

Issues: Qualification – Management Actions (recruitment/selection) and Retaliation (other protected right); Ruling Date: September 13, 2016; Ruling No. 2017-4405; Agency: Department of Medical Assistance Services; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Medical Assistance Services
Ruling Number 2017-4405
September 13, 2016

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 25, 2016 grievance with the Department of Medical Assistance Services (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

From December 2015 through March 2016, the grievant applied for a total of four Manager positions with the agency. She did not receive an interview for any of the four positions. On February 25, 2016, the grievant initiated a grievance to challenge her non-selection for each position. After proceeding through the management resolution steps, the agency head denied the grievant’s request for qualification of her grievance for hearing, and she now appeals that decision to EDR.

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as 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 “adverse employment actions.”² Thus, typically, the 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

¹ Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

² See *Grievance Procedure Manual* § 4.1(b).

³ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

employment.⁴ For purposes of this ruling only, we will assume that the grievant's non-selection constitutes an adverse employment action in that her selection for any of the four Manager positions would have been a promotion.

Retaliation

For three of the Manager positions, the grievant was removed from consideration due to not possessing a Virginia law license, which was a minimum requirement for each job. She challenges agency management's decision to include such a requirement in each of the three positions as retaliatory, because none of the positions require appearing in court or acting as counsel for the agency.

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;⁵ (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.⁶ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.⁷

In this case, the grievant has shown that she engaged in a protected activity—raising concerns about the unit's operations and how challenges were addressed to management—and that she was subsequently not selected for any of the Manager positions for which she applied. In response, the agency indicates that management decided to require a Virginia law license for three Manager positions because the employee in those positions will be expected to analyze legal issues and make legal decisions which will be subject to review by Virginia courts. The agency further indicates that whether the grievant held a Virginia law license had no bearing upon this decision. Only candidates possessing a Virginia law license proceeded to the interview stage for the three positions that required such.

DHRM Policy 2.10, *Hiring*, outlines initial steps that an agency must undertake prior to posting a position to be filled. Specifically, this policy provides that agencies should “[a]nalyze the vacant position and work to determine if any changes have occurred[,] . . . [d]etermine the necessary and preferred knowledge, skills, and abilities (KSAs) or competencies for the position[, and] . . . [i]dentify any bona fide occupational qualifications (BFOQs).”⁸ In this case, it appears that the agency has fulfilled its responsibility under policy to review open positions and determine the appropriate requirements for each, in accordance with agency business needs.

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

⁵ See Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

⁶ See, e.g., *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005).

⁷ See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981).

⁸ DHRM Policy 2.10, *Hiring*.

There is no evidence to raise a sufficient question that the either the established criteria for the Manager positions or ultimate selection decision was driven by a retaliatory motive rather than the agency's appropriate assessment of the best-suited candidate for these positions. Accordingly, the grievant's claim of retaliation is not qualified for hearing.

Misapplication and/or Unfair Application of Policy

The grievant essentially asserts that the agency misapplied and/or unfairly applied policy by failing to select her for an interview for any of the four Manager positions for which she applied, as she claims that she is better qualified for each position than the selected candidate. 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.⁹ Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.¹⁰

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 Here, the grievant essentially contends that agency's hiring decisions were arbitrary and capricious, as the successful candidates for all of the Manager positions possess less education, qualifications, and experience than she.

In each case, the initial screening of candidates for the Manager position was conducted by another agency manager. For three of the four positions, the grievant was immediately "swept out" of the pool of applicants as she did not possess the minimum requirements for the positions.¹² For the fourth position of Appeals Administrative Cases Manager, after the Division Director completed scoring the applications for the position using the screening criteria identified by the agency,¹³ five applications (out of the seventy total received) with scores of eleven or

⁹ See DHRM Policy No. 2.10, *Hiring*.

¹⁰ Va. Code § 2.2-2901 ("In accordance with the provision of this chapter all appointments and promotions to and tenure in positions in the service of the Commonwealth *shall be* based upon merit and fitness, to be ascertained, as far as possible, by the competitive rating of qualifications by the respective appointing authorities." (emphasis added)).

