

Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: September 15, 2017; Ruling No. 2017-4576; Agency: Department of Game and Inland Fisheries; 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 Game and Inland Fisheries
Ruling Number 2017-4576
September 15, 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 May 16, 2017 grievance with the Department of Game and Inland Fisheries (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

On March 22, 2017, the grievant applied for two Captain positions with the agency. On April 28, 2017, he received notification that he did not receive an interview for either position. On May 16, 2017, the grievant initiated a grievance to challenge his non-selection for each position. At the third management resolution step, the grievant was provided partial relief through the agency’s rescreening of one Captain position, which led to his inclusion in the interview pool for that position.¹ 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.² Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”³ 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

¹ Ultimately, the grievant was not selected for either position.

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

³ See *Grievance Procedure Manual* § 4.1(b).

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, we will assume that the grievant’s non-selection constitutes an adverse employment action in that his selection for either of the two Captain positions would have been a promotion.

Misapplication and/or Unfair Application of Policy

The grievant asserts that the agency misapplied and/or unfairly applied policy during the recruitments for each Captain position, stating that the agency’s promotional practices are arbitrary and capricious. 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 Further, it is the Commonwealth’s policy that hiring and promotions be competitive and based on merit and fitness.⁷ 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.⁸

The initial screening of candidates for the Captain positions was conducted by an agency recruiter. For the position in which the grievant did not receive an interview, after the recruiter completed scoring the applications for the position using the screening criteria identified by the agency,⁹ seven applications (out of the ten total received) with scores of nine or higher were

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 See DHRM Policy No. 2.10, *Hiring*.

⁷ 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)).

⁸ 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”).

⁹ The screening criteria used by the agency were: (1) “[d]emonstrated ability to supervise and evaluate employees”; (2) “DCJS law enforcement certification”; (3) “[d]emonstrated ability to interact with a diverse population”; (4) “[c]onsiderable ability to plan [and] conduct law enforcement operations”; (5) “[d]emonstrated ability to interpret [and] apply complex laws, regulations and court rulings”; (6) “[d]emonstrated ability to recognize, collect, [and] preserve evidence and conduct thorough investigations; (7) “[c]onsiderable ability to develop, manage and execute a multifaceted budget”; (8) “[h]igh school diploma, GED or equivalent”; (9) “[c]onsiderable knowledge of internal affairs policies with emphasis on best practice and procedures”; and as a “preferred” criteria, (10) “BS degree in criminal justice, police science or related field.” The grievant received points for each established criteria except for the seventh and tenth.

considered screened in for interviews. From that pool, three employees were offered second interviews before the successful applicant was selected.

EEDR has reviewed the grievant's application materials and notes that he disputed the fact that he did not receive a point for "[c]onsiderable ability to develop, manage and execute a multifaceted budget."¹⁰ The grievant claims that he does possess experience in developing and managing a large regional budget. Agency decision-makers deserve appropriate deference in making determinations regarding a candidate's knowledge, skills, and abilities. EEDR cannot conclude, based upon a review of the documentation provided, that the agency's determination not to award the grievant a point for this criteria was without a reasoned basis. However, even had the grievant been awarded this point, and been screened in for an initial interview, there is little evidence that, having passed this hurdle, he would then have been one of the three given a second interview, much less that he would have been chosen as the selected candidate. EEDR has not reviewed any evidence that the agency would ultimately have found this particular grievant to have been the best-suited for the position, compared to the other candidates who did proceed to the interview stage. Instead, it appears that the interviewers' assessment of the candidates and subsequent selection decision were not motivated by anything other than a good faith assessment of the candidates. Thus, any error in the initial process as it relates to the grievant must be viewed as harmless. The grievant has not identified any policy violated by the agency's manner of scoring applications for this position, and the agency's actions appear to fall within the discretion granted under state hiring policy.¹¹

Further, EEDR has thoroughly reviewed the grievance information, as well as the interview notes, regarding the Captain position for which the grievant received a first-round interview, but did not proceed to the second round. While the grievant was rated as "Recommend" for a second interview by the panel, all of the candidates that ultimately received a second interview were rated "Recommend Very Highly." It was noted by the panel that, while the grievant met minimum requirements for the position, other applicants possessed "more experience and training with Internal Affairs." The agency indicates that the candidate who ultimately obtained this position had more overall years of experience with the agency. The selection panel's notes following their interview with the successful candidate pointed to his "valuable experience," "excellent comm[unication] skills," and his demonstrated passion for improving the agency's operations.

