might want to consider broadening the range of her work experiences by applying for other positions.[4]

The grievant points to the "new blood" comment as evidence of an age bias by the Unit Manager. However, the Unit Manager's comment regarding "new blood" does not, by itself, serve as unequivocal evidence of discrimination. To the contrary, courts often reject such comments, standing alone, as evidence of discrimination.[5] Because grievant

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[1] Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1.

[2] *See* Dugan v. Albemarle County Sch. Bd., 293 F.3d 716, 720-721 (4th Cir. 2002) (proof of selection of a substantially younger worker is required; not selection by someone entirely outside of the ADEA's protected class).

[3] The hiring authority could neither definitively confirm nor deny that he had made the "new blood" comment.

[4] According to the Unit Manager, the grievant has remained in the same position since her arrival at the facility over 15 years ago.

[5] *See* Fortier v. Ameritech, 161 F.3d 1106, 1113 (7th Cir. 1998) noting that statement that "new blood" would be good in a position, and that plaintiff's younger replacement had a "lot of energy" and would be a "quick study," were not indicative of an age bias. *See also* Blackwell v. Cole Taylor Bank, 152 F.3d 666,

has not provided any other potential evidence of age discrimination, this Department cannot qualify the issue of age discrimination.

Misapplication of Policy-- Arbitrary and Capricious Hiring Process

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.[6] State hiring policy is designed to ascertain which candidate is best suited for the position, not merely to determine who might be qualified to perform the duties of the position.[7] It is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.[8] The grievant alleges that the agency misapplied policy by utilizing an arbitrary and capricious hiring process. She generally asserts that the agency management hires whomever they want regardless of qualifications and that the hiring process is influenced by connections, favors, and/or family or personal relationships.

Education

First, the grievant notes that she has more education than does the successful applicant. This Department does not find the grievant's higher level of education to be a relevant factor in this case. The grievant received a degree in forestry which presumably has no bearing on the work performed by an ATS. The ATS position does not require a college degree, only graduation from high school or the equivalent.

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671 (7th Cir. 1998) (stating that employer's concern that certain employees were not "flexible" or "energetic" is not evidence of age discrimination); Richter v. Hook-SupeRx, Inc., 142 F.3d 1024, 1032 (7th Cir. 1998) (holding that employer's statements that employee had a "low energy level" and was "resistant to change" did not raise an inference of age discrimination); *see also* EEOC v. Clay Printing Co., 955 F.2d 936, 942 (4th Cir. 1992) (holding that statements referring to "young blood" are not probative of age discrimination or a discriminatory purpose); *but see* Abrams v. Lightolier, Inc. 50 F.3d 1204 (3rd Cir. 1995) (holding that reference to an employee as a "dinosaur" relevant to an age discrimination claim.) *Cf.* EDR Ruling 2002-044 (holding that alleged reference to older workers as "dinosaurs" coupled with purported statement indicating a desire to "get rid of them," sufficient to qualify grievance for hearing).

[6] We note that a mere misapplication of policy in itself is insufficient to qualify for a hearing. The General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions." Va. Code § 2.2-3004(A). For purposes of this analysis, we consider denial of a promotion to be an adverse employment action.

[7] Department of Human Resource Management (DHRM) Policy No. 2.10, pages 2-4 (defining selection as the result of the hiring process that identifies the applicant best suited for a specific position; and knowledge, skill, and ability as components of a position's qualification requirements).

[8] Va. Code § 2.2-2901 (stating, in part, that "in accordance with the provision of this chapter 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") (emphasis added).

Experience and Attendance

The grievant asserts that she has more experience and better attendance than does the successful applicant. In addition, as part of the relief requested, the grievant requests that a "certain weight" be assigned to the interview, education, experience, and work record.

The Unit Director concedes that the grievant has more experience than the successful applicant and that her attendance is better as well. However, he was quick to note that the successful candidate's attendance has steadily improved and never required disciplinary action. Moreover, as noted above, state hiring policy is designed to ascertain which candidate is best suited for the position, not merely to determine who might be qualified to perform the duties of the position. More experience and a better attendance record, without more, do not render a candidate best suited for a given position. An agency is allowed to consider many job-related factors and, more importantly, assign to those various factors the weight *it* deems appropriate. In this case, the agency placed substantial weight on the interview (which is discussed separately below).[9] Absent an abuse of discretion by the agency (of which there is no evidence here), this Department cannot second-guess the agency's assignment of weight to a given factor.

The Interview

The grievant cites to several purported problems with the interview process. First, the grievant asserts that the agency did not properly credit her for responses to two of the interview questions. The Unit Director prepared nine questions which were approved by the Human Resources Department. Correct answers to the questions were also prepared in advance of the interviews. As explained below, this Department cannot conclude that the facts surrounding the interview process, including the award of credit for answers, are sufficient to warrant a hearing.

The first question at issue is Question #5 which posed the following hypothetical factual scenario and query:

> One employee has missed 20 shifts of work during a 6 month period, but has provided a Dr.'s note for every absence. Another employee has missed 5 shifts of work during the same time frame, but has not submitted Dr.'s notes for any absences. Given this information, which employee has the more severe attendance problem, and what discussions might you have with these employees?

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[9] When the Unit Manager was asked by this Department's investigating consultant: "What tipped the scales in favor of the successful applicant," he responded by stating: "Her interview responses did more than anything."

