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QUALIFICATION RULING

In the matter of the Department of Wildlife Resources
Ruling Number 2022-5322
January 20, 2022

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether his September 24, 2021 grievance with the Department of Wildlife Resources (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

The grievant works for the agency as a Conservation Police Officer. Between February and April 2021, he participated in the agency’s recruitment process for a Conservation Police Major (“Operations Major”) position. Based on the documentation provided by the agency, it appears that approximately 11 candidates, including the grievant, were initially interviewed by phone for the position. During the interviews, a three-member selection panel asked the candidates a standardized set of questions and recorded notes about their answers.

The panel recommended three candidates, none of whom was the grievant, as finalists for an in-person interview. Based on the grievant’s responses to the questions asked at his interview, the panel decided not to recommend him for hiring. Each of the three finalists ultimately declined the Operations Major position. Accordingly, the agency decided in approximately August 2021 to transfer another Conservation Police Major (“Major X”) into the vacant position instead of recruiting for the position a second time.

On or about September 24, 2021, the grievant initiated a grievance alleging that the agency had unfairly applied its selection policy because employees must “be in [their] assignment for 2 years before being eligible to transfer.” The grievant further argues that the agency “circumvent[ed] equal opportunity for hiring” and “show[ed] favoritism” by not recruiting for the vacant Operations Major position a second time and that the transfer was not a “lateral transfer” because Major X’s previous position had different responsibilities than the vacant position. As relief, the grievant requested pay commensurate with the Operations Major position, removal of Major X from the position, and a fair opportunity to compete for the position again. Following the management resolution steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

An Equal Opportunity Employer

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.¹ Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve an “adverse employment action.”² 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.”³ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁴ For purposes of this ruling, we assume that the grievant has alleged an adverse employment action because it appears the position he applied for would have been a promotion.

Here, the grievant essentially alleges that the agency misapplied or unfairly applied policy by transferring Major X into the vacant Operations Major position. The grievant appears to claim that he should have been selected instead, but also generally disputes the agency’s choice to fill the position via lateral transfer instead of competitively.⁵ In support of his position, the grievant argues that the agency’s General Order 02-20, *Assignment and Transfer of Personnel*, requires employees to work in a position for at least two years before they are eligible for a lateral transfer. The grievant also disputes whether Major X’s transfer was a “lateral transfer” based on the responsibilities of their former position as compared with the Operations Major position. Finally, the grievant contends that the agency has shown “favoritism,” failed to demonstrate a “critical need” justifying the transfer of Major X, and excluded otherwise-qualified candidates from consideration for the position by choosing not to recruit for it competitively.

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.⁶ 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

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

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

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

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

⁵ Although the grievant describes concerns about “equal opportunity,” he has not alleged that the selection process was carried out in a discriminatory or retaliatory manner. Accordingly, EDR will only address whether the selection was consistent with policy.

⁶ *See DHRM Policy No. 2.10, Hiring*, at 22.

resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.⁷

Assessment of the Grievant's Suitability

First, we address the agency's assessment of the grievant's suitability for the Operations Major position. 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."⁸ EDR has thoroughly reviewed the panel's notes from the grievant's and the recommended candidates' interviews and finds that the panel's decision to not select the grievant for the position was consistent with its assessment of his suitability for the Operations Major position.

For example, the panel members commented that the finalist candidates variously possessed "outstanding," "above-average," and "average" knowledge, skills, and abilities for the position based on their responses to the interview questions. With regard to the grievant, on the other hand, the panel members wrote that his responses displayed a "minimal level of skills and abilities needed to perform many of the job duties and responsibilities." The panel concluded that the grievant would "require additional training and/or experience to perform all job requirements successfully," and thus declined to recommend him for hiring. The panel's notes from the grievant's and the finalists' interviews could have explained its assessment of the candidates' suitability for the position in more detail; however, EDR's review of the available documents indicates that the panel's evaluation of the candidate's responses and decision regarding which candidates to recommend as finalists were consistent with management's discretion to determine such issues.

Furthermore, 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, EDR 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. Under the circumstances presented here, EDR can find nothing to indicate that the grievant was so clearly a better candidate that the selection panel's recommendation disregarded the facts or was anything other than a reasonable exercise of discretion based on a good faith assessment of the candidates' suitability for the position, based on their performance at their interviews.

