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QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2024-5616
November 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 July 19, 2023 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

On May 2, 2023, the grievant interviewed for a Maintenance Supervisor position at the agency. The selection panel ultimately found another candidate to be best suited for the role. On or about July 19, 2023, the grievant initiated a grievance alleging that the selection panel did not properly consider the grievant’s veteran status in their selection process. In support of his position, the grievant argues that contrary to what DHRM Policy 2.10 allows, the agency only considered his veteran status during the initial screening of applicants and did not mention it in the interview notes or any other stage of the selection process. Additionally, the grievant points out that an agency Human Resources (“HR”) Consultant noted that she was not able to clearly identify why each candidate was evaluated as selected or not. Due to this, the selection panel had to update their evaluation summaries multiple times. After the selected candidate was hired, the grievant argues that another agency representative questioned the selected candidate’s qualifications for the position via notes from that candidate’s Pay Action Request.

The grievant also raises issues with the selection panel itself, primarily that the panel was not diverse and that it was a violation of DHRM policy to not include an HR representative in the panel. The grievant also adds that one of the panel members “knew all candidates and went to school with them including [the third-step respondent].” Finally, the grievant adds various other claims for why he should have been selected for the position, stating that he was verbally given the position 15 years ago, that being “best suited” and “most qualified” for the position are synonymous with one another, and that he was taking on and performing multiple duties at once. As relief, the grievant requests an in-band adjustment, or alternatively, a promotion to the Maintenance Supervisor position in another county, and reimbursement of attorney’s fees.

An Equal Opportunity Employer

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. 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.

Veteran Status

The grievant asserts that, at his interview for the Maintenance Supervisor position, the selection panel did not properly consider his status as a veteran. DHRM Policy 2.10, *Hiring*, provides that: “[a]s directed by Section] 2.2-2903 [of the] Code of Virginia, a veteran’s military service shall be taken into consideration by the Commonwealth during the selection process, provided that such veteran meets all the knowledge, skill, and ability requirements for the available position.”⁵ DHRM has provided policy guidance as to the application of this “veteran’s preference.” In pertinent part, the policy guide states:

In accordance with the Code of Virginia, which requires that state agencies give preference in the hiring process to veterans . . . the following is provided to guide agencies’ application of the Veterans Preference provision of the Commonwealth’s Hiring Policy.

. . . .

Initial screening: Applicants are screened to identify those who meet the minimum requirements for the position – the equivalent of achieving a passing score on a test.

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”).

⁵ DHRM Policy 2.10, *Hiring*, at 9.

No preference is given. Applicants must meet the required criteria at a minimum or better level on their own.

Preference applied after initial screening phase: After the initial screening, veteran status is noted for the candidates. The state application provides preliminary notice of veteran status; the agency may need to follow up to identify the exact status of veteran applicants. At this stage, preference shall be given by treating veteran status as a preferred qualification. Further preference shall be given if the veteran applicant also has a service-connected disability rating by treating the veteran's disabled status as a second preferred qualification. Adding a preferred qualification criterion for veteran status and, if applicable, a second preferred criterion for disabled veteran status will therefore result in the veteran applicant and the disabled veteran applicant receiving the additional preference required by Code.

The additional credit for veteran, or disabled veteran status, remains with the applicant throughout the hiring process, and ultimately becomes a part of the hiring manager's final decision. This process is comparable to how preference or credit is applied in situations where scored examinations are used. For example, applicants take a scored examination *one time*, and applicants who are veterans receive the additional points *one time*. Those points, like our credit for having a preferred qualification, remain with the applicants throughout the process.⁶

This policy language and guidance only requires an agency to consider the preferred qualification of veteran status and/or a veteran's service-connected disability status during screening for interviews.⁷ In this case, the grievant was interviewed for the Maintenance Supervisor position. DHRM Policy 2.10, *Hiring*, does not require the agency to have considered his veteran status at any point other than screening for interviews.⁸ As the grievant was screened in for an interview and the agency considered his veteran status during this part of the selection process, we cannot conclude that the agency's consideration of the grievant's veteran status was inconsistent with the requirements of state policy.

