

Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: December 21, 2017; Ruling No. 2018-4652; 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 2018-4652
December 21, 2017

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 October 5, 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 a Case Management Counselor. After competing for an internal voluntary transfer to a position as a Roving Cognitive Counselor, the grievant received a letter offering him that position, along with an accompanying salary increase, on August 21, 2017. The grievant signed the offer letter to indicate his acceptance of the position and returned the letter to the agency on August 23, 2017. On or about September 6, 2017, the grievant was notified by the agency that the employment offer had been rescinded “due to pending disciplinary action” at the grievant’s current facility.

The grievant filed a grievance on October 5, 2017, alleging that the agency had not complied with state and/or agency policy because the offer letter “did not state or imply any conditions of employment,” but was nonetheless rescinded after he had accepted the position.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 EEDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.¹ Thus, 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 The grievant has not alleged discrimination,

¹ See Va. Code § 2.2-3004(B).

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

retaliation, or discipline. Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "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 the grievant has alleged an adverse employment action, in that it appears the position he accepted would have been a promotion.

In the grievance, the grievant asserts that the agency did not include any conditions in his offer letter indicating that the offer could be withdrawn after he had accepted the position, and that his acceptance therefore made the offer letter a "binding agreement" under agency policy. The grievant further argues that "[n]o policy exists authorizing the Agency to issue its . . . letter rescinding [the] offer of employment. Finally, he claims the agency prematurely withdrew the offer "without considering if there was enough evidence" to support the issuance of disciplinary action.

As a general proposition, state policy and the agency's Operating Procedure ("OP") 102.2, *Recruitment and Selection*, provide that "[c]lassified state employees are not employed by contracts either expressed or implied," but are instead "employed pursuant to the Code of Virginia and applicable personnel policies and regulations."⁶ Accordingly, written offers of employment should "avoid implying a contract or guarantee of employment"⁷ OP 102.2 further states that hiring decisions should be based on the "merits, qualifications, eligibility, and suitability" of the candidates.⁸ In selecting a candidate for hiring, the policy specifically notes that the the appointing authority should consider whether the candidate has any "active disciplinary actions" in his or her personnel file.⁹

In this case, the grievant's offer letter does not appear to create a contractual guarantee of employment, consistent with the requirements of state and agency policy. Moreover, the grievant

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 Department of Corrections ("DOC") OP 102.2, *Recruitment and Selection*, § IV(M)(2)(b); DHRM Policy 2.10, *Hiring*, § D.

⁷ DHRM Policy 2.10, *Hiring*, § D(1); DOC OP 102.2, *Recruitment and Selection*, § IV(M)(2)(b)(1).

⁸ DOC OP 102.2, *Recruitment and Selection*, § IV(A)(1).

⁹ *Id.* § IV(K)(2).

accepted an internal transfer to another position with the agency, and was, therefore, properly subject to a background check under agency policy. After the employment offer had been extended to the grievant, management learned that the grievant's facility was considering issuing disciplinary action due to attendance issues, and he ultimately received a Group I Written Notice for excessive tardiness. Under OP 102.2, active disciplinary action is one factor that may be appropriately considered by the appointing authority when assessing the suitability of a candidate for a position, and the agency asserts that it was unaware of the pending disciplinary action at the time the position was initially offered to the grievant.

With regard to background investigations, OP 102.2 notes that "[b]ackground investigations must be completed for all applicants recommended for hire," including "[e]mployees who are selected for transfer, promotion or for advancement to a higher position in a pay band" ¹⁰ While the agency may choose to make "a conditional offer of employment" pending the completion of a background investigation, ¹¹ a conditional offer of employment "must identify the condition(s) to be met by the employee." ¹² The grievant has correctly noted that the offer letter itself does not appear to identify any conditions that could result in withdrawal of the offer, such as the issuance of disciplinary action. Policy guidance from DHRM on this issue additionally notes that agencies should either complete reference checks before extending an offer of employment or clearly inform the candidate that the offer is conditional. ¹³ In this respect, the agency's offer letter is, at least, inconsistent with the expectations of policy. However, DHRM's policy guidance further states that agencies are not prohibited from "withdraw[ing] an offer of employment based on information learned after an offer has been extended," though "it is not good Human Resource Practice" and could be "unfair" to the candidate. ¹⁴

Having conducted a thorough review of the information provided by the parties, and particularly considering DHRM's policy guidance, EEDR finds there is no specific mandatory policy provision that prohibits an agency from withdrawing an employment offer after it has been extended to a candidate. EEDR has reviewed nothing to show that the agency acted outside the scope of the discretion granted under policy. The grievant understandably disagrees with the agency's decision to withdraw its offer of employment; however, he has not raised a sufficient question as to whether the agency misapplied and/or unfairly applied policy, acted in a manner that was inconsistent with other hiring decisions, or was otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for hearing on this basis. ¹⁵

¹⁰ *Id.* §§ IV(K)(3), IV(K)(3)(c).

¹¹ *Id.* §§ IV(K)(3)(b), IV(K)(3)(d).

¹² *Id.* § IV(M)(2)(f).

¹³ Policy Guide – Withdrawing an Employment Offer, <http://www.dhrm.virginia.gov/hrpolicies/policyguidewithdrawinganoffer>.

¹⁴ *Id.*

¹⁵ This ruling only determines that this issue does not qualify for a hearing under the grievance statutes. It does not address whether there may be some other legal or equitable remedy available to the grievant in relation to this claim.

EEDR's qualification rulings are final and nonappealable.¹⁶



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¹⁶ Va. Code § 2.2-1202.1(5).