Although the grievant may disagree with the panel's decision not to recommend him for the Operations Major position, EDR's review of the grievance record indicates that the information available reasonably supports the selection panel's conclusion that the three finalist candidates would be more suitable for the position. The grievant has not presented evidence to demonstrate that the agency had an improper reason in not selecting him or that the agency's determination

⁷ See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as "[i]n disregard of the facts or without a reasoned basis.").

⁸ DHRM Policy 2.10, *Hiring*, at 11.

disregarded the pertinent facts or was otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on these grounds.

Transfer of Major X

Next we turn to the grievant's assertion that the agency improperly transferred Major X into the Operations Major position. DHRM Policy 2.10 provides that agencies are not required to post for recruitment positions that are filled through "non-competitive voluntary transfers."⁹ Additional DHRM policy guidance emphasizes that "[a] non-competitive transfer should be an unusual event" and "[m]ost vacancies should be filled through posting and the competitive process."¹⁰ The agency's General Order 02-20 provides more detailed information, stating that a lateral transfer to a vacant position by an employee "of the same rank and role" may be initiated either by the employee or by management. General Order 02-20 further states that employees "should have spent a minimum of 2 years in the previous assignment before being eligible for a lateral transfer."

Following interviews for the Operations Major position, each of the three finalists recommended by the selection panel declined to accept the job. The agency therefore decided to transfer Major X, who held a different Conservation Police Major ("Support Services Major") position at the time, into the vacant one instead of recruiting for it competitively a second time. The agency determined that filling the Operations Major position was more significant to its operational needs because that job is responsible for managing the agency's law enforcement services and personnel. In contrast, Major X's Support Services Major position consisted of supervising budget, procurement, communications, records, and emergency services matters.

The evidence in the grievance record indicates that the agency's decision was based on the failure of the original recruitment process to yield a viable candidate for the position. According to the agency, this outcome would normally result in posting the vacant position for recruitment a second time. Though the grievant understandably disputes the agency's decision to transfer Major X rather than re-posting the position, apparently alleging that he and other employees should have had an opportunity to compete again, the agency's position here is reasonable. Approximately six months passed between the original posting and the transfer of Major X. Faced with the prospect of posting the Operations Major again, conducting interviews, and proceeding through the remainder of the recruitment process for a second time, the agency instead elected to transfer Major X because it determined that filling the position as soon as possible was critical to its operations. Significantly, we have not reviewed evidence to suggest that lateral transfers of this nature are a routine event; rather, it appears that the transfer of Major X was "an unusual event" as contemplated by DHRM's policy guidance due to the above factors.

Regarding the grievant's specific concern that Major X was not eligible for a transfer because they had occupied the Support Services Major position for less than two years, General Order 02-20 recommends this practice but does not mandate it. Moreover, Major X was the senior of the agency's incumbent Majors at the time.¹¹ The grievant likewise questions whether Major

⁹ DHRM Policy 2.10, *Hiring*, at 5.

¹⁰ DHRM Policy Guide, *Voluntary Transfer – Non-Competitive*, <https://www.dhrm.virginia.gov/hrpolicies/policyguidevoluntarytransfernoncompetitive>.

¹¹ The agency employs three Conservation Police Majors with varying responsibilities.

X's position and the vacant position are equivalent because of the differences in their job responsibilities. However, EDR has reviewed job descriptions for both positions and confirmed that, although the core functions of the jobs are different, they are in the same Role and Pay Band. In addition, the required knowledge, skills, and abilities, as well as with the necessary education and experience required for both positions, are essentially the same.

The grievant may disagree with the agency's decision to transfer Major X into the Operations Major position, but he has not presented evidence that raises a sufficient question as to whether the agency misapplied or unfairly applied policy, acted in a manner that was inconsistent with other decisions regarding the reassignment of employees, or was otherwise arbitrary or capricious. Indeed, the information provided by the agency supports a conclusion that the transfer was based on legitimate business needs. Moreover, the grievant has not identified a mandatory policy provision that would prevent the agency from transferring Major X under these circumstances, nor has EDR identified such a policy. As stated above, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government, including the methods, means and personnel by which work activities are to be carried out.¹² It therefore appears that the agency's decision to reassign Major X to the vacant Operations Major position was consistent with the discretion granted by policy. Accordingly, the grievance does not qualify for hearing on these grounds.

CONCLUSION

For the reasons expressed above, the facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.¹³ EDR's qualification rulings are final and nonappealable.¹⁴

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¹² Va. Code § 2.2-3004(B).

¹³ See *Grievance Procedure Manual* § 4.1.

¹⁴ See Va. Code § 2.2-1202.1(5).