

Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: March 29, 2013; Ruling No. 2013-3536, 2013-3537; Agency: Department of State Police; Outcome: Not Qualified.



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

**QUALIFICATION RULING**

In the matter of the Department of State Police  
Ruling Number 2013-3536, 2013-3537  
March 29, 2013

The grievant has requested a ruling on whether his October 26, 2012 and November 20, 2012 grievances with the Department of State Police (the agency) qualify for a hearing.<sup>1</sup> For the reasons discussed below, these grievances do not qualify for hearing.

FACTS

The grievant initiated his October 26, 2012 grievance to challenge the agency's selection process for a Trooper-Pilot position in which he participated unsuccessfully. During the pendency of this grievance, he requested certain documents generated in the interview process, and, following his review of those documents, initiated a second grievance, dated November 20, 2012. This second grievance alleges that he received prejudicial, biased, and unequal treatment during the interview process, based upon the notes and recommendations made by the selection panel.

In this instance, the initial pool of applicants for the Trooper/Pilot position was screened using the information on a Qualification Summary Sheet completed by each applicant to show that he/she possessed the minimum necessary qualifications for the position. Five candidates were chosen to receive an in-person interview in front of three interview panel members; four of the five completed the interview. A standardized set of scenario-based questions were asked of each applicant at the interview, and each panel member recorded notes based on the answers provided by the candidates. After the grievant's interview, all three members of the panel evaluated him as "Do Not Recommend" for hiring based on their notes regarding the grievant's responses to the questions asked. The grievant argues that, essentially, the agency misapplied hiring policy during this process, contending that the selection process was discriminatory, arbitrary, and capricious. He further asserts that he was better qualified than the successful candidate. The agency disputes the grievant's claims and states that it selected the best-suited candidate as determined by the selection process.

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<sup>1</sup> Apparently per the agency's instructions, the grievant initiated two separate grievances challenging the same selection process and requesting the same relief. Upon the agency head's denial of each grievance for qualification, both were forwarded to EDR and both will be addressed in this ruling.

## 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.<sup>2</sup> Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment action.”<sup>3</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>4</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>5</sup> For purposes of this ruling only, it will be assumed that the grievant has alleged an “adverse employment action,” in that it appears the position he applied for could have been a promotion.

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>6</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>7</sup>

All members of the selection panel recorded the candidate’s responses to questions asked in the interview and noted the instances wherein they believed that the answers provided did or did not sufficiently indicate necessary knowledge regarding the duties of the Trooper/Pilot position. Each panel member then evaluated the candidates based on the totality of the interview as “Recommend Very Highly,” “Recommend Highly,” “Recommend,” or “Do Not Recommend.” The grievant argues that the answers he provided were substantially similar to those of the successful candidate, and yet, he was unfairly marked “Do Not Recommend” by each panel member, as opposed to the successful candidate’s rating of “Recommend Very

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<sup>2</sup> Va. Code § 2.2-3004(C); *See Grievance Procedure Manual* § 4.1.

<sup>3</sup> *Grievance Procedure Manual* § 4.1(b).

<sup>4</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>5</sup> *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4<sup>th</sup> Cir. 2007).

<sup>6</sup> *See Department of Human Resource Management Policy No. 2.10, Hiring.*

<sup>7</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).”

Highly.” Thus, he believes his overall rating assessed by the panel was arbitrary and without basis.

Although the grievant may reasonably disagree with the panel’s assessment, EDR has reviewed nothing that would suggest the agency’s determination disregarded the pertinent facts or was otherwise arbitrary or capricious. During the grievance process, the step-respondents noted that some similarity existed between comments on the grievant’s Interview Evaluation Worksheet and that of the successful candidate. However, after a review of the answers provided by both the grievant and the successful candidate, we conclude that those responses, while similar in some aspects, also contain distinctions that could contribute to the difference in overall rating of each candidate.

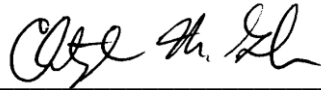
For example, one question posed a scenario wherein the candidates were to assess a potentially hazardous weather situation and determine whether they would accept a requested flight mission. While both the grievant and the successful candidate appear to have mentioned checking weather guidelines, it was noted by two panel members that the grievant appeared to have difficulty in determining whether he would accept the mission. One panel member noted that he did not believe the grievant gave a definitive answer to this question. In contrast, the panel members all noted that the successful candidate clearly stated that he would accept the mission after determining that he was comfortable with the weather in the situation described.

Further, the third step-respondent indicated that the overall determination of how well the questions were answered depended on several factors, including “organization of thoughts, organization of answers, articulation of answers, confidence shown in replies, clarity of answers, and one’s physical presence.” These factors are not always readily apparent by a plain reading of the comments recorded as answers by the selection panel. In this instance, the foundations for the panel’s assessment of the grievant’s knowledge, namely, the interview questions and answers provided by the grievant, appear reasonable and based upon potential situations with which a Trooper/Pilot may be confronted. Agency decision-makers deserve appropriate deference in making such determinations regarding a candidate’s knowledge, skills, and abilities. The grievant has not presented sufficient evidence to support an assertion that he was so clearly a better candidate that the panel’s selection of the successful candidate disregarded the facts or was otherwise arbitrary or capricious. Instead, it appears that the agency employees on the selection panel based their determinations on good faith assessments of the candidates. This grievance does not raise a sufficient question as to whether the agency misapplied and/or unfairly applied policy. Therefore, it does not qualify for a hearing on that basis.

Finally, the grievant asserts that the agency’s selection process was discriminatory. 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.<sup>8</sup> 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 not alleged membership in a protected class or presented facts in support of an allegation of unlawful discrimination; thus, the grievance does not qualify for hearing on this basis.

EDR's qualification rulings are final and nonappealable.<sup>9</sup>



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<sup>8</sup> See *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 851 (4<sup>th</sup> Cir. 2001); EDR Ruling No. 2010-2484; EDR Ruling No. 2010-2436.

<sup>9</sup> Va. Code § 2.2-1202.1(5).