

Issue: Qualification/Discrimination/Sex, Race Age; Ruling Date: November 17, 2003;
Ruling #2003-157; Agency: Department of Criminal Justice Services; Outcome:
qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Criminal Justice Services
Ruling Number 2003-157
November 17, 2003

The grievant has requested a ruling on whether his July 9, 2003, grievance with the Department of Criminal Justice Services (DCJS) qualifies for a hearing. The grievant claims that the agency has discriminated against him and misapplied state and agency policy. For the reasons discussed below, the grievance is qualified for hearing.

FACTS

The grievant is employed as a Section Chief with DCJS. In December 2002, the agency head announced to the staff his intent to modify the agency's organizational structure by creating two temporary Division Director positions effective on January 1, 2003. If the new structure proved effective after several months, the positions would be made permanent and filled through competitive selection. In the interim, the positions were to be filled by two temporary Division Directors selected from among Section Chiefs who had asked to be considered. The grievant interviewed to fill one of the temporary positions but was not selected. An African American male and a Caucasian female were selected to fill the temporary positions.

After creation of the temporary positions, organizational charts were changed to reflect the new structure and listed the incumbents as "Division Director" without the "acting" designation. In subsequent meetings, both internal and external to the agency, the incumbents were introduced by the agency head and referred to with the title of "Division Director." Further, in February 2003, the agency ordered business cards for one incumbent with the title of "Division Director" and for the temporary replacement in his section chief position as "Section Chief" without any "acting" designation.¹

In May 2003, the agency determined that the modified organizational structure would be made permanent and advertised the positions for internal recruitment. The grievant applied and was one of five applicants selected for interview. Upon completion of the hiring process, the two applicants serving in an interim status were selected.

¹ Upon temporary assignment to the Division Director positions, the incumbents appointed interim replacements for their Section Chief positions.

DISCUSSION

Age Discrimination²

For a claim of discrimination in the hiring or selection context 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 he was not selected for the position *because of* his membership in a protected class.³ A grievant may accomplish this by coming forward with evidence that: (1) he is a member of the protected class;⁴ (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. 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 evidence that raises a sufficient question as to whether the agency's stated reason was merely a pretext or excuse for age discrimination.

In this case, the grievant is 53 years of age and the successful applicants are 46 and 47 years of age respectively. The agency has proffered a legitimate, non-discriminatory reason for selecting the successful applicants over the grievant for the positions -- it noted that in its judgement the successful candidates had the best combination of knowledge, skills, and abilities. However, the grievant has brought forth evidence that raises a question of pretext. Specifically, he claims that a member of the interview panel made a statement to a constituent that he was not selected because he was in his "twilight years." The constituent corroborated the statement and interpreted it to infer that the grievant was considered too old or did not have sufficient remaining service time prior to retirement to be selected for promotion. This statement is enough to raise a sufficient question of discriminatory intent toward applicants over fifty years of age. Therefore, the issue of age discrimination qualifies for hearing.

Additional Theories for Non-selection

The grievant has advanced several alternative theories related to his nonselection, including allegations of pre-selection, race and gender discrimination. Because the issue of age discrimination qualifies for a hearing, this Department deems it appropriate to send

² Although age discrimination was not expressly listed on the grievance Form A, the issue was clarified and responded to at the second and third respondent steps, and at qualification. The grievant did note that one of the successful applicants was ten years his junior.

³ See, *Huchinson v. INOVA Health System, Inc.*, 1998 U. S. Dist. LEXIS 7723 (E.D. Va. 1998) at 3 (citing *St. Mary's Honor Center v. Hicks*, 509 U. S. 502 (1993)).

⁴ It is unlawful for an employer to discriminate against an employee on the basis of age. See 29 U.S.C. 621 et seq. (ADEA). The ADEA's protections extend only to those who are at least forty years old. . Such discrimination is also a violation of state policy. See the Department of Human Resources Management (DHRM) Policy 2.05

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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.

CONCLUSION

For the reasons discussed above, this grievance qualifies for a hearing. This qualification ruling in no way determines that the agency's decision not to select 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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