¹¹ See *Grievance Procedure Manual* § 9 (arbitrary or capricious is defined as a decision made "[i]n disregard of the facts or without a reasoned basis)."

¹² As discussed above, EDR has found no mandatory policy provision that the agency has violated by its decision to include the requirement of a current Virginia law license for these three positions, and the grievant has cited to none. Therefore, these three recruitments will not be discussed further in this ruling.

¹³ The screening criteria used by the agency were: (1) "[a]bility to build and lead a high-performing interdisciplinary team in daily operations"; (2) "[p]rofessional exp[erience] in business & administrative management"; (3) "[a]bility to interpret/apply/analyze complex laws, regulations, policies, or case law, with ability to use independent judgment

higher were considered screened in for interviews. From that pool, two employees were offered second interviews before the successful applicant was selected.

EDR has reviewed the grievant's application materials and finds no evidence to support a claim that she should have received a higher score during the screening-in process. Even had the grievant been one of the five applicants screened in for an initial interview, there is little evidence that, having passed this hurdle, she would then have been one of the two given a second interview, and then finally chosen as the selected candidate. While a review of the documentation in this matter raises some concerns regarding the qualifications of the selected candidate,¹⁴ there is no evidence that the agency would ultimately have found this particular grievant to have been the best-suited for the position, compared to the other candidates who did proceed to the interview stage. Thus, any error in the initial process as it relates to the grievant must be viewed as harmless. The grievant has not identified any policy violated by the agency's manner of scoring applications for this position, and the agency's actions appear to fall within the discretion granted under state hiring policy.¹⁵

Although the grievant may disagree with her failure to be screened in for an interview, EDR has reviewed nothing that would suggest the agency's selection process, as a whole, violated any mandatory policy, disregarded the intent of policy, or was otherwise arbitrary or capricious. To the contrary, it appears that the final selection was based on a reasoned analysis of the applicants' knowledge, skills and abilities. Agency decision-makers deserve appropriate deference in making such determinations. Therefore, the grievant's claim of misapplication and/or unfair application of policy in the hiring process does not qualify for a hearing.

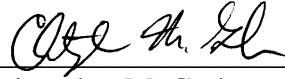
in broad range decision-making authority"; (4) "[a]bility to build collaborative working relationships with team members at all levels"; (5) "[a]bility to communicate clearly and effectively, orally and in writing"; (6) "[d]emo[nstrate] strong organization skills and ability to multi-task; (7) "[p]roficient using technology including office productivity tools such as word processing, spreadsheet, presentation, and calendaring"; (8) "[c]omprehensive knowledge of legal research methodologies including computerized research"; (9) "[k]nowl[edge of] Medicaid and other public assistance programs, health care law, and health care needs of the individuals with disabilities preferred"; (10) "[k]nowledge of administrative law and appeals procedure preferred"; (11) "[a]dvanced degree in law, public administration, social work, mental health/mental disability preferred, and/or experience as an attorney, administrative hearing officer, eligibility worker/specialist, or the equivalent combination of education and experience"; (12) "[g]raduation from an accredited law school preferred; current Virginia law license preferred." The grievant received half a point for the first, second, fourth and sixth criteria, and a point for every other criteria.

¹⁴ Specifically, the successful candidate did not graduate from an accredited law school, but was still screened in for an initial interview, as she received points in every other category, bringing her score to the required eleven. Further, the successful candidate did not possess an undergraduate degree, and she had been with the agency for only a short time, slightly under two years. It appears the successful candidate had been in an acting Lead role for approximately six months prior to her application for the manager position, which likely provided her with the skills required for the Appeals Administrative Cases Manager position. This evidence may support a claim of pre-selection if alleged by another candidate who did receive an interview but was not ultimately selected. However, as to the grievant in this instance, EDR cannot find that she was so clearly the better candidate that the selection of the successful applicant disregarded the facts or was otherwise arbitrary and capricious.

¹⁵ See DHRM Policy 2.10, *Hiring*.

CONCLUSION

For all the foregoing reasons, the grievant's request for qualification of her grievance for hearing is denied. EDR's qualification rulings are final and nonappealable.¹⁶



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¹⁶ Va. Code § 2.2-1202.1(5).