

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: February 19, 2013; Ruling No. 2013-3528; Agency: Virginia Department of Transportation; Outcome: Not Qualified.



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

**QUALIFICATION RULING**

In the matter of the Virginia Department of Transportation  
Ruling Number 2013-3528  
February 19, 2013

The grievant has requested a ruling on whether his October 31, 2012 grievance with the Virginia Department of Transportation (the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

**FACTS**

The grievant initiated his October 31, 2012 grievance to challenge the agency's selection process for a District Environmental Manager position in which he competed unsuccessfully. During the hiring process, the agency alleges that one of its selection panel members initially interviewed ten candidates via telephone, asking the same screening question to each candidate. The selection panel member then utilized the candidate's answers to determine which candidates would be best qualified for a second interview. The selection panel member decided to refer the grievant and three other candidates for second interviews. After the second round of interviews, the selection panel did not recommend the grievant for further consideration.

The grievant alleges that the selection panel misapplied the Department of Human Resource Management (DHRM) Policy 2.10, *Hiring*, and the agency's Human Resources Talent Acquisition Toolkit for Hiring Managers guidelines throughout the selection process. Specifically, he asserts the question he was asked during the initial phone interview "was different than the question that at least one other person interviewed was asked," it was not related to how the grievant would do the job, and it was age discriminatory because it required the grievant to recall a position he held twenty-seven years ago. The grievant also argues that one of the agency's selection panel members did not hold the selection panel's final recommendation confidential when he allegedly shared the recommendation with a co-worker on October 1, 2012. In addition, the grievant alleges that the selection panel's second interview summary form for the grievant was incomplete, "misleading, inaccurate, and taken out of context." The agency disputes the grievant's claims and asserts that it selected the best-suited candidate based on the applicable recruitment information.

This grievance proceeded through the management steps without resolution and the grievant now seeks qualification of his grievance from the Office of Employment Dispute Resolution (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 hearing” unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.<sup>1</sup> In this case, the grievant has alleged various misapplications of policy.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”<sup>2</sup> 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.”<sup>3</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>4</sup> 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 of Policy and/or Unfair Application of 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. 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>5</sup> 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.<sup>6</sup>

#### *1. Initial Phone Interview*

The grievant alleges that the agency misapplied Section C(g) of DHRM Policy 2.10 by asking a question during the phone interview that “was different than the question that at least

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

<sup>2</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>3</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

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

<sup>5</sup> See DHRM Policy No. 2.10, *Hiring*.

<sup>6</sup> 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.”

one other person interviewed was asked,” was not related to how the grievant would do the job, and was age discriminatory because it required the grievant to recall a position he held twenty-seven years ago. Specifically, he alleges he was asked, “Tell me about a time that you managed a group of people, how did you handle it in the first 90 days” whereas the other interviewee indicated to the grievant his question “did not include anything about the first 90 days.” In response, the agency states it used the same screening question for all ten candidates and the grievant’s concern “is negated by the fact that [the grievant] achieved a favorable result of advancing to the second round of interviews.” Furthermore, the agency asserts that the grievant “readily admitted that he did not perform well during the telephone interview.”

Section C(g) of DHRM Policy 2.10 states:<sup>7</sup>

A set of interview questions must be developed and asked of each applicant.

- Questions should seek information related to the applicant’s knowledge, skills, and ability to perform the job.
- Questions that are not job related or that violate EEO standards are not permissible.

The grievant has presented insufficient evidence to suggest that the agency’s initial screening question violated any mandatory provision or disregarded the intent of DHRM Policy 2.10.<sup>8</sup> Indeed, in reviewing the agency’s initial screening question, the candidates’ answer summaries, and the candidates’ screening interview results, EDR can find nothing to indicate that the grievant was asked a different question than the other nine candidates. It additionally does not appear that the question was age discriminatory in nature or not job related. Rather, the agency asked questions which sought information about how the applicant managed a new work group within the first three months, how he or she evaluated/monitored unit performance, how he or she motivated staff, what the applicant’s philosophy was on hiring new staff, and what the applicant considered the most important task as a Section Manager. Although the grievant may have had to recall his own personal experience that was twenty-seven years ago, we do not see how that question violates EEO standards, especially since the grievant’s answer would presumably demonstrate his vast years of experience and knowledge as well. Moreover, the issue appears to be moot as the grievant was granted a second interview. As such, the grievance does not raise a sufficient question as to whether the agency misapplied or unfairly applied Section C(g) of DHRM Policy 2.10. Therefore, this issue does not qualify for hearing.

