

Issue: Alleged racial discrimination; Hearing Date: 02/10/03; Decision Issued:
05/12/03; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 5635



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5635

Hearing Date: February 10, 2003
Decision Issued: May 12, 2003

PROCEDURAL HISTORY

On December 5, 2001, Grievant timely filed a grievance to challenge the Agency's action denying his request for a competitive salary offer. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On September 27, 2002, the Director of the Department of Employment Dispute Resolution issued Ruling 2002-038 qualifying Grievant's allegation of racial discrimination for a hearing. The EDR Director did not qualify for a hearing the issue of whether the Agency complied with DHRM Policy 3.05, *Compensation*. On January 14, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 10, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Five witnesses

ISSUE

Whether the Agency discriminated against Grievant on the basis of his race.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency misapplied policy. 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 Juvenile Justice employs Grievant as a Psychologist I. On November 7, 2001, Grievant received an offer of employment from a non-state agency.¹ Grievant sought a competitive salary offer in accordance with DHRM Policy 3.05, *Compensation* which permits DJJ to make a counter offer to Grievant to match the higher salary offer from a non-state agency. On November 9, 2001, the Psychology Director asked the Agency to make a competitive salary offer to retain Grievant with the Agency. The Compensation Manager spoke with the Deputy Director on November 9, 2001. Because of a holiday and other scheduling difficulties, the Deputy Director did not make his decision until November 19, 2001. The Deputy Director declined to pursue Grievant's request thereby ending the possibility that Grievant's salary could be increased. Grievant was informed of the Agency's decision on November 21, 2001.

DJJ implemented a Salary Administration Plan effective September 25, 2000. One of the objectives of this plan is to retain qualified, high performing employees. DJJ uses a Pay Review Committee to recommend to the Agency Director whether to grant a competitive pay request. When the procedure was established, the Deputy Director was not involved in determining what matters the Committee would consider. At some point, the Agency asked the Deputy Director to become a "gatekeeper" before compensation requests could be considered by the Pay Review Committee.²

The Deputy Director considered whether to make Grievant a competitive salary offer. He sought the advice of the Compensation Manager regarding how difficult it would be to fill Grievant's position. The Compensation Manager informed the Deputy

¹ Grievant Exhibit 3.

² Grievant's request for a competitive salary offer was the first one that the Deputy Director received once he was assigned the "gatekeeper" role.

Director that the Agency was not having difficulty recruiting Psychologist I positions, but was having difficulty recruiting Psychologist II positions because the Agency preferred its Psychologist II positions to have a doctorate and to be licensed. She believed the local employment market had many psychologists with masters degrees but few with doctoral degrees. She believed it would not be difficult to fill a Psychologist I position but would be difficult to fill a Psychologist II position. The Compensation Manager also informed the Deputy Director that Grievant received a job offer for a position similar³ to his current position with the Agency and that the initial offer made to Grievant was below Grievant's current salary but then raised to exceed his current salary. Based on this information and the Deputy Director's concern about upcoming budget problems, the Deputy Director declined to forward Grievant's request to the Pay Review Committee.⁴ His failure to forward the matter to the Committee effectively denied Grievant's a competitive salary offer.

At the time the Deputy Director was making his decision of whether to refer Grievant's case to the review committee, the Deputy Director did not know who Grievant was or his race. The Deputy Director did not speak with Grievant or with the Psychology Director about Grievant.

CONCLUSIONS OF POLICY

The Governor's Executive Order on Equal Opportunity prohibits employment discrimination on the basis of race, gender, color, national origin, religion, age, or political affiliation, or against otherwise qualified persons with disabilities. State agencies must apply their employee compensation policies in accordance with the Governor's Executive Order.⁵

Disparate Treatment

Grievant may establish racial discrimination by presenting evidence that: (1) he is a member of a protected class; (2) he is qualified for the position and his performance was satisfactory; (3) in spite of his qualifications and his performance his competitive offer was turned down; and (4) that his bid for a competitive offer was rejected under circumstances that give rise to unlawful discrimination. If the Agency presents credible evidence of a nondiscriminatory reason for its actions, then Grievant has not established he was discriminated against because of his race, unless there is sufficient evidence that the Agency's stated reason is merely a pretext or excuse for improper discrimination.

³ Grievant contends the outside job offer was for a position consistent with a Psychologist II position. The Compensation Manager did not realize this when she advised the Deputy Director.

⁴ The Deputy Director did not know that the Agency had granted a competitive salary offer to an African American Psychologist II a few months earlier.