Selection Panel

Some of the grievant's allegations throughout his grievance relate to the makeup of the selection panel itself. In particular, he alleges that (1) the panel was not diverse, (2) one of the panel members knew all of the candidates from high school, and (3) the panel did not include an HR representative.

DHRM Policy provides the following guidance as to how a selection panel should be composed:

“[P]anel members must . . . represent a diverse population; become familiar with the basic responsibilities of the position for which they will interview applicants;

⁶ The Policy Guide on Veteran's Preference for hiring is available at <http://www.dhrm.virginia.gov/docs/default-source/hrpolicy/policyguides/veteranpreferencepolicyguide.pdf?sfvrsn=2>.

⁷ See, e.g., EDR Ruling Nos. 2016-4205, 2010-2502, 2010-2553.

⁸ This interpretation is consistent with guidance provided by DHRM's Policy Administration team.

receive appropriate training, instruction or guidance on lawful selection before participation in the interview and selection process; and hold confidential all information related to the interviewed applicants and the recommendation or selection. Normally classified employees panel members should be in the same or a higher role or job class title than the position being filled (unless they are participating as human resource professionals or individuals with a particular expertise required for the position.)”⁹

It is clear from the relevant state policy that the selection panel must represent a diverse population and have the necessary background to determine who will fill the particular role. However, there is nothing in DHRM policy that requires any members of the selection panel to be HR representatives, nor is there anything that prevents certain panel members from being familiar with any of the candidates. As to the grievant’s lack of diversity claim, the available evidence indicates that the candidates were all the same race and gender as the panel members.

EDR cannot find a sufficient question being raised from this evidence that the agency misapplied policy in composing its selection panel. While the panel composed did not meet the diversity requirements of policy, it is difficult to support a determination without further evidence that the panel’s race and gender negatively impacted the grievant’s chances of selection. Further, the grievance does not provide any details as to the effect of the apparent lack of diversity. Accordingly, nothing in the evidence provided by the grievant or agency suggests a misapplication of policy regarding the composition of the selection panel such that qualification for hearing is warranted.

“Best Suited” Versus “Most Qualified”

The grievant also alleges that the agency misapplied and/or unfairly applied state and agency policy by not selecting him for the Maintenance Supervisor position because he presumably argues that he was the most qualified candidate for the position, adding that “most qualified” is synonymous with “best suited.” 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.¹⁰ 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.¹¹

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

⁹ DHRM Policy 2.10, *Hiring*, at 11-12.

¹⁰ *See id.* at 23.

¹¹ *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as “[i]n disregard of the facts or without a reasoned basis.”).

related to the applicant's knowledge, skills, and ability to perform the job," and that "[i]nterviewers must document, either written or electronically, applicants' responses to questions to assist with their evaluation of each candidate's qualifications."¹² Here, a review of the panel's notes from the grievant's interview and his subsequent evaluation form shows that the panel's decision to not recommend the grievant was consistent with its assessment of his suitability for the position. The panel, in the grievant's evaluation form in particular, does note the grievant's experience with the agency, being a crew leader and a lead operator for several years during his tenure. They also mention his experience outside of the agency and his educational background. However, the summary indicates that the grievant only demonstrated some qualifications for the position and the interview responses "revealed safety concerns."

When reviewing the evaluation summaries for the selected candidate and alternate candidate, it appears that the panel ultimately determined that both candidates better met the knowledge, skills, and abilities necessary for the position. The panelists noted for the selected candidate that with his "knowledge of the area and his maintenance and relevant management experience . . . , he meets the business needs of the organization." They additionally noted that he is a member of the "Residency safety committee" and mentioned several examples of experience in responding to emergency situations, which apparently indicated no safety concerns.

