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## **QUALIFICATION RULING**

In the matter of the Department of Motor Vehicles  
Ruling Number 2019-4907  
May 16, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”)<sup>1</sup> at the Department of Human Resource Management (“DHRM”) on whether her February 8, 2019 grievance with the Department of Motor Vehicles (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

### FACTS

The grievant initiated her February 8, 2019 grievance to challenge the agency’s selection process for a Manager position in which she competed unsuccessfully. Following interviews, the grievant was the top choice of the selection panel. However, because the grievant had a family member (by marriage) in the section she would be managing, the agency determined she was not eligible for the Manager position under its nepotism policy. In the February 8, 2019 grievance, the grievant argues that the agency has failed to follow the nepotism policy consistently in that it has made exceptions for other employees in certain instances. She additionally asserts that there is a discriminatory basis (gender) for the decision not to select her for the position and make an exception to the nepotism like that granted for other employees. After proceeding through the management resolution steps, the agency head denied the grievant’s request for qualification of the grievance for hearing. The grievant 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,

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<sup>1</sup> The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

unwarranted discipline, or a misapplication or unfair application of policy.<sup>2</sup> The grievant's claims will be analyzed both as an allegation of misapplication of policy and discrimination.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."<sup>3</sup> 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."<sup>4</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>5</sup> For purposes of this ruling only, we will assume that the grievant's non-selection constitutes an adverse employment action.

### *Misapplication and/or Unfair Application of Policy*

The grievant asserts that the agency misapplied and/or unfairly applied its nepotism policy in passing over her and selecting the second choice for the Manager 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.<sup>6</sup> Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.<sup>7</sup> 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>8</sup>

The agency's nepotism policy "prohibits supervision by an employee of any member of his/her family." The policy's definition of "family member" includes brothers and sisters "either by blood or by marriage." In this case, there appears to be no dispute that the grievant would have been in a position to supervise her brother-in-law if she had assumed the Manager position. Accordingly, the agency's determination that the grievant was ineligible for the position appears to be consistent with the language of the policy. As such, EDR can find no misapplication of policy. The grievant's argument is not that the agency has misapplied the policy itself, but rather that it has inconsistently allowed exceptions to the policy in other instances.

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<sup>2</sup> Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

<sup>3</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>4</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>5</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>6</sup> See DHRM Policy No. 2.10, *Hiring*.

<sup>7</sup> 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)).

<sup>8</sup> See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis").

The grievant cites to two examples in which she alleges the agency has permitted a family member to supervise another family member. The most persuasive of her claims involves a similar situation of a manager in the grievant's region supervising her sister-in-law. However, it appears that the agency took steps to remove that manager as the direct supervisor of the sister-in-law and had the sister-in-law report to a different manager. While it can be reasonably argued that this is a *pro forma* skirting of the nepotism policy, the grievant's argument is essentially that such an exception should have been made for her.

Upon discovering the grievant's issue under the nepotism policy if she were selected for the Manager position, the agency appears to have initially sought a solution to the situation. The hiring authority contacted another manager to determine whether there was a different position to which the grievant's brother-in-law could be moved. Finding none, the hiring authority determined that there was no other option but to move on from the grievant as the chosen candidate. Thereafter, the agency also eliminated the alleged nepotism issue noted above with another manager's sister-in-law by moving the sister-in-law to a different position.<sup>9</sup> Nevertheless, the question EDR must determine is whether there has been an unfair application of policy in relation to the grievant as a result of the agency's action in adhering to its nepotism policy in this instance. While this could be a reasonable argument where there is evidence of multiple nepotism policy exceptions and/or violations, such evidence has not been presented in this grievance. Accordingly, EDR cannot find that the agency has misapplied or unfairly applied policy by following the nepotism policy as applied to the grievant.

Agency decision-makers deserve appropriate deference in making selection determinations. As a result, EDR will not second-guess management's decisions regarding the such matters absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious. As stated above, EDR has not reviewed information sufficient to suggest that may have been the case here, or that the determination that the grievant was ineligible for the Manager position was anything other than a reasonable exercise of discretion under its nepotism policy. 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.

### *Discrimination*

For a claim of discrimination in the hiring or selection context to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. In order to establish a claim for unlawful discrimination in the hiring or selection context the grievant must present evidence raising a sufficient question as to whether: (1) she was a member of a protected class; (2) she applied for an open position; (3) she was qualified for the position, and (4) she was denied the position under circumstances that create an inference of unlawful discrimination.<sup>10</sup> Where the agency, however, presents a legitimate, non-discriminatory reason for the employment action taken, the grievance should not qualify for a hearing, unless there is sufficient evidence that the agency's stated reason was merely a pretext or excuse for discrimination.

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<sup>9</sup> The timing of the move could be correlated with the grievance at issue in this ruling.

<sup>10</sup> See *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 851 (4th Cir. 2001); EDR Ruling Nos. 2010-2436, 2010-2484.

Having considered the totality of the information presented in the grievance, EDR cannot find that there is a sufficient question raised as to an inference of unlawful discrimination in this instance. While it appears that the interview panel selected the grievant as the top candidate, she was determined to be ineligible because of the agency's nepotism policy. EDR has reviewed no evidence to suggest that the agency's determination in this regard was motivated by a discriminatory rationale. Therefore, the grievance does not raise a sufficient question that the agency failed to select the grievant for the Manager position because of her gender. Accordingly, the grievance does not qualify for a hearing on this basis.

CONCLUSION

For the foregoing reasons, the grievant's request for qualification of her grievance for a hearing is denied. EDR's qualification rulings are final and nonappealable.<sup>11</sup>



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Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

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<sup>11</sup> Va. Code § 2.2-1202.1(5).