Issues: Qualification – Management Actions (recruitment/selection) and Retaliation (other protected right); Ruling Date: January 27, 2014; Ruling No. 2014-3782; Agency: Department of Juvenile Justice; 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 Juvenile Justice
Ruling Number 2014-3782
January 27, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether her October 11, 2013 grievance with the Department of Juvenile Justice (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

In August 2013, the grievant applied for a position as an intake probation officer. She subsequently was advised that she was screened out during the interview selection process and therefore would not receive an interview for the position. On October 11, 2013, the grievant initiated a grievance to challenge her non-selection. She asserts that the selection process was unfair and biased. The agency head denied the grievant's request for qualification of her grievance for hearing, and she now appeals that decision to 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 a 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, 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 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

[1] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[2] *See Grievance Procedure Manual* § 4.1(b).
[3] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

employment.[4] For purposes of this ruling only, we will assume that the grievant's non-selection constitutes an adverse employment action.

Misapplication and/or Unfair Application of Policy

The grievant asserts that the agency misapplied and/or unfairly applied policy by failing to select her for an interview. 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.[5] Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.[6]

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] Here, the grievant argues that she should have been selected for an initial interview for the intake probation officer position, and that she was improperly screened out based on the screening criteria. In particular, she alleges that the agency erred in finding that she lacked sufficient experience for the position and by considering whether or not an applicant had a degree in a related field as a part of its screening criteria.

In this case, the screening for the intake probation officer's position was conducted by the unit director's administrative assistant. After the administrative assistant completed scoring the applications for the position using the screening criteria identified by the agency,[8] 21 applications with scores of seven or more were considered screened in for interviews. Because

[4] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[5] *See* DHRM Policy No. 2.10, *Hiring*.
[6] 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)).
[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)."
[8] The screening criteria used by the agency were: (1) knowledge of juvenile justice, court proceedings, criminogenic risk factors, evidence-based practices and effective intervention; (2) demonstrated ability to interpret regulations, guidelines, and statutes; (3) experience in interviewing and counseling; (4) demonstrated ability to analyze pertinent information from a variety of sources; (5) demonstrated ability to identify and coordinate community resources and agency services; (6) demonstrated ability to utilize computer programs including data bases and spreadsheets; (7) experience communicating with individuals from diverse backgrounds; (8) experience counseling youthful offenders in juvenile court service unit setting preferred; (9) bachelor's degree in related discipline preferred; and (10) bilingual preferred. The grievant received points for all but the fifth mandatory screening criteria. She also did not receive points for any of the three preferred criteria.

the grievant's score was below the cut-off number, the unit director asked a member of the Central Office Human Resources staff to review the grievant's application to verify that the exclusion of the grievant was correct, based on the screening criteria. The member of the Human Resources staff agreed with the administrative assistant's determination. The 21 applications that were screened in were given to two members of the hiring panel, who further reduced the pool to nine candidates, who were given first interviews. From that pool, five employees were offered second interviews before the successful applicant was selected.

While the grievant's application does not necessarily support her claim that she should have received a higher score during the screening-in process, there is other evidence to suggest that her actual work experience at the agency would arguably support an award of one additional point for a "[d]emonstrated ability to identify and coordinate community resources and agency services," bringing her total to the required score. The singling out of the grievant's application for additional review by Central Office Human Resource staff is also concerning. Although we acknowledge the request may have been made simply to ensure that the grievant was treated fairly rather than out of any inappropriate motive, in the absence of a thorough review of all the applications scored, it would have been virtually impossible for the Human Resources staff member to determine if the criteria were consistently applied to the grievant.

However, even had the grievant been one of 21 applicants screened in for an interview, there is little evidence that having passed this hurdle, she would then in fact have been one of the nine given a first interview, one of the five offered a second interview, and then finally chosen as the selected candidate. Of the five applicants offered a second interview, three had previously worked as probation officers and the remaining two had participated in probation/parole internships with the agency. In contrast, the grievant appears never to have worked as a probation officer in either a paid or unpaid capacity. Further, all five applicants offered a second interview held college degrees in related fields, unlike the grievant. As there is no evidence that the agency would ultimately have found the grievant to have been the best-suited for the position, any error in the initial process must be viewed as harmless. With respect to the grievant's argument that the agency should not have counted her lack of a related degree against her, that preferred criteria was only one of eleven criteria used by the agency, all of which were accorded equal weight. The grievant has not identified any policy violated by this manner of scoring, and the agency's actions appear to fall within the discretion granted under state hiring policy.[9]

Although the grievant may disagree with her failure to be screened in for an interview, EDR 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. To the contrary, it appears that the final selection was 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.

[9] *See* DHRM Policy 2.10, *Hiring.*

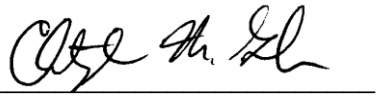
Retaliation

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;[10] (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.[11] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[12]

In this case, the grievant has shown that she engaged in a protected activity—raising concerns about the unit director's conduct to higher management—and that she was subsequently not selected for the intake probation officer's position. The agency asserts that the grievant was not the best-suited for the position, and this position is substantiated by the more relevant experience and training of the individual ultimately selected for the position. Even if we were to assume for the purpose of this ruling that the screening-in process conducted by the agency was flawed, there is no evidence to raise a sufficient question that the ultimate selection decision was driven by a retaliatory motive rather than the agency's appropriate assessment of the best-suited candidate for the position. Accordingly, the grievant's claim of retaliation is not qualified for hearing.

CONCLUSION

For all the foregoing reasons, the grievant's request for qualification of her grievance for hearing is denied. EDR's qualification rulings are final and nonappealable.[13]



Christopher M. Grab
Director
Office of Employment Dispute Resolution

[10] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).
[11] *See*, *e.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).
[12] *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981).
[13] Va. Code § 2.2-1202.1(5).