While the grievant may disagree with the agency's assessments, he has presented insufficient evidence to suggest that the agency's selection decision disregarded the facts or was

¹⁰ The grievant also disputes the use of the "preferred" criteria of possession of a BS degree in criminal justice, police science, or related field during the screening process. He states that agency policy requires that educational requirements "should not be so absolutely stated or used as to preclude consideration of applicants who possess equivalent or sufficient applicable experience or training that would reasonably predict an applicant's ability to perform the job satisfactorily" and that "[e]ducation may be reflected as a minimum requirement only if it is required by a specific certifying body, regulation of [sic] law." In this instance, it does not appear that a bachelor's degree was included as a minimum requirement for this position. Further, EEDR has found no mandatory policy provision that the agency has violated by its decision to include the consideration of the applicants' possession of bachelor's degree as a method of further screening the applications received for these positions.

¹¹ See DHRM Policy 2.10, *Hiring*.

otherwise arbitrary or capricious. Indeed, in reviewing the candidates' application materials, EEDR can find nothing to indicate that the grievant was so clearly the better candidate that the selection of the successful candidate disregarded the facts. Rather, it appears the agency based its decision on a good faith assessment of the relative qualities of both candidates. As such, EDR concludes that the grievance does not raise a sufficient question that the agency's selection decision for this position was arbitrary or capricious.

Further, EEDR has reviewed nothing that would suggest the agency's selection process, as a whole, violated any mandatory policy, disregarded the intent of policy, or was otherwise arbitrary or capricious, for either of the positions for which the grievant applied. To the contrary, it appears that the final selections were based on a reasoned analysis of the applicants' knowledge, skills and abilities. Agency decision-makers deserve appropriate deference in making such determinations. Therefore, the grievant's claim of misapplication and/or unfair application of policy in the hiring process does not qualify for a hearing.

Retaliation

The grievant challenges his non-selection for the Captain positions as retaliatory, due to his prior participation in the grievance process. For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;¹² (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.¹³ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹⁴

In this case, the grievant has shown that he engaged in a protected activity—participating in the Commonwealth's grievance process—and that he was subsequently not selected for any of the Captain positions for which he applied. He states that he had never been denied an interview for any other promotional process at the agency, before his recent participation in the grievance procedure. However, EEDR has thoroughly reviewed the documentation provided in the grievance packet, and the grievant has not presented facts that raise a sufficient question of a connection between his non-selection for the Captain positions and any such activity. As discussed above, the grievant was interviewed for one position but not selected as the best suited candidate, based on the selection panel's assessment of his responses to the questions asked at his interview, and we have found no reason to dispute that decision. Likewise, the decision not to interview the grievant for the second Captain position appears to have been based upon a good faith assessment of the grievant's application materials, and the agency's legitimate business

¹² See Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

¹³ See, e.g., *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005).

¹⁴ See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981).

needs. Because there is not a factual basis raising a sufficient question to support the grievant's allegation of retaliation, the grievance does not qualify for a hearing on this basis.

Discrimination/Equal Employment Opportunity

Finally, the grievant's assertions that the agency misapplied policies relating to equal opportunity in hiring can be fairly read as a claim of discrimination on the basis of his political affiliation. 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) he was a member of a protected class; (2) he applied for an open position; (3) he was qualified for the position, and (4) he was denied the position under circumstances that create an inference of unlawful discrimination.¹⁵ 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.

Here, the grievant has failed to raise a sufficient question that he was denied either position under circumstances that create an inference of unlawful discrimination. While the grievant may disagree with the panel's assessment of the applicants, his disagreement with that assessment alone does not render that selection decision discriminatory. Moreover, the simple fact that the person selected may have been of a different political affiliation than the grievant does not, without more, indicate pretext sufficient to overcome the agency's legitimate non-discriminatory reasons for its selection decision. Here, the grievant has not provided sufficient evidence that the agency failed to select him for the position because of his membership in a protected class. An allegation of discrimination, without more, is not appropriate for adjudication by a hearing officer.

CONCLUSION

For all the foregoing reasons, the grievant's request for qualification of his grievance for hearing is denied. EEDR's qualification rulings are final and nonappealable.¹⁶



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¹⁵ See EEOC v. Sears Roebuck & Co., 243 F.3d 846, 851 (4th Cir. 2001); EDR Ruling No. 2010-2436. 2010-2484.

¹⁶ Va. Code § 2.2-1202.1(5).