The grievance record does not demonstrate what qualifications the grievant believes he has that exceed those of the selected candidate. The grievant appears to possess a significant level of experience: 33 years of experience with the agency, a crew leader for 4-5 years, and a lead operator for 15 years. Meanwhile, the panelists noted that the selected candidate has 12 years of experience with the agency, 19 years of non-agency experience, and five years of management experience. While the grievant appears to have more years of experience at the agency, DHRM Policy 2.10 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.¹³ The agency has provided sufficient evidence showing that they considered the qualifications of the grievant in a holistic manner, but ultimately did not select him for the position because his "interview responses relating to [Maintenance Supervisor-related] competencies were vague and not as competitive as other candidates for the position," especially due to the noted safety concerns. Although the grievant may reasonably disagree with the panel's decision not to recommend him for the Maintenance Supervisor position, EDR's review of the grievance record indicates that the selection panel concluded the successful candidate would be more suitable for the position based upon a reasonable assessment of interview performance. The grievant has not presented evidence to demonstrate that he was not selected for an improper reason or that the agency's determination disregarded the pertinent facts or was otherwise arbitrary or capricious. 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.

Inconsistencies in HR Communications

As to the claims of the HR Consultant voicing uncertainty about the selection process, EDR cannot find a sufficient question being raised regarding this concern that would give rise to a misapplication of policy. From the evidence provided, it appears that the HR Consultant could not

¹² DHRM Policy 2.10, *Hiring*, at 12.

¹³ *See id.* at 23.

clearly identify the reason why the grievant was not selected as a finalist or an alternate, particularly because of his “many years of experience as a TOII and a TOIII for the past 4-5 years.” The HR Consultant appears to have provided feedback to the Maintenance Operations Manager regarding three of the candidates’ evaluation summaries, which resulted in multiple revisions of those three summaries. Ultimately, the grievant’s evaluation summary was updated a total of four times. Of note, the original evaluation summary rated the grievant as “less than requirements” for matching the business needs of the organization. However, the first three revisions rated the grievant as “meets requirements” for this category, but the final version of the evaluation summary reflected the original summary’s finding of “less than requirements.” In the first three revisions, the notes state that the grievant did in fact meet the business needs of the agency but was ultimately not selected due to not demonstrating critical behaviors required for the position. Despite this, the final version of the summary suggests that the grievant did not meet the business needs of the agency.

Having clarified the matter with the agency, the multiple revisions do not raise a sufficient question as to a misapplication of policy, but rather as to HR’s work with a manager to properly adhere to policy. The agency has further reiterated that the grievant’s non-selection resulted from his interview responses that “lacked the direction the department wanted to go for a leadership position due to safety concerns.” Specifically, the grievant talked about his response to a tree down in his area and how he attended the situation alone, and the selection panel felt “this was an unsafe act.” To supplement this concern, the agency cited an agency safety manual that requires two operators to be present when using a chainsaw. Ultimately, in the final version of the grievant’s evaluation summary, the panel noted these safety concerns. As for the other two candidates whose summaries were revised – the selected candidate and the alternate – neither had their ratings changed in any of the revisions. Indeed, the only differences in their revisions were slightly different notes elaborating on why they met all of the requirements for the position.

Finally, the grievant adds that another member of HR raised concerns over the qualifications of the selected candidate in the context of the Pay Action Request. While the HR representative may have expressed concern about how the Pay Action Request was written and wanted clarification as to how some of the selected candidate’s years of experience were directly related to the position, it appears that a consensus was eventually made, and the updated Request did not change the analysis of the grievant not being selected. Further, it does not appear that comparable years of experience led to the grievant’s non-selection in this case. Consequently, this discussion prompted by HR representatives in an effort to accurately compensate a promoted employee does not appear to cast doubt on the hiring decision itself. Having thoroughly reviewed the information provided by the parties, EDR finds that the grievant has not presented sufficient evidence to show that the panel’s decision disregarded the facts or was otherwise arbitrary or capricious as a result of various agency representatives voicing questions about the qualifications of the grievant and the selected candidate.

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, 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.

EDR's qualification rulings are final and nonappealable.¹⁴

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¹⁴ Va. Code § 2.2-1202.1(5).