

Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: April 20, 2017; Ruling No. 2017-4532; Agency: Department of Behavioral Health and Developmental Services; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2017-4532
April 20, 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 January 11, 2017 grievance with the Department of Behavioral Health and Developmental Services (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

The grievant is employed at one of the agency’s facilities as a Security Officer. He initiated a grievance on January 11, 2017, challenging the agency’s selection process for a position as a Security Officer Supervisor/Investigator at his facility in which he participated unsuccessfully. Seven candidates were offered an in-person interview with a three-member selection panel for the Security Officer Supervisor/Investigator position. Following the initial round of interviews, two finalist candidates were selected to proceed to a second round of interviews. At the first interview, each candidate was asked a standardized set of questions, and each panel member recorded notes based on the candidates’ answers. The Interview Recommendation Forms for the two finalists noted that their answers led the selection panel to “Recommend” them for a second interview. Based on the grievant’s responses to the questions asked during the first rounds of interviews, the selection panel marked the Interview Recommendation Form to indicate that he was not recommended for hiring.

In his grievance, the grievant asserts, in effect, that the agency misapplied its hiring policy, and alleges that two members of the interview panel should not have been selected to participate in the interview process. The grievant further contends that he is more experienced and better qualified than the successful candidate. 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.¹ Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment action.”² 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 causing a significant change in benefits.”³ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁴ 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.⁵ 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.⁶

In this case, the grievant asserts that one of the panel members “was [his] former chief of police” at the facility “who retired and returned as [a] part time employee,” and another panel member “ha[d] in the past investigated [him] on a patient abuse case,” which concluded with a determination that he had not engaged in abuse. The grievant alleges that the former chief of police should not have participated in the selection process because he currently works in the same position as the grievant and had “[b]utt[ed] heads” with the grievant when he was employed as the grievant’s supervisor. The grievant claims the investigator’s participation in the selection process is a conflict of interest because she previously participated in an abuse investigation involving the grievant. DHRM Policy 2.10, *Hiring*, states, in relevant part, that selection panel members should “become familiar with the basic responsibilities of the position for which they will interview applicants” and should “normally . . . be in the same or a higher Role than the position being filled (unless they are participating as human resource professionals or individuals with a particular expertise required for the position).”⁷ The grievant’s facility has a supplemental

¹ Va. Code § 2.2-3004(C); *See Grievance Procedure Manual* §§ 4.1(b), (c).

² *Grievance Procedure Manual* § 4.1(b).

³ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

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

⁵ *See* DHRM Policy No. 2.10, *Hiring*.

⁶ *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as “[i]n disregard of the facts or without a reasoned basis.”).

⁷ DHRM Policy No. 2.10, *Hiring*, § B(1)(d).

hiring policy, which states that “panel members will be chosen based on their understanding of the knowledge, skills, and abilities required for the position.”⁸

During the management resolution steps, the agency indicated to the grievant that the former chief of police was selected as a panel member because of his experience working in a security supervisor position at the facility and in law enforcement generally. The agency states that the investigator was selected as a panel member because one of job responsibilities of the Security Officer Supervisor/Investigator position consists of conducting abuse investigations at the facility. The agency’s stated reasons for selecting these two individuals to participate in the selection process appear to be consistent with state and agency hiring policies, and would also reasonably allow the panel members to make an informed assessment the qualifications and suitability of candidates for the Security Officer Supervisor/Investigator position. Furthermore, EDR has reviewed nothing to suggest that the panel members’ conduct in connection with the selection process suggested they were biased against the grievant or was otherwise improper. Accordingly, EDR finds that the agency’s selection of interview panel members does not constitute a misapplication or unfair application of policy, and the grievance does not qualify for a hearing on this basis.

The grievant further argues that he is better qualified than the finalist candidates who were recommended for a second interview, and that he should have been offered a second interview for the position. In addition, the grievant appears to that claim that the panel members did not accurately record his answers to the interview questions, with the result that he appeared less qualified for the position. In support of his position, the grievant argues that the panel stated he had no experience preparing schedules, job descriptions, or performance evaluations, that he had no experience with disciplinary actions, and that he had not investigated cases of abuse or neglect. The grievant asserts he has previously assisted with the drafting of schedules and performance evaluations, that he told the panel he would address disciplinary issues by discussing the problem with the employee, and that he does not have experience investigating cases of abuse or neglect at the facility because they have not been assigned to him.

A review of the panel’s notes from the grievant’s interview shows that the panel appears to have accurately recorded his responses to the interview questions, as the grievant has described those responses in the grievance, and that the panel’s decision to not recommend the grievant was consistent with its assessment of his suitability for the position. For example, the panel members acknowledged that the grievant had some supervisory experience, but noted that his background in preparing schedules or job evaluations, conducting employee performance evaluations, and issuing disciplinary actions was more limited, and that he had not investigated cases of abuse or neglect. With regard to the two finalist candidates, on the other hand, the panel members wrote that their responses to the interview questions showed they possessed more extensive supervisory experience than the grievant, had prepared schedules and job descriptions, and had a more thorough knowledge of performance evaluation and disciplinary processes. The panel also suggested that the finalists’ responses indicated confidence in their ability to perform the job and included suggestions for future enhancement of services at the facility.

⁸ Facility Policy No. 6001, *Procedures for Filling Vacancies*.

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.

Although the grievant may reasonably disagree with the panel's decision not to recommend him for a second interview for the Security Officer Supervisor/Investigator, 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 finalist candidates, EDR can find nothing to indicate that the grievant was so clearly a better candidate that the selection panel's recommendations disregarded the facts or were 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. 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.⁹



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⁹ Va. Code § 2.2-1202.1(5).