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QUALIFICATION RULING

In the matter of the Department of Medical Assistance Services
Ruling Number 2023-5580
October 26, 2023

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) on whether her February 27, 2023 grievance with the Department of Medical Assistance Services (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

On January 16, 2023, the grievant submitted an application for an open management position within the agency. On February 1, 2023, according to the grievant, she learned via phone call that the agency had not selected her to interview for the position.¹ In response to the grievant’s further inquiry, agency management advised her that her application did not demonstrate all of the minimum requirements for the position.

On or about February 27, 2023, the grievant initiated a grievance challenging her non-selection to interview for the position. She alleged that the hiring manager had not screened her application correctly, resulting in a comparatively low score. In support, the grievant cited decades of relevant experience and her recent tenure filling the open position in an interim capacity for several months. The grievant alleged that her non-selection and other aspects of the agency’s hiring process indicated that management had effectively pre-selected certain individuals. Finally, the grievant argued that the agency had inappropriately charged her a fee to produce to her the contents of her personnel file. During the management steps, the management respondents declined to grant relief related to the grievant’s non-selection. At some point during this time, the grievant left her employment with the agency. The agency head declined to qualify the grievance for a hearing, and the grievant has appealed that determination to EDR.

¹ It appears that this phone call followed a previous communication that invited the grievant to schedule her interview. According to the agency, this communication was sent in error to candidates not selected to advance to the interview stage, including the grievant. Agency recruitment staff then called the grievant to inform her of the error and explain that she had not in fact been selected for an interview.

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 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.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve an “adverse employment action.”³ Typically, then, a threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a “tangible employment action” constituting “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

Finally, qualification may not be appropriate even if a grievance challenges a management action that might ordinarily qualify for a hearing. For example, an issue may have become moot during the management resolution steps, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.⁶

The issue presented by this grievance is whether the agency’s failure to interview the grievant for the position of Chief Information Officer (CIO) qualifies for a hearing. In general, state hiring policy is designed to ascertain which candidate is best suited for the position, not merely 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. That said, DHRM Policy 2.10, *Hiring*, provides that agencies may screen applications to reduce the initial applicant pool for a position. If so, screening must proceed according to “the minimum qualifications . . . established for the position”⁸ In addition, “[s]creening criteria must be clearly defined and must be applied consistently to all applications.”⁹

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

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

⁴ *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)).

⁵ *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”).

⁶ See, e.g., EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.

⁷ See DHRM Policy No. 2.10, *Hiring*, at 23.

⁸ *Id.* at 9. As defined in Policy 2.10, minimum qualifications are the “knowledge, skills, abilities . . . , and competencies that are required to successfully perform the critical job functions.” *Id.* at 23.

⁹ *Id.* at 9.

Here, the grievant contends that the agency's hiring manager incorrectly determined that her application did not demonstrate three (out of 18) minimum qualifications for the position. These qualifications were:

- 1) Extensive experience in IT strategic planning, policies, and procedures related to the development and integration of information technology applications and systems.
- 2) Extensive management skills, including experience successfully developing and motivating high-quality professional staff and teams.
- 3) Extensive skills in planning, budgeting, supervision, and empowering teams for optimal performance.

The grievant argues that her qualifications in these regards were clear from her application. For example, the most recent position listed on her application was Acting Chief Information Officer, the position for which she was applying to serve on a permanent basis. As Acting CIO for several months, the grievant detailed her complex management of a significant new project implementation; development of new policies and procedures; organization of training for agency staff; oversight of procurement processes; and coordination with colleagues, vendors, and other stakeholders. Her application noted that the CIO manages multiple departments of agency staff.

Before serving as Acting CIO, the grievant was a Systems Development Manager and Supervisor for approximately eight years combined, including the following experience (as reflected in her application):

- 1) Direct[ed] the initiation, analysis, design, development, and implementation of . . . applications
- 2) Supervise[d] and direct[ed] the work of Information Management staff
- 3) Ensure[d] that [agency] management and staff are adequately supported in [her] Division
- 4) [D]evelop[ed] strategic teams . . . as the I[nformation] M[anagement] project lead to ensure monies were allocated and appropriated correctly
- 5) [S]erved as management liaison in support of managers, directors, and . . . [other state agency partners]
- 6) [W]orked with policy and contracts . . . [as] the [agency] representative for eligibility vendor contracts and [federal] data sharing agreements
- 7) [F]unction[ed] in multiple roles for special track releases, which are typically politically sensitive, high profile implementations
- 8) [L]ed, developed, and managed a professional staff of associates and consultants Mentored numerous key I[nformation] M[anagement] associates who went on to promotional leadership opportunities
- 9) [M]anaged IT procurements for key initiatives and enhancements

The grievant's application also detailed a consistent work history since 1983 in which she held several significant management or other leadership roles related to information technology and healthcare reimbursement systems.