The answer that the agency deemed appropriate was:

> Employee with only 5 missed shifts has the better attendance. Must realize that any absence, whether or not documented by a Physician's note, creates the same negative impact on the residents. Staff must realize that good attendance is a condition of employment. Discussions should include a warning concerning the 40 hrs. of "NF" [no fault] absences for the one employee; for the other employee, discussions should be held about the necessity of resolving whatever health issues they may have, regardless of their legitimacy. Let employee know of the impact he/she is having on all other employees, and especially the residents when he/she is away form work. Possibly set up a plan for improvement, including getting prior approval for all absences. Discuss issues such as how to trade shifts and rest days with other staff, etc. Be sure employee is aware of possible disciplinary actions if poor attendance continues, including standards of conduct, poor evaluation, impact on promotions and transfers.

The grievant was given no credit for her answer.[10] She replied that the individual who had missed 5 shifts was closer to receiving a group notice because of the absences. She added that she would discuss, in private, ways to try to help this employee. The grievant also said that she would talk to the employee with 20 absences to determine what was going on, how the absences are causing problems for other staff, and what sort of a plan of action could improve the situation.

The successful candidate, on the other hand, answered that the employee with 20 absences "definitely" had the more severe problem. She stated that if you are that sick, you cannot work in this field. The successful applicant further stated that she would talk to both staff members and advise that one missing person affects staff and overtime.

While this Department is extremely hesitant to second-guess the agency in terms of what it considers the best answer, we cannot help but note that the answer sought by the agency did not address the possible Family Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA) ramifications potentially implicated under the given fact pattern. We recognize that the essential functions of any job require regular attendance.[11] However, if a disabled employee or an employee with FMLA eligibility is forced to miss work because of a disability or a serious personal health condition, such an employee is entitled to the protections of the ADA and FMLA, statutes which form the

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[10] In fact, her answer was apparently deemed to be more than merely wrong. Applicants were purportedly evaluated on the basis of a 5-point scale with "wrong" answers receiving a 1 and "perfect" answers receiving a 5. Curiously, the grievant received 0 points for her answer to Question #5.

[11] *See*, e. g., Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209, 213 (4th Cir. 1994) (holding that attendance is an essential function of any job).

basis of two state policies.[12] The 'correct' answer does not recognize these policies and underlying statutes nor does it appear to reflect a tolerance for legitimate health problems.

Notwithstanding this Department's concerns with the answer sought by the agency, we note that the agency scored applicants consistent with the response that it had pre-determined was appropriate. Accordingly, we cannot conclude that the scoring of this question was arbitrary.

The remaining question at issue was Question #8 which inquired the following: "As ATS on 3A/3/B, you would be supervising employees who were competing with you for this position. Would this create problems, and if so, how would you address them?" According to the agency the correct answer was:

> Discuss things openly with them from the start, clear the air if there are any hard feelings. Show other employee that you value their experience and knowledge of the residents. Work harder than anyone, that will win other staff over more than anything you can do! [sic]

The grievant's answer was awarded a single point for her answer to question #8 (which, according to the agency's grading scale, indicates that she provided a "wrong" answer.) The grievant answered question # 8 as follows: "Wouldn't create problems with most on 3A/B. Can't let personal feelings effect [sic] work. Act in a prof[essional] manner. Talk to people—get along like you have in the past. Work as a team."

The successful applicant, on the other hand, received a 5-point rating indicating that she had answered the question perfectly. She answered question #8 by stating: "Wouldn't create a problem w/her- would go to each one individually & discuss it. Get things out in the open, talk about it right then."

Both the grievant and successful candidate agreed that they would talk to employees about the situation with the successful applicant adding that she would do so "right then." However, neither expressly mentioned working harder than others or recognizing the value of subordinates (although the grievant noted the importance of teamwork and professionalism by the supervisor). One might expect a "perfect" answer to contain each of the elements in its predetermined answer (working harder than others, recognition of the value of subordinates, and prompt discussions), not just the single element of prompt discussions. However, it appears that the agency placed great emphasis on immediately 'clearing the air' through discussion, which was a concept reflected in the successful applicant's answer but not the grievant's. Just as this Department cannot substitute its judgment for that of the agency in determining which job-related factors (e.g. education, experience and so on) should receive the greatest weight, nor can we, absent evidence of an abuse of discretion, second guess the agency's

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[12] *See* Department of Human Resources Management (DHRM) Policies 4.20 (Family and Medical Leave) and 2.05 (Equal Employment Opportunity).

determination of the appropriate weight to assign a particular element of an interview answer.[13]

The grievant also notes that the successful candidate did not show up for her interview nor did she call to inform the agency that she would not be coming in. The Unit Manager has explained that the successful applicant (who was not scheduled to work that day) unexpectedly had to take her sick child to the doctor on the day of the interviews and simply forgot about the appointment. The interview panel asked the Human Resources Department how it should handle the situation and was informed that it was up to the panel as to whether it would allow her another opportunity to interview. The panel decided to allow her to interview the following day, which she did. Under the particular facts of this case, this Department cannot conclude that by extending the successful applicant another opportunity to interview, the interview panel unfairly or arbitrarily applied the selection policy.

APPEAL RIGHTS

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 of 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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William G. Anderson, Jr.
EDR Consultant, Sr.

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[13] We note that even if the successful applicant had only received two or three points for her answer instead of five, the grievant would still not have had the highest interview score. The grievant received a total of 27 points and the successful applicant was awarded 33 points.