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QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2023-5506
March 3, 2023

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether his November 21, 2022 grievance with the Virginia Department of Transportation (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Maintenance Operation Manager ("MOM") for the agency. On July 17, 2022, he applied for the Residency Administrator Assistant (RAA) position and was subsequently interviewed for the position on September 1, 2022. A selection panel interviewed four candidates, including the grievant, for the position. During their interviews, the candidates were asked a standardized set of questions and each panel member recorded notes about the candidates' answers. The panel members then filled out respective evaluation forms for each of the candidates, indicating the degree to which the candidates met requirements as to four primary evaluation criteria, ending with an ultimate determination on whether the candidate was recommended as a finalist. Based on the evaluation forms, the panel determined that while the grievant met requirements as to all four evaluation criteria, another candidate exceeded requirements as to all four criteria, and for that reason, they selected that other candidate as the finalist. The grievant states he learned he did not get the RAA position on or about October 19, 2022.

On November 21, 2022, the grievant initiated a grievance alleging that the denial of the RAA position "was discriminatory based on [his] race and/or national origin (African descent), in retaliation for prior protected complaints, and in violation of DHRM policy." In support of his position, the grievant argues that the agency hired a candidate "with lesser direct qualifications – in particular VDOT maintenance experience." The grievant argues that the outside selected candidate showed minimal knowledge and experience as to the agency's Maintenance program, unlike the grievant himself. Next, the grievant argues that the agency violated DHRM Policy 2.10, *Hiring*, by "not properly considering the diversity of the agency's workforce and the availability of qualified applicants," and by choosing an outside candidate over a candidate already within the agency like the grievant. The grievant argues that the candidate selection was based on

discrimination and/or retaliation based upon the history of the agency selecting people for RAA or Residency Administrator (RA) positions instead of the grievant with a race or national origin different from the grievant; the grievant supplied a list of these chosen candidates. The grievant also provided a list of internal promotions in the Maintenance sections (positions that the grievant did not apply for), all of whom the grievant argues lack the required experience. Finally, the grievant references multiple events of potential retaliation, the first in 2014 in which discrimination allegedly took place in the form of upper management sidelining minority employees, including the grievant, for field work in favor of white employees, and that when the grievant complained about this, he was reprimanded and allegedly told that "someone could use this email against [him] in future promotions and that [he] should guard his career." He also describes being told by co-workers and agency managers that one agency employee, who ultimately was a part of the RAA position interview panel, has stated she would not promote him to a new position but keep him at his current MOM position. Lastly, he references an event in 2016 where the grievant was transferred to a new work location for no discernible reason.

Following the management resolution steps, the agency head determined that the grievance record did not contain evidence demonstrating that a misapplication or unfair application of agency policy had occurred or evidence supporting the grievant's allegations of discrimination and retaliation. As a result, the agency head declined to qualify the grievance for a hearing. 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 an "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, EDR will assume that the grievant has alleged an adverse employment action, in that it appears the position he applied for would have been a promotion.

Misapplication/Unfair Application of Policy

The grievant essentially alleges that the agency misapplied and/or unfairly applied state and agency policy by selecting a less-qualified outside candidate. The grievant asserts this claim

[1] Va. Code § 2.2-3004(C); *see Grievance Procedure Manual* §§ 4.1(b), (c).
[2] *Grievance Procedure Manual* § 4.1(b).
[3] Ray v. Int'l Paper Co., 909 F.3d 661, 667 (4th Cir. 2018) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).
[4] Laird v. Fairfax County, 978 F.3d 887, 893 (4th Cir. 2020) (citing Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007)) (an adverse employment action requires more than a change that the employee finds "less appealing").

in his appeal for a hearing by arguing that he is the "second-longest serving field Maintenance Operation Manager in the same position since 2012," and that those selected for these positions have often, according to the grievant, had much less service time, education, and experience than the grievant. Consequently, the grievant argues that the agency violated DHRM Policy 2.10, *Hiring*, by selected a less-qualified candidate and not considering the diversity of the agency, given the race and ethnic background of the grievant.

