

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date:
February 6, 2013; Ruling No. 2013-3492; Agency: Virginia Employment Commission;
Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Virginia Employment Commission
Ruling Number 2013-3492
February 6, 2013

The grievant has requested a ruling on whether his August 6, 2012 grievance with the Virginia Employment Commission (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant initiated his August 6, 2012 grievance to challenge the agency's selection process for a Local Office Manager position in which he competed unsuccessfully. In this instance, the selection process consisted of two rounds of interviews, each with a different panel of interviewers. A standardized set of questions were asked of each applicant at both stages of the interview process, and each applicant was rated on a numerical scale based on the answers that he or she provided. Following the initial round of interviews, the grievant and four other individuals were selected to proceed to the second round of interviews. After the grievant's second interview, both members of the panel evaluated him as "Do Not Recommend for Hire" based on the numerical score assessed and their notes regarding the grievant's responses to the questions asked. The grievant argues that the agency misapplied hiring policy during this process, and contends that he was better qualified than the successful candidate. The agency disputes the grievant's claims and states that it properly followed competitive selection procedures, and ultimately selected the best-suited candidates as determined by the selection process.

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 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 "adverse employment actions."² Thus, typically, a threshold question is whether the grievant has suffered an adverse

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

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

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 only, it will be assumed that the grievant has alleged an “adverse employment action” as to this grievance in that it appears the position he applied for would have been a promotion.

Misapplication and/or Unfair Application of Policy

In this case, the grievant alleges that policy was misapplied during the selection process for the Local Office Manager position.⁵ 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 resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.⁷

The grievant asserts that the agency misapplied policy by pre-selecting, as the successful candidate for the position, an individual who was less qualified than he and not the best suited applicant for the position. In support of his claim of pre-selection, the grievant asserts that the hiring manager has a personal relationship with the successful candidate, Ms. A. He presents as evidence that the hiring manager had personally advised Ms. A that she would need to re-apply for the position following its re-advertisement due to an error in the initial post, whereas the other candidates had been contacted by another agency employee. In response, the hiring manager denies that she has a personal relationship with Ms. A, and states that Ms. A showed her around the locality when the hiring manager relocated, as did several other agency employees. The hiring manager admits that she told Ms. A that she would have to re-apply for the position following its re-advertisement and indicates that all previous applicants were advised of the need to re-apply.

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

⁴ Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

⁵ Within the grievance packet, the grievant asserts that he experienced subsequent retaliation for filing the grievance at hand in the form of unjustified disciplinary action. A grievant may not add claims to a grievance once it has been initiated, and thus, this claim will not be addressed within this ruling. *See Grievance Procedure Manual* § 2.4.

⁶ *See* Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.

⁷ *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.”

Following an investigation, the agency's third step-respondent concluded that, while the circumstances surrounding the communication of the re-posted position appear to have been "less than optimal," that alone does not constitute a misapplication of policy. We agree. While the hiring authority may have used poor judgment in her communications regarding the position's re-advertisement, her actions do not demonstrate that any applicant was pre-selected, without regard to merit or suitability, for the Local Office Manager position. Ms. A possessed the qualifications posted for the position and received the highest score assessed out of the five candidates who completed a second interview. Both members of the selection panel noted her strong experience in management, excellent communication skills, and extensive related experience.

In contrast, while the grievant also displayed strong communication skills, it was noted by one panel member that he did not answer some questions directly and was missing key elements of a particular question related to goals. Further, it appears that the individual selected for the Local Office Manager position had more experience with the agency's various programs than did the grievant. In reviewing the selection panel's notes following the second interview, Ms. A was rated significantly higher than the grievant; in fact, the grievant received the lowest score of all five candidates interviewed. The panel recommended Ms. A for hire, whereas the panel did not recommend the grievant.

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 otherwise arbitrary or capricious. Indeed, in reviewing the candidates' application materials, EDR 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 pre-selection may have tainted the process.

Discrimination

Finally, the grievant's assertions that the agency misapplied policies relating to the equal employment of minorities can be fairly read as a claim of discrimination on the basis of race.⁸ For a claim of race 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.⁹ Where the agency, however, presents a legitimate, non-discriminatory reason for the employment action

⁸ The grievant also alleges a violation of DHRM Policy 2.05, *Equal Employment Opportunity*, as it pertains to the agency's emphasis on the recruitment of qualified minority candidates. While this goal is outlined within the policy in question, nothing in policy mandates particular agency action toward this end. Thus, we are unable to conclude that a policy violation has occurred under the facts presented.

⁹ See *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 851 (4th Cir. 2001); EDR Ruling No. 2010-2436. 2010-2484.

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 the position under circumstances that create an inference of unlawful discrimination. In particular, as outlined above, the agency's records indicate that in the second round of interviews the grievant did not interview as well as did the successful candidate. Furthermore, the selection panel made note of Ms. A's familiarity with various agency programs, as she had been employed by the agency for over ten years at the time of the interview, in a variety of positions. In contrast, the grievant had been employed by the agency for approximately two years as a hearing officer, which one panel member noted provided him with "limited experience with other programs in [the agency]." The successful candidate had also spent fourteen years as the Director of another organization, while the grievant had only spent seven years as the Manager of another organization.

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 race 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.

The grievant also asserts that the selection panel for the second interview was not "diverse" as encouraged by agency policy.¹⁰ Upon review, we do not find a violation of any mandatory policy language by the selection panel in question. The second interview panel consisted of the hiring manager and a representative from the agency's human resources. A good practice may be to provide a diverse population on any interview panel; however, there is no such requirement with respect to this circumstance. Because there is no indication that the agency's non-discriminatory reasons for the selection of the successful candidate were pretextual, the grievant's claims of discrimination do not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.¹¹



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¹⁰ DHRM Policy 2.10(C)(1)(f), *Hiring*.

¹¹ Va. Code § 2.2-1202.1(5).