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<sup>7</sup> See DHRM Policy No. 2.10, *Hiring*.

<sup>8</sup> The grievant also alleges the agency misapplied page 14 of the *Virginia Department of Transportation’s Human Resource Talent Acquisition Toolkit for Hiring Managers* guidelines. Although it is best practice for the agency to consider these agency specific guidelines during the selection process, these guidelines are not mandatory policy provisions the agency is required to follow. As such, EDR will not address whether the agency misapplied and/or unfairly applied these guidelines in this ruling.

## *2. Second Interview Summary Form*

The grievant alleges the agency misapplied Section C(g) of DHRM Policy 2.10 by issuing a second interview summary form for the grievant that was incomplete, “misleading, inaccurate, and taken out of context.”

Section C(g) of DHRM Policy 2.10 states:<sup>9</sup>

Interviewers must document applicants’ responses to questions to assist with their evaluation of each candidate’s qualifications. This information should be retained with other documentation of the selection process.

The grievant has presented insufficient evidence to suggest the interviewers did not accurately document the grievant’s responses to the second interview questions. During the second interview, each of the three selection panel members documented the grievant’s responses to the questions in extensive detail. Afterward, the selection panel summarized the grievant’s documented responses in an interview summary form. In reviewing the second interview summary form against the three selection panel members’ notes, it appears the summary form accurately recaps the selection panel’s comments. As such, the grievance does not raise a sufficient question as to whether the agency misapplied or unfairly applied Section C(g) of DHRM Policy 2.10. Therefore, this issue does not qualify for hearing.

## *3. Confidentiality*

The grievant alleges that a member of the second interview panel violated policy by disclosing the recommendation of the panel to another employee. Even if the grievant’s allegations are true and this action can be viewed as a violation of policy, this disclosure had no effect on the selection of the successful candidate and, thus, no impact on the grievant’s candidacy. Consequently, because there is no adverse employment action as to this alleged breach of confidentiality, the claim does not qualify for hearing.

## *No Effectual Relief*

Finally, to the extent the grievant is alleging the second interview summary form adversely impacted him and, as such, the relief he requests is repayment for loss of wages and full-time telecommuting, it appears that there is no effectual relief that a hearing officer could order in this case. In a misapplication of selection process policy case, a hearing officer only has the authority to order an agency reapply the policy from the point at which it became tainted.<sup>10</sup> Furthermore, a hearing officer does not have the authority to direct the methods, means, or

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<sup>9</sup> See DHRM Policy No. 2.10, *Hiring*.

<sup>10</sup> *Rulings for Conducting Grievance Hearings* § VI(C)(1) which states “[r]emedies that conform to law and policy for misapplications or unfair applications of policy may include ... A repeat of the selection process by the agency in accordance with policy (not the selection of any particular employee for the job, unless such a selection is the only possible result under a written policy mandate).” See also *Grievance Procedure Manual* § 5.9(a).

personnel by which work activities are to be carried out.<sup>11</sup> As a result, even if the grievant were able to establish such an adverse employment action at a hearing, a hearing officer could not order repayment of wages or full-time telecommuting to the grievant. The fact that there is no effectual relief that a hearing officer could order in this grievance is another reason that the grievant's request for qualification cannot be granted.<sup>12</sup>

EDR's qualification rulings are final and nonappealable.<sup>13</sup>



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<sup>11</sup> *Grievance Procedure Manual* § 5.9(b).

<sup>12</sup> See EDR Ruling Nos. 2011-2698, 2010-2461, and 2010-2513.

<sup>13</sup> Va. Code § 2.2-1202.1(5).