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]

DHRM Policy 2.10, *Hiring*, provides that when an agency is conducting a recruitment, "[the] decision should be based on factors such as the diversity of the agency's workforce and the availability of qualified applicants."[7] This language is referring to the method of recruitment, i.e., whether the agency only considers current agency employees, state employees, or all of the general public.[8] The grievant appears to be arguing that the agency was wrong to consider non-agency employees when the grievant is already within the agency and contributes to a diverse workforce; he supports this assertion with a list of previous internally-promoted employees in the past, all of whom he alleges were less qualified than him. Here, however, the agency used a valid open recruitment process: of the four candidates who were interviewed, three, including the grievant, worked for the agency, with one candidate (the ultimate finalist) not being a current agency or state employee. As the agency asserts in its decision to not qualify the grievance for a hearing, while the grievant is focusing the misapplication-of-policy claim on the ultimate hiring decision, this portion of Policy 2.10 is focused on the factors to consider for the *method of recruitment*. There is no indication that the agency did not consider the relevant factors of Policy 2.10 in choosing the method of recruitment.

The grievant also argues that certain initiatives, workshops, and programs of the agency encourage succession planning and internal employee growth. However, as the agency points out, these are modes of *encouragement*, not requirements to strictly adhere to. The agency felt that for this position, it was in its best interests to recruit outside of the agency, and that is a sufficient reason that does not violate Policy 2.10 or these supplemental initiatives.

Finally, as to the claim that the final candidate should not have been selected due to having less experience and qualifications than the grievant, there is nothing in the record that indicates a

[5] *See* DHRM Policy No. 2.10, *Hiring*, at 21.
[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*, at 7.
[8] *Id*.

misapplication of policy regarding this issue.[9] The grievant primarily asserts that the panel misevaluated the finalist's experience. For example, the grievant identifies that the selection panel indicated on the finalist's candidate evaluation form that they "ha[ve] 25 years of experience in public administration," while on the grievant's form, they wrote that he "has over 15 years' experience working in VDOT," despite him working a total of 24.5 years in public administration when considering the prior years worked in other agencies. The grievant also argues that the finalist is not qualified due to their lack of an Engineering Degree and a lack of any substantial snow and emergency operations experience. In essence, the grievant feels that the panel was inconsistent in considering the relative experience of the grievant and the finalist, and that the grievant ultimately has more experience than the finalist. The grievant also points out other inconsistencies in the evaluation forms, such as the panel finding leadership skills and succession planning ability more in favor of the finalist, and how the panel failed to elaborate on why they preferred these skills and abilities of the finalist over the grievant.

Overall, the agency provides explanations as to why the finalist was more qualified in these aspects. The evaluation form of the finalist describes in detail the finalist's experience in the role's relevant duties, the finalist's technical abilities, and the finalist's overall professional demeanor in the interview. While the finalist does not have a Bachelor's Degree in Engineering like the grievant mentions, such a degree is not required in the job description; a degree in a related field such as engineering is a "preferred" qualification, and can also be replaced with equivalent experience or training. Based on the redacted job applications, it appears that the finalist received a Master's Degree in Public Administration, a degree that falls within the relevant expertise preferred by the position. Another aspect of note is the interview panel's emphasis on the finalist's extensive experience in interacting with stakeholders and elected officials. While it is questionable as to why there were no prompted questions in the interview regarding such communications experience, a review of the RAA job description confirms that it is a core responsibility of the position, which can support the finalist's selection based on their experience in this aspect. While the grievant may be correct in some instances of being more qualified in some areas, such as his expertise in snow and emergency operations, this alone is insufficient to support the claim that the panel misapplied policy by choosing the other candidate. It is not a requirement that a candidate be more qualified in every possible category than another candidate in order to be considered the best suited overall – especially in the interview phase, as all candidates have proven at that stage to be viable for the job. EDR finds nothing in the evaluation forms, nor in the interview notes, to suggest that the agency chose the other candidate over the grievant for any arbitrary or capricious reason.

In summary, DHRM Policy 2.10 does not require that hiring decisions be made based solely on factors such as intra-agency promotions and diversity; the relevant portion of the Policy only refers to methods of recruitment, and the agency has made clear that they felt an open recruitment process was most appropriate. As to the hiring decision itself, 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. Under the circumstances presented here, although the

[9] For example, EDR has reviewed the RAA job description, interview notes, and candidate evaluation forms of all four interviewing candidates.

grievant may reasonably disagree with the panel's decision not to recommend him for the RAA position, 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 their 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.

