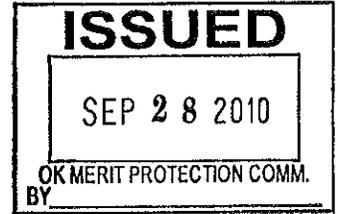


OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA



THOMAS TRENT PETTIGREW,)
Appellant)
vs.)
DEPARTMENT OF PUBLIC SAFETY,)
Appellee.)

CASE NO. MPC 10-017

ORDER

This matter comes before the undersigned Administrative Law Judge on Appellee Department of Public Safety's (hereinafter sometimes called "DPS") Motion to Dismiss Appellant Pettigrew's appeal as moot. On August 12, 2010 Appellee filed its *Motion to Dismiss as Moot the Appeal Based on Appellant's Original Grievance of Reverse Race Discrimination and Pre-Selection in the Promotion Process*. Appellant filed his *Brief in Response to Appellee's Motion to Dismiss as Moot* on September 1, 2010; and Appellee replied on September 10, 2010 with its *Reply Brief in Support of Its Motion to Dismiss the Instant Appeal as Moot*.

FINDINGS OF FACTS

Appellant filed this appeal from a denied grievance on July 17, 2009, alleging pre-selection and reverse race discrimination in violation of departmental policies and Merit Rules, based on Appellant's non-selection for either of two posted promotional opportunities to the rank of Major in the Oklahoma Highway Patrol. The grievance was investigated internally by DPS and found to be without cause. It was again investigated by an independent certified EEO investigator who found no reverse race discrimination

or pre-selection, but found that the selection process violated agency policy and "the principles of the merit system." The investigator recommended (1) that the positions be vacated and reposted separately to include major duties of each position; (2) that objective criteria be developed upon which all applicants would be evaluated based on merit, ability, and capacity; and (3) that the selection process include consideration of applicants' employee service evaluations. In his appeal, Appellant requested the following remedies:

1. I request the promotions be reversed and that I be promoted to the rank of Major.
2. I request back-pay to May 1, 2009 to restore what I have lost as a result of an incorrect and inappropriate decision.
3. I request the promotional process of the OHP be completely revised to include specific criteria that will be used to determine an individual's suitability for a position.
4. I request a classified employee be assigned to oversee the process so that decisions can be made without the individual fearing for their [*sic*] job and so the perception that decisions are influenced by that factor can be eliminated.

Petition for Appeal, filed by Appellant on July 17, 2009
with the Oklahoma Merit Protection Commission

On July 29, 2010 a pre-hearing conference was held in this matter. At the conference Appellee announced its intention to vacate the two subject positions and repost them, providing Appellant an opportunity to reapply and be reconsidered. Appellee further stated its intention to file a motion for dismissal of this matter as moot once the stated actions had been taken. Appellant indicated that he sought, as remedy in this matter, to be named to one of the vacant positions retroactively and with back-pay. A discussion ensued concerning whether this Administrative Law Judge has

authority to place Appellant into one of the vacated positions if a violation of agency policies, Merit Rules or State Statutes is found, or whether her authority is limited to vacating the agency action, ordering corrections to the promotional selection process, and providing Appellant an opportunity to reapply. The determined issue in this case is whether there were any violations of State statutes, Merit Rules or agency policies and procedures that prevented Appellant from receiving fair consideration and the opportunity to become a successful candidate for either of the two positions. Hearing was set for November 15, 16, and 17, 2010.

On July 30, 2010 Appellee posted announcements for the two Major positions which are the subject of this action, as well as a third such position. Appellee represents that the recommendations of the EEO investigator were incorporated to include the primary duties of each position; to develop objective criteria upon which all applicants would be evaluated based on merit, ability, and capacity; and to consider employee service evaluations of applicants. Appellant concedes that "...although DPS has re-posted the positions and made new appointments (which were the same as the ones before in most respects), they have violated additional policies and procedures which will need to be grieved." (*Appellant's Brief in Response to Appellee's Motion to Dismiss as Moot*, page 3).

