

Issues: Qualification – Management Actions (Recruitment/Selection) and  
Discrimination (Other); Ruling Date: March 10, 2014; Ruling No. 2014-3808, 2014-  
3809; 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 Numbers 2014-3808, 2014-3809  
March 10, 2014

The grievant has requested a ruling on whether her two October 31, 2013 grievances with the Department of Corrections (the “agency”) qualify for a hearing. For the reasons discussed below, both grievances do not qualify for a hearing.

FACTS

The grievant is employed at one of the agency’s facilities as an Office Services Specialist. She initiated her first October 31, 2013 grievance (“Grievance 1”) to challenge the agency’s selection process for a position as a Personnel Analyst at her facility in which she participated unsuccessfully. The grievant initiated her second October 31, 2013 grievance (“Grievance 2”) to challenge the agency’s selection process for a position as an Offender Grievance Coordinator at her facility in which she participated unsuccessfully.

Six candidates were offered an in-person interview with a three-member selection panel for the Personnel Analyst position. Three finalist candidates, none of whom were the grievant, were later interviewed by the agency’s appointing authority. 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 selection panel decided to “Not Recommend” the grievant for hiring based on her responses. All members of the selection panel determined to “Recommend” the three finalist candidates who were later interviewed by the appointing authority. The grievant argues, essentially, that the agency misapplied its hiring policy and the selection process for this position was discriminatory, arbitrary, and capricious.

For the Offender Grievance Coordinator position, ten candidates were offered an in-person interview with a three-member selection panel. Three finalist candidates, none of whom were the grievant, were later interviewed by the agency’s appointing authority. At the first interview, each candidate was again asked a standardized set of questions, and each panel member recorded notes based on the candidates’ answers. Based on the grievant’s responses, all three members of the selection panel marked the appropriate area on her Applicant Evaluations to “Recommend” her for hiring. She was not, however, chosen by the selection panel as one of the three finalist candidates to be interviewed by the appointing authority. The Applicant Evaluations of all three finalists, including the successful candidate, noted that their answers led the selection panel to “Recommend” them for hiring. The grievant argues that the agency

misapplied its hiring policy and asserts that the selection process for this position was arbitrary and capricious.

### DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the 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>1</sup> Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment action.”<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, in that it appears the position she applied for would 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>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>

#### *Grievance 1*

The members of the selection panel recorded the candidates’ responses to the questions asked in the interview and noted whether their answers sufficiently indicated necessary knowledge regarding the duties to perform in the position. The grievant argues that she is more qualified than the successful candidate and that the agency’s decision was influenced by “[p]re-

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

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

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

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

<sup>5</sup> *See* Department of Human Resource Management Policy No. 2.10, *Hiring*.

<sup>6</sup> *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as “[i]n disregard of the facts or without a reasoned basis.”).

selection and nepotism” because the successful candidate is allegedly a friend of her facility’s HRO.

Although the grievant may reasonably disagree with the panel’s assessment of her qualifications, EDR has reviewed nothing that would suggest the agency’s determination disregarded the pertinent facts or was otherwise arbitrary or capricious. A review of the grievant’s Applicant Evaluations shows that, based on her responses to the questions asked, all of the panel members determined that the grievant would not have been able to satisfactorily perform the job. For example, one panel member noted that the grievant “did not get specific answers to show needed [knowledge, skills, and abilities].” Another panel member concluded that the grievant “had little knowledge pertaining to this position” and “need[ed] more experience in Human Resources.” These comments are consistent with the decision of all three panel members to not recommend the grievant to her facility’s appointing authority for hiring. 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 show that she was so clearly a better candidate that the panel should have recommended her for hiring instead of any of the three finalists, or that the decision to not recommend her for hiring disregarded the facts or was otherwise arbitrary or capricious.

