

Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: April 6, 2017; Ruling No. 2017-4517; Agency: Department of Game and Inland Fisheries; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution¹

QUALIFICATION RULING

In the matter of the Department of Game and Inland Fisheries
Ruling Number 2017-4517
April 6, 2017

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether his September 26, 2016 grievance with the Department of Game and Inland Fisheries (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a law enforcement sergeant. He initiated his September 26, 2016 grievance to challenge the agency’s selection process for a Lieutenant position in which he participated unsuccessfully. In the grievance, the grievant claims that the agency misapplied its hiring policy and contends that he should have been selected for the position. After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.²

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the hiring, promotion, transfer, assignment, and retention of employees within the agency “shall not proceed to a hearing” unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.³ Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment action.”⁴ Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a “tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision

¹ Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as “EDR” in this ruling to alleviate any confusion. EDR’s role with regard to the grievance procedure remains the same post-merger.

² The grievant also alleges that the agency repeatedly failed to comply with the grievance procedure by not producing requested documents. Claims of noncompliance must be raised through the procedure set forth in Section 6.3 of the *Grievance Procedure Manual*. As the claims raised in the request for qualification were not pursued through the noncompliance process, they will not be addressed in this ruling.

³ Va. Code § 2.2-3004(C); see *Grievance Procedure Manual* §§ 4.1(b), (c).

⁴ *Grievance Procedure Manual* § 4.1(b).

causing a significant change in benefits.”⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁶ For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action, in that it appears the position he applied for would have been a promotion.

For an allegation of misapplication of policy or unfair application 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. State hiring policy is designed to ascertain which candidate is best suited for the position, not just to determine who might be qualified to perform the duties of the position.⁷ Moreover, the grievance procedure accords much deference to management’s exercise of judgment, including management’s assessment of applicants during a selection process. Thus, a grievance that challenges an agency’s action like the selection in this case does not qualify for a hearing unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.⁸

The grievant asserts that the hiring decision was the result of “cronyism” and was not made in accordance with agency Policy No. 13. In particular, the grievant argues that the Colonel had indicated that he would hire “who ever [sic] [he] want[s] to hire for the positions.” He also asserts that the agency failed to follow written policy during the interview process, in that the grievant appears to believe that no notes were taken during the interviews, the candidates were not ranked, no interview summaries or selection reports were prepared, and the interview panel was not properly selected.⁹

During the course of its investigation, EDR has reviewed the interview materials prepared by the agency, including interview notes and interview summaries.¹⁰ From this review, there is nothing apparent from the panel’s assessment of the candidates’ performance at the interview to indicate that selection process as a whole was conducted in a manner that resulted in an unfair or inaccurate assessment of the grievant’s qualifications and suitability for the Lieutenant position. Furthermore, to the extent any mandatory provision of Policy 13 was violated, EDR has reviewed nothing in the selection paperwork to indicate that consideration of this information would have resulted in a different outcome. As such, any failures had no material effect on the selection process.

DHRM Policy 2.10, *Hiring*, provides that “[a] set of interview questions must be developed and asked of each applicant” who is interviewed, that those “[q]uestions should seek

⁵ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁷ See DHRM Policy 2.10, *Hiring*.

⁸ See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as “[i]n disregard of the facts or without a reasoned basis.”).

⁹ In support of its position that the hiring process was conducted properly, the agency asserts that Policy 13 had not been reviewed and approved by agency management and/or any other appropriate entities. Accordingly, the agency rescinded Policy 13 as of December 15, 2016. For purposes of this ruling, EDR will assume that Policy 13 was in effect at the time of the selection process in which the grievant competed. However, while the parties’ positions are understandable, Policy 13 is ultimately irrelevant to the outcome of this case.

¹⁰ As previously noted, the grievant apparently requested this documentation from the agency but the agency failed to produce it.

information related to the applicant's knowledge, skills, and ability to perform the job," and that "[i]nterviewers must document applicants' responses to questions to assist with their evaluation of each candidate's qualifications."¹¹ In this case, the grievant was one of the top three finalists for the position. A review of the panel's notes from the grievant's and the successful candidate's interviews shows that the panel's and the appointing authority's decision was supported by a reasonable assessment of their overall suitability for the position. In particular, the panel appears to have concluded that the successful candidate provided more thoughtful and detailed answers to the interview questions and more successfully demonstrated the characteristics of a good leader. In contrast, while the grievant was recommended for hiring, his answers were considered to be less thorough and complete.

DHRM Policy 2.10, *Hiring*, is designed to ascertain the candidate best suited for the position, not just to determine who might be qualified to perform the duties of the position. A candidate's suitability for a particular position is not always readily apparent by a plain reading of the comments recorded during an interview. Agency decision-makers deserve appropriate deference in making determinations regarding a candidate's knowledge, skills, and abilities. As a result, EDR will not second-guess management's decisions regarding the administration of its procedures absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious. EDR has not reviewed any information to suggest that may have been the case here, or that the selection of the successful candidate was anything other than a reasonable exercise of discretion based on a good faith assessment of which of the candidates was most suitable for the position based on their performance at the interview.

Although the grievant may reasonably disagree with the panel's decision not to select him for the Lieutenant position, EDR has reviewed nothing that would suggest the agency's determination disregarded the pertinent facts or was otherwise arbitrary or capricious. Likewise, EDR has reviewed no information to suggest that the grievant was not selected for an improper reason or that the panel members failed to follow the provisions of DHRM Policy 2.10, *Hiring* in evaluating the grievant's suitability for the position. In reviewing the panel's interview notes for the grievant and the successful candidate, EDR can find nothing to indicate that the grievant was so clearly a better candidate that the selection of the successful candidate disregarded the facts or was motivated by anything other than a good faith assessment of the candidates based on their performance at the interview. Accordingly, the grievance does not raise a sufficient question as to whether the agency misapplied and/or unfairly applied policy, and does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.¹²



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¹¹ DHRM Policy 2.10, *Hiring*, § B(1)(e).

¹² Va. Code § 2.2-1202.1(5).