

Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: June 11, 2018; Ruling No. 2018-4723; Agency: Department of Corrections; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2018-4723
June 11, 2018

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) on whether his February 8, 2018 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant initiated his February 8, 2018 grievance to challenge the agency’s selection process for a Psychology Associate position in which he competed unsuccessfully. On January 10, 2018, he was one of four candidates that received an interview; however, another candidate was ultimately selected for the position. In the February 8, 2018 grievance, the grievant argues that the agency misapplied hiring policy during the selection process by having his immediate supervisor sit on the hiring panel for his interview. After proceeding through the management resolution steps, the agency head denied the grievant’s request for qualification of his grievance for hearing, and he now appeals that decision to EEDR.

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

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).

agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁴ For purposes of this ruling only, we will assume that the grievant's non-selection constitutes an adverse employment action in that it appears his selection for the Psychology Associate position would have been a promotion.

The grievant asserts that the agency misapplied and/or unfairly applied policy during the recruitment for the Psychology Associate 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.⁵ Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.⁶ 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

The grievant asserts that the agency misapplied policy by allowing his direct supervisor to serve on the interview panel. In support of his position, he points to agency policy stating that "[t]he appointing authority, immediate supervisor, or anyone in the direct line of supervision will not be members of the panel."⁸ In response, the agency indicates that the interview process in which the grievant participated was classified as an "Appointing Authority Interview," which is governed by a different section of the policy.⁹ The agency states that such an interview may include supervisors of a candidate on the panel. Given the plain language of the policy itself, EEDR cannot find that the agency has misapplied or unfairly applied the agency policy in this instance. Importantly, the panel membership challenged by the grievant was permissible under state policy.¹⁰ Furthermore, during the course of its investigation, EEDR has reviewed the interview materials prepared by the agency, including interview notes and interview summaries for the grievant and the selected candidate. From this review, there is nothing apparent from the panel's assessment of the candidates' performance at the interviews to indicate that the selection

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

⁵ See DHRM Policy No. 2.10, *Hiring*.

⁶ 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)).

⁷ 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)."

⁸ Department of Corrections ("DOC") Operating Procedure 102.2, Recruitment, Selection, and Appointment, § IV (J)(13)(e).

⁹ See *id.* at § IV (J)(14)(b).

¹⁰ See DHRM Policy 2.10, *Hiring*.

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 position at issue.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 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.”¹² In this case, after interviews by the panel, the notes taken by the three panel members indicate that the grievant was not recommended for hire by any member of the panel. EEDR has thoroughly reviewed the grievance information, including all of the interview notes made by each member of the panel and 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 interviews.

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. Agency decision-makers deserve appropriate deference in making determinations regarding a candidate’s knowledge, skills, and abilities. As a result, EEDR 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. EEDR 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. 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.

CONCLUSION

For the foregoing reasons, the grievant’s request for qualification of his grievance for hearing is denied. EEDR’s qualification rulings are final and nonappealable.¹³



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¹¹ Of note, the grievant indicates in his request for qualification that he is no longer interested in the position for which he interviewed.

¹² *Id.*

¹³ Va. Code § 2.2-1202.1(5).