

Issue: Qualification/Compensation/Leave/Competitive Offer, Discrimination/Race;  
Ruling Date: September 27, 2002; Ruling #2002-038; Agency: Department of Juvenile  
Justice; Outcome: Race issue qualified; misapplication of policy not qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Juvenile Justice  
No. 2002-038  
September 27, 2002

The grievant has requested a ruling on whether his December 5, 2001 grievance with the Department of Juvenile Justice (“DJJ or the agency”) qualifies for a hearing. The grievant claims that by refusing to make him a competitive salary offer and not informing him of the decision in a timely manner, the agency inconsistently applied policy and discriminated against him. For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

The grievant is employed by the agency as a Psychologist. On November 6, 2001, the grievant received a job offer from a non-state agency and requested a competitive salary offer.<sup>1</sup> The agency instructed the grievant to obtain a written offer that he submitted to his supervisor on November 7, 2001. The grievant, after several attempts to obtain management’s decision, declined the non-state offer in the belief that DJJ would make a competitive offer to keep him. The grievant was informed on November 21, 2001 that DJJ denied his request for a competitive salary offer.<sup>2</sup> After attempts to resolve the issues were unsuccessful, the grievant initiated his grievance on December 5, 2001. The agency head denied qualification and the grievant requested a ruling from this Department.

DISCUSSION

Although all complaints initiated in compliance with the grievance process may proceed through the three resolution steps set forth in the grievance statute, thereby

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

<sup>2</sup> See email from agency compensation manager to grievant sent November 21, 2001 1:38pm.

allowing employees to bring their concerns to management's attention, only certain issues qualify for a hearing. 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.<sup>3</sup> In this case, the grievant claims that policy has been inconsistently applied, the decision was not made in a timely manner, and that the agency's denial of a competitive offer arose from racial discrimination.

### *Discrimination*

Under the grievance procedure, a claim of discrimination arising from membership in a protected class (in other words, on the basis of race, color, religion, political affiliation, age, disability, national origin, or sex) may qualify for a hearing.<sup>4</sup> In this case, the grievant asserts that the agency may have discriminated against him on the basis of his race, Caucasian.

For a claim of reverse discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. The grievant must present facts that raise a sufficient question as to whether the decision regarding his competitive offer was made *because of* his membership in a protected class. The grievant may accomplish this by coming forward with 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.<sup>5</sup> If, however, the agency comes forward with a nondiscriminatory reason for its actions, the grievance should not qualify for hearing, unless there is sufficient evidence that the agency's stated reason is merely a pretext or excuse for improper discrimination.<sup>6</sup>

In this case, there remain questions as to whether the grievant has met all of the above four elements of a discrimination claim. As a Caucasian, the grievant is a member of a protected class.<sup>7</sup> It is undisputed that the grievant is qualified for his position, as evidenced by his supervisor's support in requesting the competitive offer on his behalf.

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

<sup>4</sup> Va. Code §2.2-3004 (A) *Footland v. Daley*, 2000 U.S. App. LEXIS 26632 (4<sup>th</sup> Cir. 2000), page 3 (unpublished decision).

<sup>5</sup> See *Footland v. Daley*, 2000 U.S. App. LEXIS 26632 (4<sup>th</sup> Cir. 2000), page 3 (unpublished decision).

*Hutchinson v. INOVA Health System, Inc.*, 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

<sup>6</sup> *Hutchinson v. INOVA Health System, Inc.*, 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

<sup>7</sup> The grievance Form A does not state the specific basis of the alleged discrimination, however the claim was clarified as "racial discrimination" and addressed as such within the resolution steps.

Further, for the purposes of this ruling only, we will assume the rejection of a competitive offer was an adverse employment action.<sup>8</sup> As to the final element, there are remaining questions as to whether the denial of the competitive offer occurred under circumstances that gave rise to unlawful discrimination.

The grievant asserts that he is “aware that in at least one other instance race was a factor in attempts to retain an employee.”<sup>9</sup> During the review for this ruling, the grievant clarified that the person was an African-American member of his department who had asked for and received a competitive salary offer. It is undisputed that a Psychologist Senior, who is African American, did receive a competitive offer several months prior to the grievant’s request. Also there purportedly is witness testimony that could show that race was one factor considered in the Psychologist Senior’s case. Consideration of race in one instance does not establish that race was considered in another. However, it does raise a question of fact as to whether race may have been improperly considered in the grievant’s case. In addition, the grievant asserts that he was told by the Deputy Director that he did not feel compelled to provide the grievant with a competitive match as psychologists are easily replaced. On the surface at least, this alleged statement would appear to contradict the agency’s earlier action of providing the Psychologist Senior with a competitive match. Accordingly, this issue is qualified for a further development of the facts.

