

Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: June 29, 2018; Ruling No. 2018-4737; 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 2018-4737  
June 29, 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 her December 14, 2017 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

The grievant is employed at one of the agency’s facilities as an Academic Teacher. She initiated her December 14, 2017 grievance to challenge the agency’s selection process for a position as an Adult Education Teacher at another facility (“Facility A”), in which she participated unsuccessfully. Seven candidates, including the grievant, were offered an in-person interview with a three-member selection panel for the Adult Education Teacher position. Following the initial round of interviews, three finalist candidates were selected to proceed to a second round of interviews. Based on the grievant’s responses to the interview questions, two members of the selection panel marked that she was “Recommended for Hire,” and the third panel member marked the “Not Recommended for Hire” area. The grievant was not selected as one of the three finalist candidates.

In her grievance, the grievant claims that she was “unfairly excluded from the final interview process” for the Adult Education Teacher position, that she “should have had an opportunity to laterally transfer into” the position, and that “the hiring process was manipulated to ensure that a certain person got the job.” 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 EEDR.

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.<sup>1</sup> Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment action.”<sup>2</sup> Thus, typically, a threshold question is whether the grievant has

<sup>1</sup> Va. Code § 2.2-3004(C); see *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>2</sup> *Grievance Procedure Manual* § 4.1(b).

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.”<sup>3</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>4</sup> For purposes of this ruling only, EEDR will assume that the grievant has alleged an adverse employment action.

In her grievance, the grievant appears to contend that the agency did not comply with state and/or agency hiring policy. More specifically, the grievant asserts that she should have received a second interview but was “unfairly excluded” from advancing as a finalist candidate, and that the selection process was “manipulated” to result in a particular candidate receiving the position. In support of this argument, the grievant contends that the agency used “two different screening procedures” for the position for which she competed and a similar position at another facility (“Facility B”), for which she apparently did not compete. In addition, the grievant argues that she was not given an opportunity to transfer into the position noncompetitively, and that the agency should have allowed her to do so.

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.<sup>5</sup> 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.<sup>6</sup>

The agency’s recruitment policy states that its employment decisions are based on an individual’s “merits, qualifications, eligibility, *and suitability*” for the position.<sup>7</sup> The panel’s notes from the grievant’s and the finalists’ interviews reflects that the panel’s decision to not recommend the grievant for a second interview was consistent with its assessment of her suitability for the position and management’s discretion to determine such issues. Based on EEDR’s review of the selection materials, it appears that the grievant and the three finalist candidates could all be considered qualified to carry out the duties of the position. Agency policy, however, states that selection panels should submit the names of no more than three candidates to the appointing authority for hiring.<sup>8</sup> Here, the panel assessed the candidates and

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

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

<sup>5</sup> See DHRM Policy No. 2.10, *Hiring*; Department of Corrections Operating Procedure (“OP”) 170.1, *Recruitment, Selection, and Appointment*, § IV(A)(1).

<sup>6</sup> See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as “[i]n disregard of the facts or without a reasoned basis.”).

<sup>7</sup> DOC OP 170.1, *Recruitment, Selection, and Appointment* § IV(A)(1) (emphasis added).

<sup>8</sup> See DOC OP 170.1, *Recruitment, Selection, and Appointment*, § IV(J)(13)(j).

ultimately elected not to recommend the grievant for hiring as one of the three finalist candidates.

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, 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. In this case, EEDR finds that the information provided by the parties does not raise a sufficient question as to whether the selection panel's assessment of the grievant's suitability for the position was inconsistent with state and/or agency policy or otherwise improper.

With regard to her claim regarding the screening process for the Adult Education Teacher position, the grievant alleges that applicants for the position were screened by staff at Facility A, and that applicants for another similar position at Facility B were screened at the agency's headquarters office. The grievant contends that the successful candidate for the Adult Education Teacher position applied for the position at Facility B and was not selected for an interview, and questions why the agency's applicant screening resulted in different outcomes for the successful candidate in these two recruitment processes. In response, the agency has represented to EEDR that applicants for both the Adult Education Teacher and the comparator position at Facility B were screened by staff at the respective facilities where the positions are located. According to the agency, applicant screening is generally handled by facility staff, with the exception of certain management-level positions. Moreover, the agency has indicated that it used different screening criteria for the two positions, with the result that a different group of candidates was offered an interview for the two positions. The grievant's concern about fairness in the agency's applicant screening practices is understandable, and agencies should ensure they are consistently following recruitment and selection processes. Here, however, EEDR has not reviewed information to demonstrate that the agency's screening process for the Adult Education Teacher position and/or the comparator position at Facility B were carried out improperly or in a manner that was contrary to policy.

Finally, the grievant contends that she should have been laterally transferred into the Adult Education Teacher position without a competitive recruitment process, and that opportunities for lateral transfers are not "uniformly available to all employees" or approved "equally, consistently, or fairly . . .". The agency's recruitment policy states that "[p]ositions may be filled on a non-competitive basis through . . . [a] management initiated process, or an employee initiated process."<sup>9</sup> A management-initiated placement must be "based on DOC operational needs . . ."<sup>10</sup> An employee-initiated transfer must be "requested by a current employee" and approved by management to fill a position "that otherwise would be filled on a competitive basis . . ."<sup>11</sup> The policy specifically provides that agency management "has the discretion to accept or reject requests for transfer . . . and may post a vacant position without regard to written requests for transfer."<sup>12</sup> Here, the grievant does not appear to allege, and EEDR

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<sup>9</sup> *Id.* § IV(D).

<sup>10</sup> *Id.* § IV(D)(2).

<sup>11</sup> *Id.* § IV(D)(3)

<sup>12</sup> *Id.* § IV(D)(3)(b)(iii).

has not reviewed anything to indicate, that she requested a lateral transfer to the Adult Education Teacher position in particular, but had indicated that she wished to transfer to the particular facility. However, it would have been within management's discretion to approve or deny that request and recruit for the position competitively. The agency has further indicated to EEDR that it has used competitive recruitment processes to fill teaching positions for a number of years.<sup>13</sup> The grievant has not identified any similarly situated employees who were allegedly treated differently than she, nor has she provided other information that raises a sufficient question as to whether the agency has misapplied and/or unfairly applied its policy relating to lateral transfers. Under these circumstances, EEDR finds that the grievance does not raise a sufficient question as to whether the agency's decision to fill the Adult Education Teacher through a competitive recruitment process was inconsistent with policy.

In summary, and although the grievant may reasonably disagree with the panel's decision not to recommend her to the appointing authority for hiring or even a second interview, EEDR has reviewed nothing that would suggest the agency's determination disregarded the pertinent facts or was otherwise arbitrary or capricious. Likewise, EEDR has reviewed no information to suggest that the grievant was not selected to advance to the second round of interviews for an improper reason or that the agency failed to follow the provisions of state and/or agency policy in evaluating the grievant's suitability for the position. In short, there is no basis for EEDR to conclude that the panel's assessment of the candidates and subsequent recommendation to the appointing authority were motivated by anything other than a good faith assessment of the candidates based on their performance at the interview. Moreover, both the agency's applicant screening process and its decision to fill the Adult Education Teacher position through a competitive recruitment process appear to be consistent with the discretion granted by policy under the circumstances presented here. 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.

EEDR's qualification rulings are final and nonappealable.<sup>14</sup>



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<sup>13</sup> While the agency noted that some positions have been filled by lateral transfers, none of these appear to be comparable to the Adult Education Teacher position at issue in this case.

<sup>14</sup> Va. Code § 2.2-1202.1(5).