

Issues: Qualification – Management Actions (assignment of duties) and Discrimination (other); Ruling Date; April 10, 2013; Ruling No. 2013-3570; Agency: Department of Corrections; 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 Corrections
Ruling Number 2013-3570
April 10, 2013

The grievant has requested a ruling on whether his December 21, 2012 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant initiated his December 21, 2012 grievance to challenge the agency’s selection process for a position as a Major in which he participated unsuccessfully. He argues that he is more qualified than the successful candidate and alleges that he received prejudiced, biased, and unequal treatment during the interview process, claiming that “there were ulterior motives and hidden agendas” in the selection process.

In this instance, five candidates were selected to receive an in-person interview in front of three panel members. Three candidates, two of whom were the grievant and the successful candidate, were interviewed by the agency’s appointing authority several days later in a second panel. At the first interview, each candidate was asked a standardized set of questions, and each panel member recorded notes based on the candidates’ answers. All three members of the panel evaluated both the grievant and the successful candidate as “Recommend” for hiring based on their responses to the questions asked.

This process was repeated for the second interview with the appointing authority, after which the appointing authority selected the successful candidate for hiring. The grievant argues, essentially, that the agency misapplied the agency’s hiring policy during this process, contending that the process was discriminatory, arbitrary, and capricious.¹ The agency disputes the

¹ The grievant also expresses concern that, after the third resolution step, his grievance was “tampered with.” It appears that the third step-respondent forwarded the grievance record to the agency head before the grievant had submitted his request for qualification. The agency head then determined that the grievance did not qualify for a hearing, also before the grievant had submitted his request for qualification. Although it has not, in this case, caused any prejudice to the grievant, EDR cannot recommend handling requests for qualification in this manner. Nevertheless, there is no basis to find that the handling of the grievance amounted to “tampering” or was in any way in bad faith.

grievant's claims and states that it selected the best-suited candidate 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 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 action."³ 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."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, it will be assumed that the grievant has alleged an adverse employment action, in that it appears the position he applied for would have been a promotion.

Misapplication/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.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 members of the selection panel and the appointing authority recorded the candidate's responses to the questions asked in the interview and noted whether the candidate's answers sufficiently indicated necessary knowledge regarding the duties to perform in the position. The grievant argues that his qualifications were greater than or substantially similar to those of the

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

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

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

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

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

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

successful candidate, yet he was not selected for the position. As a result, he believes that the appointing authority's hiring decision 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. An examination of the relevant Applicant Evaluations shows that there is some similarity between some comments on the grievant's and the successful candidate's evaluations. However, after a review of the answers provided by both the grievant and successful candidate, we conclude that the responses, while similar in some respects, also contain distinctions that could contribute to the ultimate hiring decision. For example, one interviewer noted that the successful candidate possessed "considerable administrative responsibilities and experience" with the agency and noted her attention to detail. The same interviewer concluded that the grievant's administrative knowledge was more limited. Moreover, when questioned by EDR about the agency's hiring practices, the agency's employee relations manager stated that, in furtherance of its mission and vision, the agency seeks forward-thinking, engaged individuals who are committed to evidence-based practices, open dialogue, and creating a healing environment in its facilities. One interviewer noted that the successful candidate "understands a [H]ealing [E]nvironment and what it takes to achieve" that goal.

The second step-respondent noted that both the grievant and the successful candidate "met the qualifications, requirements and duties for the position." The agency's policy states that its employment decisions are based on an individual's "merits, qualifications, *and suitability*" for the position.⁸ 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 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 appointing authority based his determination on a good faith assessment of the candidates. This grievance does not raise a sufficient question as to whether the agency misapplied and/or unfairly applied policy, and does not qualify for a hearing on this basis.

Discrimination

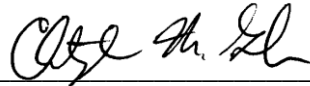
In addition, the grievant seems to assert that the agency's selection process was discriminatory. For a claim of discrimination in the hiring or selection context to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. In order to establish a claim for unlawful 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.⁹ Where the agency, however, presents a legitimate, non-discriminatory reason for the

⁸ Department of Corrections Operating Procedure 170.1, Recruitment, Selection, and Appointment, § IV(A)(1) (effective July 1, 2012) (emphasis added).

⁹ See *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 851 (4th Cir. 2001); EDR Ruling Nos. 2010-2436, 2010-2484.

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.¹⁰



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¹⁰ Va. Code § 2.2-1202.1(5).