Upon a review of the grievance record, it does not appear that the agency offered a rationale for rating the grievant as not fully qualified for the CIO position. Moreover, in comparing the grievant's application to those applicants who were rated as qualified in these areas and who received interviews, EDR is unable to discern a basis for rating the grievant as not qualified in the three areas identified. Accordingly, the record raises a sufficient question whether the agency misapplied or unfairly applied policy by excluding the grievant from its interview pool for the CIO position.¹⁰ We also assume, for purposes of this ruling, that the grievant has sufficiently alleged an adverse employment action, as it appears the position she applied for would have been a promotion.

Nevertheless, EDR typically does not qualify a grievance for a hearing if the hearing officer does not have the authority to grant effectual relief. Relief that is not available through the grievance procedure includes monetary damages and policy revisions.¹¹ In cases alleging misapplication of policy, "the hearing officer may order the agency to reapply the policy from the point at which it became tainted."¹² However, if a grievance challenges a recruitment that has already concluded with the selection of another candidate, an opportunity only to interview for that position will be moot and ineffectual in most cases. As such, in cases challenging a selection that has already occurred, the relevant question for qualification purposes is whether sufficient evidence exists to demonstrate that the agency's misapplication of policy at the screening phase, rather than the availability of a more suitable candidate, caused the grievant's non-selection **as the finalist** for the position. Although EDR's independent review of the CIO selection documentation suggests that the grievant could well have been a strong candidate, we find nothing to indicate that she was so clearly the best candidate that the agency's ultimate selection of another individual, in their discretion, would have been arbitrary or capricious. In sum, notwithstanding any problems with the agency's screening process, the available record does not reasonably support a finding that the grievant should properly have been offered the position, over the candidate the agency ultimately chose instead.

In any event, the grievant is not apparently seeking to repeat the selection process, as she chose to retire from her employment with the agency following her non-selection. Instead, she seeks to recover expenditures caused by her early retirement, as well as the fees she allegedly paid to obtain documents from the agency.¹³ The grievant has also expressed that DMAS hiring policy must change if it did not allow her qualifications to be recognized from her application. Finally, the grievant seeks a DHRM investigation, suggesting that her non-selection was the result of discrimination on the basis of sex. Although the grievant's desire to remedy her exclusion from

¹⁰ The screening sheet indicates that, although the grievant was not rated as qualified in three required areas, the hiring manager indicated that she should nevertheless be selected for an interview along with eight other candidates. It appears that the agency subsequently narrowed this pool of candidates to include only those scored as meeting all of the minimum qualifications.

¹¹ *Grievance Procedure Manual* § 5.9(b).

¹² *Rules for Conducting Grievance Hearings* § VI(C)(1).

¹³ The grievant alleges that the agency charged \$350 to provide her with a copy of her personnel file and other "public records" she requested. We note that EDR lacks authority to interpret or enforce public records laws. To the extent that the \$350 charge was within the scope of the grievance and covered by DHRM policies, EDR lacks information as to the volume of documentation requested, which would be necessary to assess whether this amount "exceed[ed] the actual cost of providing the information," including copying costs and labor. See DHRM Policy 6.05, *Personnel Records Disclosure*. However, as \$350 is generally more than would be reasonably expected to produce a personnel file to the subject employee, we encourage the agency to review whether that amount exceeded the actual cost of production, if it has not done so already.

the interview pool is understandable, none of the proposed relief could be granted by an EDR hearing officer. Monetary damages are explicitly excluded from remedies that can be granted to a successful grievant, and the hearing officer similarly lacks any authority to change agencies' policies or procedures.¹⁴ In addition, because grievances must relate to the grievant's own employment and/or work situation,¹⁵ a broad investigation of another agency would also be outside the scope of the hearing officer's authority to fashion effective relief for the issues grieved in this matter.¹⁶

Accordingly, although the record presents a sufficient question whether the agency's screening process was applied fairly, EDR cannot say that the grievance presents a claim that would be susceptible to relief via a grievance hearing. This ruling determines only that the grievance does not qualify for an administrative hearing. It does not address whether other remedies may be available to the grievant through other processes.

EDR's qualification rulings are final and nonappealable.¹⁷

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¹⁴ *Grievance Procedure Manual* § 5.9(b); *Rules for Conducting Grievance Hearings* § VI(A) (“the hearing officer has no authority to change [an agency's] policy, no matter how unclear, imprudent or ineffective they believe it may be”).

¹⁵ *Grievance Procedure Manual* § 2.4.

¹⁶ Although employees may file a complaint of discrimination with DHRM, the “employee may not simultaneously use the grievance process and a formal complaint of discrimination with DHRM to address the same work-related action.” *Grievance Procedure Manual* § 1.6.

¹⁷ Va. Code § 2.2-1202.1(5).