

Summary: Qualification/Salary Disputes; Ruling Date: May 23, 2002; Ruling #2002-014; Agency: Department of Health; Outcome: Not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Health
No. 2002-014
May 23, 2002

The grievant has requested a ruling on whether his November 20, 2001 grievance with the Virginia Department of Health (“agency”) qualifies for a hearing. The grievant claims that by refusing to make him a competitive salary offer, the agency misapplied policy and retaliated against him for his having questioned its intent to implement compensation reform. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a Field Services Engineer. On October 23, 2001, the grievant received a written job offer from another state agency. The grievant submitted the written offer to his supervisor on October 25, 2001 and requested a competitive salary offer¹ which the agency denied. After subsequent attempts to resolve the issues were unsuccessful, the grievant initiated his grievance on November 20, 2001. The agency head denied qualification and the grievant requested a ruling from this Department.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.² Although all complaints initiated in compliance with the grievance process may proceed through the three resolution steps set forth in the grievance statute, thereby allowing employees to bring their concerns to management’s attention, only certain issues qualify for a hearing.

¹ The Department of Human Resources Management (DHRM) Policy 3.05 allows a state agency to make a single counter offer to match a higher salary offer from another state agency. Such counter offers, termed “competitive salary offers,” are available to employees deemed critical to the agency’s mission and operations.

² Va. Code § 2.2-3004 (B).

Claims relating to such issues as the establishment and revision of wages (including competitive salary offers) generally 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 management's decision, or whether state policy may have been misapplied.³ In this case, the grievant claims that policy has been misapplied and that he was subjected to retaliation for his statements regarding the agency's implementation of the state's new compensation plan.

Misapplication of Policy

For an allegation of misapplication 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. Further, if a claim of policy misapplication is qualified and proven at hearing, the relief that a hearing officer can grant is limited to directing the agency to reapply the policy from the point at which it was misapplied. A hearing officer may not award damages or attorney's fees or any other prospective relief.⁴

The controlling policy in this grievance is DHRM Policy No. 3.05.⁵ According to Policy 3.05, when an employee receives a job offer from another state agency, the agency for which the employee currently works "may provide competitive salary adjustments to employees who are deemed critical to the agency's mission and on-going operations." An agency's decision of whether to extend a counter offer is discretionary, and the election to withhold a counter offer clearly falls within the parameters set by policy. In addition, there is a distinction between a *position* and an individual *employee* considered critical to an agency. In other words, while the *duties* performed by a particular individual may be critical to the agency's ongoing mission, it may not be necessary to have a particular person carry out those duties. Furthermore, state policy does not appear to require any particular form of evaluation for determining whether a particular *employee* is deemed critical to the agency. Accordingly, this grievance presents no evidence that the agency misapplied or unfairly applied policy.

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity; (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If any of these three elements are not met, the grievance may not qualify for hearing. Further, if the agency presents a nonretaliatory business reason for the adverse

³ Va. Code §2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (c) page 11.

⁴ *Grievance Procedural Manual* § 5.9, pages 15-16; *Rules for Conducting Grievance Hearings*, page 10.

⁵ DHRM Policy No. 3.05, effective September 25, 2000, revised March 1, 2001.

action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.⁶

Under the grievance procedure, only certain activities are considered "protected" activities that will support a claim of retaliation; included among these activities is "exercising any right otherwise protected by law."⁷ Assuming without deciding that questioning the intentions of the agency to carry out compensation reform is a protected activity under the grievance procedure, and further, that the failure to award a competitive salary offer is an adverse employment action, this grievance provides no evidence to support the allegation that the agency refused to extend a counter offer because the grievant had questioned the agency's intent to implement the new compensation plan. Moreover, the agency asserts a nonretaliatory business reason that is consistent with controlling policy, DHRM Policy No. 3.05: management simply determined that the grievant was not an employee it deemed critical to the agency's mission and on-going operations. The grievant has provided no evidence to rebut the agency's stated business reason, or to show that the decision to deny him a competitive salary offer was based on any improper motive. Accordingly, this grievance does not qualify 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, he 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 notifies the agency that she does not wish to proceed.

Claudia T. Farr
Director

Deborah M. Amatulli

⁶ See *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653 (4th Cir. 1998).

⁷ See *Grievance Procedure Manual* § 4.1(b)(4), page 10. Only the following activities are protected activities under the grievance procedure: participating in the grievance process; complying with any law or reporting a violation of such law to a governmental authority; seeking to change any law before Congress or the General Assembly, reporting a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law.

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