Discrimination/Retaliation

The grievant has also alleged that he was not selected for the RAA position as a form of discrimination and/or retaliation. DHRM Policy 2.05, *Equal Employment Opportunity*, requires that "all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity or expression, age, veteran status, political affiliation, genetics, or disability." For a claim of discrimination on any of these grounds to qualify for a hearing, the grievance must present facts that raise a sufficient question as to whether the issues describe an adverse employment action that has resulted from prohibited discrimination.[10] However, if the agency provides a legitimate, nondiscriminatory business reason for the acts or omissions grieved, the grievance will not be qualified for hearing absent sufficient evidence that the agency's proffered justification was a pretext for discrimination.[11]

Similarly, a claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether the grievant's protected activity is causally connected to a subsequent adverse employment action against her.[12] Ultimately, a successful retaliation claim must raise a sufficient question as to whether, but for the grievant's protected activity, the adverse action would not have occurred.[13]

Here, the grievant engaged in protected activity by complaining to the agency in 2014 about minority employees being sidelined regarding a field assignment. The grievant feels that this led to VDOT management holding a grudge against the grievant, with one of those members, Ms. M, later allegedly stating that "she will not promote [him] to a new position but keep [him] as a MOM." However, the protected activity in 2014 and Ms. M's alleged statement do not appear to be connected in time. Further, given that the protected activity occurred many years ago, we are unable to infer retaliation. Ultimately, Ms. M was selected to be on the interview panel. Therefore, the grievant alleges that Ms. M engaged in retaliation by favoring the other candidate in the selection process. In the third-step management response, the agency clarified that it is common for Assistant District Administrators (the role Ms. M holds) to serve on hiring panels for positions like these, and provide feedback on the candidates. While Ms. M's alleged assertion that the grievant would not be promoted is concerning without additional context, there is no evidence that raises a sufficient question that this person actually engaged in retaliation during the selection process, and a review of the interview notes does not suggest otherwise.[14]

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[10] *See* Strothers v. City of Laurel, 895 F.3d 317, 327-28 (4th Cir. 2018).
[11] *See id.*; *see*, *e.g.*, EDR Ruling No. 2017-4549.
[12] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).
[13] *Id.*
[14] EDR has followed up with the agency and the grievant regarding the matter of Ms. M. The agency stated that Ms. M denied the relevant statements, and when EDR asked the grievant to provide the names of those who informed him

Moreover, the grievant appears to allege that the agency's selection process was discriminatory, noting that he is of African descent and was not selected for the position. While the information submitted by the grievant is sufficient to create an inference of discrimination, the agency has provided a non-discriminatory justification for its decision. As discussed above, the selection panel determined that the grievant should not be recommended for hiring based on its assessment of his qualifications and interview responses versus those by the chosen candidate. Further, the agency had its Civil Rights Division review the matter, with the District Civil Rights Manager determining that the final selection was made "under legitimate business reasons and there is no evidence to support the selection was made with regard to the candidates' race or national origin." While the Civil Rights Division offered little explanation for this determination, such an explanation is not required here. EDR has been unable to identify any evidence that raises a sufficient question as to whether the agency's justification for its decisions was mere pretext for discrimination or that the agency would have selected the grievant for the position but for his protected activity. The grievant does allege evidence of pretext, but the evidence in question deals with the agency's inconsistent explanations as to whether Ms. M had a say in the final selection process. The agency appears to have clarified in the third-step response that Ms. M did in fact have a say in the process, as she was a member of the interview panel. However, EDR is not persuaded that her apparent influence demonstrates pretext under these facts, as it is not an inconsistent explanation about the agency's ultimate candidate selection.[15] Even though the grievant may reasonably disagree with the agency's assessment of the candidates and its selection decision, this in itself does not raise a sufficient question as to whether discrimination or retaliation motivated the agency's actions in this case. Consequently, EDR cannot qualify the grievance for a hearing on either of these grounds.

EDR's qualification rulings are final and nonappealable.[16]

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of Ms. M's statements, he declined due to fear of agency retaliation against his coworkers. Without being able to discuss these statements with the relevant coworkers and managers, EDR is unable to corroborate the claim against Ms. M, and thus the record does not raise a sufficient question as to an improper motivation.

[15] *See* Holland v. Wash. Homes, Inc., 487 F.3d 208 at 214 (defining pretext as a non-legitimate reason offered by the employer to shield its true reason for discriminating against the employee).

[16] Va. Code § 2.2-1202.1(5).