#### 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.<sup>10</sup>

The controlling policy in this grievance is DHRM Policy No. 3.05.<sup>11</sup> According to Policy 3.05, when an employee receives a job offer from a non-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 when the employee receives a job offer.*”(Emphasis added.) An agency’s decision of whether to extend a counter offer to such an employee is discretionary under Policy 3.05, and the agency’s election to withhold a counter offer clearly falls within the parameters set by that policy. In addition, while psychologist *positions* may be critical to

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<sup>8</sup> See *Boone v. Goldin*, 178 F.3d 253, 255 (4<sup>th</sup> Cir. 1999) typical requirements for an “adverse employment action” include, but are not limited to, a decrease in pay or benefits.

<sup>9</sup> See grievant’s February 5, 2002 appeal of the agency head’s decision.

<sup>10</sup> *Grievance Procedural Manual* § 5.9, pages 15-16; *Rules for Conducting Grievance Hearings*, page 10.

<sup>11</sup> DHRM Policy No. 3.05, effective September 25, 2000, revised March 1, 2001, pages 11-12.

DJJ's mission and operations, Policy 3.05 refers to an *employee* considered critical to an agency. In other words, while the *duties* associated with a particular position may be critical to the agency's ongoing mission, the particular *employee* carrying out those duties may not be. 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, nor any particular timeframe in which this decision must be made.<sup>12</sup>

DHRM Policy No. 3.05 also calls for each agency to institute an Agency Salary Administration Plan.<sup>13</sup> According to the DJJ Salary Administration Plan, the Pay Review Committee will make decisions on competitive offers.<sup>14</sup> The grievant asserts that the decision regarding his competitive offer was made by the Deputy Director and was not done in a timely manner, taking over a period of weeks for him to finally receive an answer. However, neither the Salary Administration Plan nor the Pay Review Committee Procedures provides any specific timeline for a response from agency management. Thus, although during the grievance process management acknowledged that it hopes it "will be able to improve upon the timeliness of our responses in the future," there is no applicable policy provision that has been misapplied.<sup>15</sup>

In sum, because DHRM Policy No. 3.05 gives management the discretion to determine which employees are deemed critical to the agency's mission, and there is no policy provision establishing a timeframe within which agency management was required to respond to grievant's request for a competitive offer, the claim that management misapplied or unfairly applied policy No. 3.05 does not qualify for a hearing. However, as noted above, the grievant has raised a question of race discrimination in DJJ's decision regarding his request for a competitive salary offer, which qualifies for hearing. To the extent that race discrimination in selection is also a misapplication of DHRM's Policy 2.05 (which requires that "all aspects of human resource management be conducted without regard to race, color, religion, gender, age national origin, disability, political affiliation") the question of whether DHRM Policy 2.05 was misapplied also qualifies for hearing.

#### ADDITIONAL INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. Please also note that our qualification ruling is not a determination that the agency discriminated against the grievant or misapplied

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<sup>12</sup> The grievant alleges that neither his supervisor nor his supervisor's supervisor were contacted for input regarding his relative value to the agency. While it would certainly appear reasonable and appropriate for management to confer with the supervisors of an individual seeking a competitive match, there is no mandatory requirement that they be consulted.

<sup>13</sup> *Id.*, which states in pertinent part that the "The Agency Salary Administration Plan addresses the agency's internal compensation philosophy and policies; responsibilities and approval processes." See page 1 of 21.

<sup>14</sup> See Department of Juvenile Justice Agency Salary Administration Plan (II) (2), page 2.

<sup>15</sup> See Agency Head Qualification Decision.

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DHRM Policy 2.05. Rather, this ruling simply reflects that there is a sufficient question such that further review by a hearing officer is justified. If a hearing officer determines that DJJ has misapplied or unfairly applied policy, he may only order that the agency reapply the policy as mandated or in a manner in keeping with the intent of the applicable policy. Similarly, if a hearing officer determines that discrimination has occurred, he may order that the agency create an environment free from discrimination, or take corrective actions necessary to cure the violation and/or minimize its reoccurrence.

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Director

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