Furthermore, there is no evidence to suggest that the successful candidate may have been pre-selected based on a pre-existing relationship with the facility’s HRO or that the HRO may have influenced the appointing authority’s decision in any way. According to agency Operating Procedure 170.1, *Recruitment, Selection, and Appointment*, the HRO’s only involvement in the selection process was the initial screening of applicants for an interview.<sup>7</sup> Both the grievant and the successful candidate were selected for an initial interview with the selection panel for this position by the HRO. The policy further indicates that neither a selection panel’s recommendation of finalists nor an appointing authority’s hiring decision are made in consultation with the HRO.<sup>8</sup> It was the decision of the selection panel that the grievant not be recommended for hiring based on the answers she provided at her interview. The grievant has not presented any information to show that the HRO improperly influenced the selection panel’s decision as to which candidates should be recommended to the appointing authority. There is no indication that pre-selection, nepotism, or some other improper motive tainted the selection panel’s or appointing authority’s determinations, as the grievant asserts. Instead, it appears that the panel based its determination on a good faith assessment of the candidates and concluded that the grievant was not qualified for the position. Accordingly, 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.

In addition, the grievant seems to assert that the agency’s selection process with respect to the Personnel Analyst position was discriminatory because there is “no diversity in the Human Resource Department” at her facility. 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

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<sup>7</sup> See Department of Corrections Operating Procedure 170.1, *Recruitment, Selection, and Appointment*, § IV(H).

<sup>8</sup> *Id.* §§ IV(K)(3)(c), IV(M)(2).

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) she was a member of a protected class, (2) she applied for an open position, (3) she was qualified for the position, and (4) she was denied the position under circumstances that create an inference of unlawful discrimination.<sup>9</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, there are no facts that raise a question as to whether the grievant was either qualified for the position or was denied the position due to a discriminatory reason. As discussed above, the selection panel determined that the grievant was "Not Recommended" for hiring based on her responses to the questions asked at her interview, and we have found no reason to dispute that decision. Furthermore, EDR has been unable to identify any evidence to support the grievant's allegation that she was denied the position for a discriminatory reason, other than her claim that there is "no diversity" in her facility's Human Resources office. A grievance must present more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. There are no such facts here, and the grievance does not qualify for a hearing on this basis.

### *Grievance 2*

The members of the selection panel and the appointing authority recorded the candidates' responses to the questions asked in the interview and noted whether their answers sufficiently indicated necessary knowledge regarding the duties to perform in the position. The grievant asserts that she is more qualified than the successful candidate chosen for this position and that the agency's decision was motivated by "nepotism" because the successful candidate is allegedly a family member of her facility's HRO. The grievant further claims that the HRO "sabotaged [her] chances" for a fair interview for the Offender Grievance Coordinator position by "deliberately" failing to notify her in advance that she had been selected for an interview and that the successful candidate was provided with unfair "coaching" in advance of an interview for the position.

Although the grievant may reasonably disagree with the panel's assessment of her qualifications, EDR has reviewed nothing that would suggest the agency's determination disregarded the pertinent facts or was otherwise arbitrary or capricious. Likewise, there is no evidence to suggest that the successful candidate may have been pre-selected based on a pre-existing family relationship with the facility's HRO or that the HRO may have influenced the appointing authority's decision in any way. As with the selection process for the Personnel Analyst position discussed above, the HRO's only involvement in the selection process for the Offender Grievance Coordinator position was the initial screening of applicants for an

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

interview.<sup>10</sup> Both the grievant and the successful candidate were screened for an interview with the selection panel for this position.

The policy further indicates that neither a selection panel's recommendation of finalists nor an appointing authority's hiring decision are made in consultation with the HRO.<sup>11</sup> A selection panel is only authorized to recommend "three applicants or less to the appointing authority" for hiring.<sup>12</sup> While the grievant's Applicant Evaluations indicate that she would have been able to perform in the position, the selection panel did not conclude that the grievant should be recommended for hiring when compared with all of the other applicants who received an interview.