DISCUSSION

Merit Rule 455:10-3-13 (a) (1) provides that an appeal may be dismissed if it is moot or there is insufficient evidence to support the allegations. A matter may be considered moot if it presents no real controversy between the parties.¹ In this instance, Appellee has vacated the two positions, reposted them, developed new

¹ West's Encyclopedia of American Law, 2nd Edition, The Gale Group, Inc. (2008)

evaluation criteria that incorporates review of applicants' employee service evaluations, and has thus provided Appellant the relief he could have expected to receive had he prevailed after a hearing before the Commission.² As Appellant has received substantially all the relief available to him, there is no longer any controversy, no need for a hearing, and this appeal is moot.

Appellant has requested as relief that he be placed in one of the positions and receive retroactive back pay. Merit Rule 455:10-9-2 (f) (2) states that in an alleged violation appeal the appointing authority may be ordered to take the necessary corrective action, but that corrective action shall be limited to issues submitted for decision, and limited to action which makes the person harmed by the violation whole as if the violation had not occurred. In this instance, Appellant could not be placed into the requested position unless he was determined to be the most qualified applicant. The issue of Appellant's qualifications is not before this administrative law judge. If Appellant were to prevail in this appeal, his remedy would be to place him in the position where he would have been were it not for the alleged reverse discrimination, pre-selection, or other violations. This means vacating the positions and providing Appellant a fair opportunity to compete for those positions, along with other applicants.³

Appellant states that Appellee has acted in a wrongful and dilatory manner in vacating and reposting the two positions months after the EEO investigator

² This Administrative Law Judge recognizes that the changes in the evaluation process made by Appellee were based on the recommendations of the EEO investigator and that a hearing *de novo* before this Commission may have produced different recommendations were Appellant to prevail. To this extent, the relief granted by this Commission may not have been *exactly* the same as the actions taken by Appellee. However, the predominant action taken – to vacate and repost the positions, with changes in the evaluation process – was substantially all the relief Appellant could have expected to receive were he to prevail in a hearing before this Commission.

³ In an adverse action appeal (e.g. discharge, demotion, or other disciplinary action) where just cause is found not to exist for the action taken by the agency, the Appellant may be ordered reinstated with back pay. However, this is not an adverse action appeal and such remedy is not applicable in this case.

recommended that Appellee do so. He seeks a determination that Appellant is the prevailing party in this matter and entitled to apply for attorney fees and costs. Such a determination is beyond the scope of this motion to dismiss. However, Appellant has the right to file an appropriate motion for attorney fees and costs, where those issues may be raised.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above-entitled matter.

2. Any findings of fact that are properly conclusions of law are so incorporated herein as conclusions of law.

3. Merit Rule 455:10-9-2 (f) (2), Alleged Violation Appeal, states that the burden of proof in an alleged violation appeal is on the Appellant to prove his case by a preponderance of the evidence.

4. Merit Rule 455:10-9-2 (f) (2), Alleged Violation Appeal, states that upon a finding that a violation within the Commission's jurisdiction did occur, the appointing authority may be ordered to take the necessary corrective action or report the findings to any other authorities for further action. Corrective action shall be limited to issues submitted for decision, shall be consistent with applicable statutes and rules, and shall be limited to action which makes the person harmed by the violation whole as if the violation had not occurred.

5. Merit Rule 455:10-3-13 (a) (1), Dismissal of Appeals, states that a petition for appeal may be dismissed if it is moot.

6. Appellee's actions to vacate the two subject positions, repost them for interested applicants to apply, and incorporate the recommendations of the EEO investigator to include the primary duties of each position; to develop objective criteria upon which all applicants would be evaluated based on merit, ability, and capacity; and to consider employee service evaluations of applicants, provided Appellant with substantially all the remedy he could expect to obtain if he were to prevail in this action, and renders this matter moot.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant is hereby **DISMISSED** as moot.

DATED: this 24th day of September, 2010.



Annita M. Bridges, OBA # 1119
Administrative Law Judge
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PROTECTION COMMISSION
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