

Issue: Qualification/ Discrimination-Race, Age; Ruling Date: September 16, 2002;
Ruling #2002-044; Agency: Department of Juvenile Justice; Outcome; qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Juvenile Justice/ No. 2002-044
September 16, 2002

The grievant has requested a ruling on whether his September 14, 2001 grievance with the Department of Juvenile Justice (DJJ) qualifies for a hearing. The grievant claims that the agency has discriminated and retaliated against him, created a hostile work environment, and engaged in improper favoritism. For the following reasons, the grievance is qualified for hearing.

FACTS

The grievant is a Corrections Sergeant with DJJ. He states that he has over ten years of experience in the area of juvenile corrections. From September 2000 to September 2001, the grievant claims that twelve individuals received promotions at his facility, only one of whom was African-American.¹ The grievant is also African-American, and claims that he did not receive a promotion to Lieutenant because of his race. He also claims that those individuals who were promoted were significantly younger than he is. He expresses concern that qualifications and experience were not considered during the selection process, and that DJJ instead relied on race, age, and improper favoritism. Moreover, the grievant feels that his promotional opportunities were adversely affected after he cooperated with an investigation against his former supervisor. Finally, the grievant claims that DJJ failed to process a grievance that he filed on July 23, 2000.

The agency claims that race and age were not factors in its decisions to promote others ahead of the grievant. During this Department's qualification review, DJJ stated that the grievant was not chosen for a promotion because other candidates exhibited more professional conduct during the interview process. Finally, the agency claims that because the grievant did not challenge earlier the agency's failure to process his July 23, 2000 grievance, he has waived his right to do so now, and that the July 23, 2000 grievance must be deemed closed.

¹ The grievant and another employee revealed during this Department's qualification review that since the filing of this grievance, three other minorities have received promotions. The grievant and the other employee claim that the agency is attempting to "cover up" its earlier acts of discrimination.

DISCUSSION

Age Discrimination

For a claim of age discrimination in the hiring or selection context to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, an employee must be forty years of age or older and must present evidence raising a sufficient question as to whether he was: (1) he was a member of a protected class; (2) he applied for an open position; (3) he was qualified for the position, and (4) he was denied promotion under circumstances that create an inference of unlawful discrimination.² Where the agency, however, presents a legitimate, non-discriminatory reason for the employment action taken, the grievance should not qualify for a hearing, unless there is sufficient evidence that the agency's stated reason was merely a pretext or excuse for age discrimination.

The grievant is 50 years old and, as discussed above, is qualified for a promotion to Lieutenant. He claims that those receiving promotions were primarily "in their thirties." As noted above, the agency stated a non-discriminatory reason for promoting others before the grievant: more professional conduct during their interviews. However, the grievant has brought forth evidence that raises a question of pretext. Specifically, he claims that a manager referred to some older employees as "dinosaurs" in a staff meeting and threatened to "get rid of them," a statement which was corroborated by another employee present at this meeting. Although the statement was not made in reference to promotional opportunities, it is enough to raise a sufficient question of discriminatory intent. Therefore, the issue of age discrimination qualifies for hearing.

Additional Theories for Non-selection

The grievant has advanced several alternative theories related to the agency's decision not to promote him, including allegations of retaliation, race discrimination, and favoritism. Because the issue of age discrimination qualifies for a hearing, this Department deems it appropriate to send these ancillary issues for adjudication by a hearing officer as well, to help assure a full exploration of what could be interrelated facts and claims.

Compliance - July 23, 2000 Grievance

Finally, the grievant raises a concern that DJJ failed to respond to a grievance he filed on July 23, 2000. Management asserts that the grievant did not raise this compliance matter in a timely manner, and thus has forfeited his right to do so now. Under this Department's longstanding practice, the agency may administratively close a grievance

² See O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 310-11, 134 L. Ed. 2d 433, 116 S. Ct. 1307 (1996).

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by notifying the grievant in writing that: (1) the grievance has been administratively closed, and (2) the grievant may challenge the closing of his grievance by requesting a compliance ruling from this Department within five business days of his receipt of the written notification of closure. In this case, DJJ provided no such written notice to the grievant, so the grievance remains open.

The parties are advised to proceed with the July 23, 2000 grievance and/or its closure within five work days of their receipt of this ruling. This Department's rulings on matters of compliance are final and nonappealable.³

CONCLUSION

For the reasons discussed above, this Department qualifies the September 14, 2001 grievance for a hearing. This qualification ruling in no way determines that the agency's decision not to promote the grievant was discriminatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

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Director

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³ Va. Code § 2.2-1001(5).