A review of panel's notes from the grievant's and the finalists' interviews shows that the panel's decision to not recommend the grievant was consistent with its assessment of her suitability for the position. For example, one panel member recorded that the grievant had "basic job knowledge," "satisfactory skills and abilities," and "acceptable communication skills." Another panel member wrote that the grievant was "capable of learning this job" and that her knowledge, skills, and abilities were "sufficient . . . to carry out the job's duties and responsibilities successfully with some additional training." The panel members commented that the finalist candidates demonstrated, among other things, such qualities as "an above average level of [skills and abilities] needed to perform job duties," "above average communication skills," and knowledge indicating "a firm grasp of the position." The finalists also provided "clear and comprehensive" responses to the questions asked, expressed "a high level of understanding and competency," and possessed "an excellent understanding of the job duties and knowledge required for the position."

Agency decision-makers deserve appropriate deference in making such determinations regarding a candidate's knowledge, skills, and abilities, and there is no evidence to suggest that the grievant was so clearly a better candidate that the panel should have recommended her for hiring instead of any of the three finalists, or that the decision to not recommend her for hiring disregarded the facts or was otherwise arbitrary or capricious. Furthermore, the grievant has not raised a question as to whether the HRO improperly influenced the selection panel's decision as to which candidates should be recommended to the appointing authority. There is no indication that pre-selection, nepotism, or some other improper motive tainted the selection panel's and appointing authority's determinations, as the grievant asserts. Instead, it appears that the panel based its determination on a good faith assessment of the candidates and concluded that the grievant was not qualified for the position. Accordingly, 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.

The grievant's claim that the HRO "sabotaged" her ability to compete for the position by failing to notify the grievant of her interview is likewise without merit. It is unclear whether the HRO actually sent the grievant, or any of the other applicants, an email notification of their

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<sup>10</sup> See Department of Corrections Operating Procedure 170.1, *Recruitment, Selection, and Appointment*, § IV(H).

<sup>11</sup> *Id.* §§ IV(K)(3)(c), IV(M)(2).

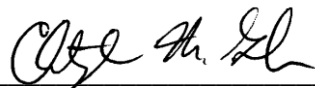
<sup>12</sup> *Id.* § IV(K)(3)(c).

interview date and time. The HRO believes that she personally emailed all six candidates with this information. The successful candidate recalls receiving such an email, and no other candidate reported any problem with receiving notice of his or her interview in advance. A search of the HRO's email account, however, indicated that there is no record of any such emails being sent, either to the grievant or any of the other candidates.

When notified of the mistake, the HRO took immediate action to correct the problem by rescheduling the grievant's interview time for later in the day in order to give her sufficient time to prepare. Based on this information, there is no basis to conclude that the HRO intentionally attempted to prevent the grievant from receiving or having the opportunity to prepare for an interview. Whether the issue was a clerical error, administrative oversight, or some other problem, it does not appear that the HRO's actions were the result of a desire to prevent the grievant from obtaining the position. To the contrary, it seems that the HRO dealt with the situation as best she could in a manner that would ensure the grievant's opportunity to have a fair interview was not compromised. Most importantly, there is nothing to suggest that the selection panel's decision to not recommend the grievant as a finalist was based in any way on the grievant's alleged lack of advance notice of her interview. As a result, the grievance does not qualify for a hearing on this basis.

Finally, the grievant argues that she observed an employee at her facility "coaching" the successful candidate about "all that the Offender Grievance Coordinator job entailed a few days before the interview." EDR has been unable to identify any policy or other directive that would prohibit a candidate who is interviewing for a position from seeking out or receiving "coaching" or other assistance as part of his or her preparation for an interview. To the contrary, it would seem to be a good practice to encourage agency management and/or staff to help candidates prepare in this way, so long as that opportunity is not offered or withheld as a method of giving any one candidate an advantage over the others who are competing for a particular position. In this case, there is no indication that the grievant sought or requested coaching or any other assistance while preparing for her interview or that she was denied that opportunity for an improper reason. Accordingly, the grievance does not qualify for a hearing on this basis.

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



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