⁵ Grievant Exhibit 9; DHRM Policy 2.05.

If the Hearing Officer assumes for the sake of argument that Grievant has established his *prima facie* case, the Agency has presented credible evidence of a nondiscriminatory reason for its action. No credible evidence was presented suggesting the Agency's reason was a pretext or excuse for improper discrimination.

DHRM Policy permits state agencies to make a competitive salary offer to an employee "to counter a higher salary offered by an organization outside the Commonwealth to an employee deemed critical to the agency."⁶ DJJ developed a Salary Administration Plan setting forth its process to make certain compensation decisions including whether to make competitive salary offers.⁷ DJJ will not make a competitive salary offer to an employee without the recommendation of a Pay Review Committee. Before the Pay Review Committee considers whether to recommend a competitive salary offer, the Deputy Director must refer the matter to the Pay Review Committee.

The Deputy Director did not ask the Pay Review Committee to consider whether Grievant should receive a competitive salary office. He made this decision because he believed it would not be difficult to fill Grievant's position if Grievant left the Agency and because he was interested in avoiding taking actions that might increase the Agency's fiscal problems. The Deputy Director did not refuse to consider the request because of Grievant's race. This conclusion is confirmed by the fact that the Deputy Director did not know Grievant personally and was not aware of Grievant's race before the Deputy Director made his decision.

Grievant has not established unlawful disparate treatment. Declining to offer a competitive salary increase because of the ease of filling a position and in order to limit the fiscal impact on an agency are legitimate nondiscriminatory reasons. Although Grievant contends his position was difficult, not easy, to fill because of its low salary range, Grievant has not established that the Agency's reason is a pretext for improper discrimination. If the Hearing Officer assumes for the sake of argument that the Deputy Director was incorrect regarding the ease of replacing Grievant, all this shows is that the Deputy Director's opinion⁸ was wrong and not that the Deputy Director created the reason to distract others from observing any unlawful behavior by the Agency.

Grievant argues he was discriminated against because another similarly situated employee was presented with a competitive salary offer several months earlier.⁹ That

⁶ DHRM Policy 3.05 (effective September 25, 2000, revised March 1, 2001).

⁷ Grievant Exhibit 1.

⁸ There is no reason to believe the Deputy Director's opinion was wrong. He testified "I hire people, for a living." Given his numerous years of executive management experience and involvement in the Agency's hiring process, the Deputy Director's opinion was credible.

⁹ The Deputy Director was not involved as a gatekeeper at the time of that decision.

individual was an African-American male holding a Psychologist II position. Although disparate treatment may be inferred from a difference in treatment of employees, the weight of the evidence shows that the credible testimony of the Deputy Director is more persuasive than an inference based on circumstantial evidence.¹⁰

Disparate Impact

Grievant may establish racial discrimination by presenting evidence of an unlawful employment practice based on disparate impact.¹¹ Grievant must establish either (1) the specific employment practice that causes a disparate impact on the basis of race and the Agency fails to establish that the practice is job related and consistent with business necessity or (2) the Agency refused to implement an effective alternative practice that would have had a lesser adverse impact.

Grievant has not offered credible evidence of either option to prove his *prima facie* case. It is unclear that statistical evidence could have been produced to support a claim of disparate impact. For the period beginning September 25, 2000 when the competitive salary offer policy became effective through January 31, 2002 there were 17 requests by employees¹² for competitive salary offers. In Price v. City of Chicago, 2000 U.S. Dist. LEXIS 12447, the Court held that use of the Four-Fifths rule under the Uniform Guidelines on Employee Selection Procedures used by the EEOC “is suspect as the sample size of 22 is quite small.” A population size of 17 is unlikely to accurately the Agency’s pattern of behavior.

DECISION

For the reasons stated herein, Grievant has not established that the Agency discriminated against him on the basis of his race. His request for relief is denied.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

¹⁰ The Deputy Director testified he had been informed that a Psychologist II position was more difficult to fill than a Psychologist I position. Had Grievant held a Psychologist II position at the time the Agency had denied that request, then Grievant’s argument would have held much greater weight.

¹¹ To prevail with a claim of disparate impact discrimination, Grievant need not provide evidence of the employer’s subjective intent to discriminate on the basis of his membership in a protected class.

¹² The 17 requests were for many different positions not just positions similar to Grievant’s position.

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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].

Carl Wilson Schmidt, Esq.
Hearing Officer

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