

Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: April 12, 2017; Ruling No. 2017-4520; Agency: Department of Game and Inland Fisheries; Outcome: Not Qualified.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Employment Dispute Resolution<sup>1</sup>**

**QUALIFICATION RULING**

In the matter of the Department of Game and Inland Fisheries  
Ruling Number 2017-4520  
April 12, 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 December 8, 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 Conservation Police Sergeant. He initiated his December 8, 2016 grievance to challenge a selection process in which he participated unsuccessfully.<sup>2</sup> In the grievance, the grievant claims that the agency misapplied its hiring policy and contends that he should have been selected. In addition, he asserts that he has experienced retaliation for protected activity and that the agency has been subjected to improper political influence. 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.

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.<sup>3</sup> Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment action.”<sup>4</sup> 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,

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<sup>1</sup> 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.

<sup>2</sup> This selection process was for two positions, Major (Administration) and Major (Operations).

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

<sup>4</sup> *Grievance Procedure Manual* § 4.1(b).

firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”<sup>5</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>6</sup> 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.

### *Misapplication of Policy*

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.<sup>7</sup> 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.<sup>8</sup>

The grievant argues that the agency failed to follow policy and engaged in preselection. In particular, the grievant argues, among other things, that the agency failed to offer him a telephone interview (as it offered another candidate),<sup>9</sup> interviewed and selected a candidate who was not among the top 3 ranked by the first panel, included on the second panel an outside panelist who did not have relevant experience, and preselected a candidate who enjoys a personal friendship with a member of the state legislature.<sup>10</sup> The grievant also appears to argue that agency Policy No. 13 was not followed during the selection process.<sup>11</sup>

During the course of its investigation, EDR has reviewed the interview materials prepared by the agency, including interview notes and interview summaries. From this review, there is nothing apparent from the panel’s assessment of the candidates’ performance at the interviews to indicate that the selection process as a whole was conducted in a manner that

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

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

<sup>7</sup> See DHRM Policy 2.10, *Hiring*.

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

<sup>9</sup> The grievant was actually interviewed in person.

<sup>10</sup> The grievant also asserts that approximately five months prior to the initial interviews, the Director sought a coworker’s feedback regarding the potential selections for the Major positions, including inquiring about the coworker’s opinions of the two successful candidates.

<sup>11</sup> In support of its position that the hiring process was conducted properly, the agency asserts that Policy No. 13 had not been reviewed and approved by agency management and/or any other appropriate entities. Accordingly, the agency rescinded Policy No. 13 as of December 15, 2016. For purposes of this ruling, EDR will assume that Policy No. 13 was in effect at the time of the selection process in which the grievant competed. However, while the parties’ positions are understandable, Policy No. 13 is ultimately irrelevant to the outcome of this case.

resulted in an unfair or inaccurate assessment of the grievant's qualifications and suitability for either Major position at issue. Furthermore, to the extent any mandatory provision of Policy No. 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 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.”<sup>12</sup> In this case, after interviews by the first panel, the grievant was selected as one of the top three finalists for both Major positions available. The same individual was the top finalist for both positions. The second panel selected the top finalist for one of the two positions, determined that the grievant (as well as another candidate) were not “good fit[s]” for the remaining position, and selected the remaining candidate after a telephone interview.<sup>13</sup> The interview notes show that some of the primary factors in the hiring decisions were the grievant’s relative lack of experience in administration, a lack of depth to some of his answers, and the grievant’s “attitude. In contrast, the selected candidates gave answers that were considered “strong,” “thorough,” and “very good.” The selected candidates have at least a bachelor’s degree, while the grievant has an associate’s degree; their work experience is generally more extensive or comparable.

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, 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

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<sup>12</sup> DHRM Policy 2.10, *Hiring*, § B(1)(e).

<sup>13</sup> The reason for the telephone interview was the hospitalization of that candidate’s mother. Although the selected candidate had not been identified as one of the top three candidates for the Major (Administration) position, he was among those initially interviewed for the position and had been ranked among the top three finalists interviewed for the Major (Operations) position.

grievant's suitability for the position. In reviewing the panel's interview notes for the grievant and the successful candidates, 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 interviews. 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.

### *Retaliation*

The grievance also alleges that agency management has engaged in an ongoing campaign of retaliation for various acts taken by the grievant, and that his non-selection for a Major position is part of that retaliation.<sup>14</sup> For a claim of retaliatory harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or prior protected activity; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.<sup>15</sup> In the analysis of such a claim, the "adverse employment action" requirement is satisfied if the facts raise a sufficient question as to whether the conduct at issue was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment.<sup>16</sup> "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."<sup>17</sup>

Having reviewed the facts as presented by the grievant, however, EDR cannot find that the grievant has presented sufficient evidence to show that the course of conduct he cites was based on an impermissible retaliatory motive or that the conduct rose to a sufficiently severe or pervasive level to create an abusive or hostile work environment. Though the grievant may reasonably disagree with management's actions, prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.<sup>18</sup> Because the grievant has not raised a sufficient question as to either the causation of the alleged retaliatory conduct or the existence of severe or pervasive harassment reaching the level of an abusive or hostile work environment, the grievance does not qualify for a hearing on this basis.

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<sup>14</sup> Among these acts and/or conduct are previous grievance activity, Freedom of Information Act requests, and political affiliations, as well as others.

<sup>15</sup> See *Gilliam v. S.C. Dep't of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

<sup>16</sup> See generally *Gilliam v. S.C. Dep't of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

<sup>17</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

<sup>18</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("[C]onduct must be extreme to amount to a change in the terms and conditions of employment . . ."); see *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996).

*Alleged Political Influence*

The grievant appears to assert that a member of the state legislature has repeatedly intervened in agency personnel matters. To the extent the grievant challenges such intervention in personnel matters that do not directly involve him, those complaints cannot be addressed through the grievance process. Section 2.4 of the *Grievance Procedure Manual* provides that a grievance must “[p]ertain[] directly and personally to the employee’s own employment.” As the grievant’s complaints regarding personnel matters in which he is not involved do not pertain directly and personally to his employment, these concerns will not be addressed in this ruling.

CONCLUSION

For the reasons set forth above, this grievance does not qualify for a hearing. EDR’s qualification rulings are final and nonappealable.<sup>19</sup>



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<sup>19</sup> See Va. Code § 2.2-1202.1(5).