

Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: February 24, 2017; Ruling No. 2017-4481; Agency: Department of Game and Inland Fisheries; 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 Game and Inland Fisheries
Ruling Number 2017-4481
February 24, 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 December 14, 2016 grievance with the Department of Game and Inland Fisheries (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a Conservation Police Officer. He initiated his December 14, 2016 grievance to challenge the agency’s selection process for a position as a Conservation Police Sergeant in which he participated unsuccessfully. Candidates for the position, 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 three finalist candidates. The finalist candidates included the grievant and the successful candidate. After considering the recommendation of the selection panel, the appointing authority selected the successful candidate for the Conservation Police Sergeant 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. 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.² Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve

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.

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

“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.

In the grievance, the grievant asserts that at his interview, the panel remembers refused to accept a copy of his resume and cover letter for review. As a result, the grievant claims that the selection process “was based entirely on a subjective evaluation of candidate responses” without a “scoring or ranking system” and did not comply with agency policy. In support of this argument, the grievant cites to a provision of the agency’s Policy Number 13, *Promotions/Competitive Transfers* (“Policy 13”), stating that “[a] thorough examination of the applicant’s education, training, qualifications, experience, and work/career history,” among other factors must be considered in addition to a panel interview when selecting a candidate for hire. In effect, the grievant claims that, if the agency had considered the information in his resume and cover letter in addition to his performance at the interview, he would have been selected for the position.

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 support of its position that the hiring process was conducted properly, the agency asserts that Policy 13 had not been reviewed and approved by agency management and/or any other appropriate entities. Accordingly, the agency rescinded Policy 13 as of December 15, 2016, the day after the grievant initiated his grievance. The grievant claims that the agency retroactively suspended Policy 13 to excuse the selection panel’s failure to follow the policy and consider information other than his performance during the interview.⁸ For purposes of this

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 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.”).

⁸ In an attachment to the grievance addressing the content of the third step response, the grievant appears to allege that Policy 13 was rescinded “in retaliation to [his] grievance.” Retaliating against an employee because he has engaged in protected activity, which includes “participating in the grievance process,” is prohibited under the

ruling, EDR will assume that Policy 13 was in effect at the time of the selection process in which the grievant competed. While the parties' positions are understandable, Policy 13 is ultimately irrelevant to the outcome of this case.

Consideration of information other than a candidate's performance in a panel interview, such as a resume and cover letter, could be considered a best practice in the recruitment and selection process. However, in this case there is nothing apparent from the panel's assessment of the candidates' performance at the interview to indicate that selection process as a whole was conducted in a manner that resulted in an unfair or inaccurate assessment of the grievant's qualifications and suitability for the Conservation Police Sergeant position. Furthermore, even if the alleged disregard for the grievant's resume and cover letter is considered a violation of a mandatory provision in Policy 13, EDR has reviewed nothing in the selection paperwork to indicate that consideration of this information would have resulted in a different outcome. As such, any failure to consider or accept the grievant's resume and cover letter had no material effect on the selection process.

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."⁹ 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 made up two of the three finalists recommended to the appointing authority. Furthermore, a review of the panel's notes from the grievant's and the successful candidate's interviews shows that the panel's and the appointing authority's decision was supported by a reasonable assessment of their overall suitability for the position. In particular, the successful candidate indicated during his interview that he had greater supervisory experience. Though the grievant had served as an acting supervisor on occasion in the past, his supervisory experience was more limited. According to the job description for the Conservation Police Sergeant position, supervisory experience and leadership were important factors for successful performance. While both the grievant and the successful candidate were recommended for hiring, the grievant's more limited supervisory experience led the selection panel to conclude that the successful candidate would be more suitable for the position.

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

grievance procedure. See *Grievance Procedure Manual* § 4.1(b); Va. Code § 2.2-3004(A). However, the grievance procedure provides that "challenges to additional management actions or omissions cannot be added" after a grievance is initiated. *Grievance Procedure Manual* § 2.4. If the grievant believes he has experienced retaliation as a result of his grievance activity, he may file a new grievance raising that issue. Any such grievance must comply with the initiation requirements of the grievance procedure. *Grievance Procedure Manual* §§ 2.2, 2.4. This ruling does not address whether the agency's rescission of Policy 13 constitutes an adverse employment action or whether there is a causal link between the grievant's exercise of protected activity and the rescission of the policy.

⁹ DHRM Policy 2.10, *Hiring*, § B(1)(e).

procedures absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious. EDR has not reviewed any information to suggest that may have been the case here, or that the selection of the successful candidate was 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.

Although the grievant may reasonably disagree with the panel's decision not to select him for the Conservation Police Sergeant 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 of the successful candidate disregarded the facts or was motivated by anything other than a good faith assessment of the candidates 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.¹⁰



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¹⁰ Va. Code § 2.2-1202.1(5).