

Issues: Qualification – Management Actions (Recruitment/Selection) and Discrimination (Age); Ruling Date: June 14, 2017; Ruling No. 2017-4565; Agency: Department of Behavioral Health and Developmental Services; 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 Behavioral Health and Developmental Services
Ruling Number 2017-4565
June 14, 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 February 13, 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 Senior. He initiated a grievance on February 13, 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, including the grievant, were offered an in-person interview with a three-member selection panel for the position. Each candidate was asked a standardized set of questions, and each panel member recorded notes based on the candidates’ answers. After interviewing all of the candidates, the selection panel identified two finalist candidates, consisting of the grievant and the successful candidate, both of whom participated in a second interview. Following the second round of interviews, the grievant was not selected for the Security Officer Supervisor/Investigator position.

In the grievance, the grievant claims that the agency misapplied its hiring policy and contends that he should have been selected for the position. He further asserts that the agency discriminated against him based on his age and engaged in “[c]ronyism/[n]epotism by selecting the successful candidate.” Finally, the grievant argues that “[e]quipment malfunctions during [the] interview” impacted the selection process. 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.

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.

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.² Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment action.”³ 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.”⁴ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁵ 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.⁶ 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.⁷

In this case, the grievant asserts that an agency employee who previously worked with the successful candidate had been overheard stating that he “was going to get [the successful candidate] on with [the agency].” The grievant believes that the selection process was a “preplanned hiring.” The grievant further claims that he was more qualified than the successful candidate and should have been selected for the Security Officer Supervisor/Investigator position based on his “[e]xperience,” “[t]raining,” and “[d]ependability.” Finally, the grievant claims he had technical difficulties with an agency computer while completing a written skill exercise at the conclusion of his second interview and was later “told that one employee . . . had to use 3 different computers before finishing” the exercise.

² Va. Code § 2.2-3004(C); *See Grievance Procedure Manual* §§ 4.1(b), (c).

³ *Grievance Procedure Manual* § 4.1(b).

⁴ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁵ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁶ *See DHRM Policy No. 2.10, Hiring*.

⁷ *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as “[i]n disregard of the facts or without a reasoned basis.”).

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.”⁸ It is clear from a review of the selection panel’s notes that the interviewers determined the grievant and the successful candidate were both qualified for the position, as they were both selected as finalist candidates and offered a second interview. Furthermore, a review of the panel’s notes from the grievant’s and the successful candidate’s interviews shows that the panel’s recommendation was supported by a reasonable assessment of their overall suitability for the position. In particular, the panel stated that the successful candidate “responded clearly and specifically to the questions asked,” had “notable experience as a supervisor in a Law Enforcement setting,” and “showed a good level of professionalism and judgment.” With regard to the grievant, the panel noted that, while he was an “experienced officer,” he “had difficulty responding to several off [sic] the interview questions” and his “responses did not demonstrate the knowledge that [was] needed for th[e] position, nor the ability to articulate his position clearly.” According to the job description for the Security Officer Supervisor/Investigator position, supervisory experience, leadership, and effective communication skills were important factors for successful performance. EDR’s review of the grievance record indicates that the selection panel concluded the successful candidate would be more suitable for the position, and the grievant has not presented sufficient evidence to show that he was so clearly a better candidate that the panel should have recommended him for hiring instead of the successful candidate, or that the panel’s decision disregarded the facts or was otherwise arbitrary or capricious.

Furthermore, the selection materials do not suggest that the successful candidate may have been pre-selected based on any alleged pre-existing relationship, or that any such alleged pre-existing relationship may have influenced the appointing authority’s decision in any way. Based on EDR’s review of the materials, there is insufficient indication that pre-selection, nepotism, or some other improper motive tainted the selection panel’s determination, as the grievant asserts. Instead, it appears that the panel based its determination on a good faith assessment of the candidates and concluded that the grievant was not the most suitable candidate for the position.

With regard to the grievant’s description of technical difficulties he experienced while completing the written skill exercise, EDR has reviewed nothing to indicate that any such issues negatively impacted the agency’s consideration of his suitability for the position. Likewise, there is nothing apparent from the panel’s assessment of the candidates’ performance to indicate that any technical issues resulted in an unfair or inaccurate assessment of the grievant’s qualifications and suitability for the Security Officer Supervisor/Investigator position. To the contrary, the agency has noted that the grievant was able to complete the exercise despite any problems with the computer on which it was completed, and that the grievant’s response to the exercise was considered by the selection panel. As such, EDR finds that any technical issues that occurred had no material effect on the selection process.

⁸ DHRM Policy 2.10, *Hiring*, § B(1)(e).

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 select him for the Security Officer Supervisor/Investigator 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 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.

Discrimination

In addition, the grievant alleges that the selection process was conducted in a discriminatory manner, on the basis of his age. In support of this position, the grievant notes that he is 51 years old and the successful candidate is 40 years old. Grievances that may be qualified for a hearing include actions that occurred due to discrimination on the grounds of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, genetics, disability, or veteran status.⁹ For a claim of discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.¹⁰

Even assuming that the grievant was qualified for the Security Officer Supervisor/Investigator position, there are no facts that raise a question as to whether he was denied the position due to a discriminatory reason. As discussed above, the grievant was not selected as best suited based on the selection panel's assessment of his responses to the questions

⁹ See, e.g., Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.

¹⁰ See *Hutchinson v. INOVA Health Sys., Inc.*, Civil Action No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *4 (E.D. Va. April 8, 1998).

asked at his interview and its determination as to his suitability for the position, and EDR finds no reason to dispute that decision. A grievance must present more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. There are no such facts here. Consequently, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.¹¹



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¹¹ Va. Code § 2.2-1202.1(5).