

IF AN ELIGIBLE CANDIDATE FOR AGE PREFERENCE IS NOT ON “LIST OF ELIGIBLES,” NOT HIRING THAT CANDIDATE IS NOT AGE DISCRIMINATION PER SE, AND A VACANCY NOTICE WHICH DOES NOT MENTION AGE PREFERENCE IS NOT DEFECTIVE

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In Thompson v. State Civil Service Commission, 869 A.2d 575 (Pa. Commw. 2005), the Commonwealth Court held that public employers are not required to state on position vacancy notices that the position is subject to age preference. Additionally, even though a qualified applicant is over sixty (60) years old and the position is subject to age preference, the applicant is not entitled to the position if her name does not appear on the list of certified eligibles.

The Thompson case involved the Beaver County Area Agency on Aging (the “Agency”), which posted a personnel vacancy notice for the position of Community Health Nurse 1 at a workplace where Nancy Thompson was employed. The notice did not contain any indication that the position was subject to an age preference. Thompson, who was over sixty (60) years old, submitted an application and letter of interest, but did not indicate her age or request an age preference. Thus, nobody associated with interviewing or hiring candidates for the Agency knew Thompson’s age. Additionally, although she was qualified for the position, and received a high enough score on the Civil Service Examination, Thompson’s name was not on the list of certified eligibles issued to the Agency by the State Civil Service Commission. Thompson did not allege before the Court that she was left off the list improperly.

The agency hired somebody else, who had an identical score as Thompson on the Civil Service Exam, for the position. The person who was hired was under age sixty (60), but unlike Thompson, was on the list of certified eligibles.

Before the Commonwealth Court, Thompson argued that she was entitled to age preference under the Department of Aging’s statute and regulations. Section 2203-A of the Administrative Code of 1929 requires that: “[I]n filling vacancies authorized to the [Agency], the Secretary shall assure that preference is given to persons sixty years of age or older.” 7 P.S. § 581-3(b). Likewise, the Department of Aging regulation states that:

In the selection of personnel to fill vacant positions in the [Agency], preference, subject to this chapter, shall be given to available qualified persons 60 years of age or older.

6 Pa. Code § 5.3.

Thompson alleged that the Agency’s failure to apply the age preference constituted age discrimination. The Court disagreed. Under the “rule of three,” if a vacant position is to be filled from an employment list, the employer is required to select a person among the three highest rankings on the certification of eligibles. 71 P.S. § 741.602. The Code requires that qualified

persons over sixty (60) years old are to be identified on Certifications of Eligibles issued by the Commission. Then, in order to receive preference, a person who is sixty or older is placed among the three highest ranking eligibles.

Because Thompson was not on the list of certified eligibles, and because the successful candidate must be selected from the top three names on the list of certified eligibles, the Court held that she was not entitled to the age preference. Thompson also argued that the vacancy notice was defective because it did not mention that preference would be given to applicants over age sixty. The Court held that while such a statement in the vacancy notice would be consistent with the goals of the Code, it is not mandated by the Code, and therefore such a failure is not defective.