Issues: Qualification – Management Actions (recruitment/selection) and Discrimination (other); Ruling Date: April 24, 2014; Ruling No. 2014-3837; 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 2014-3837
April 24, 2014

The grievant has requested a ruling on whether his December 12, 2013 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant initiated his December 12, 2013 grievance to challenge the agency's selection process for an Assistant Warden position in which he competed unsuccessfully. In this instance, the selection process consisted of two rounds of interviews. A standardized set of questions were asked of each applicant at both stages of the interview process, and each member of the interview panel recorded notes based on the answers that the applicant provided. Nine candidates were interviewed in the first round, after which three were selected to proceed to the second round of interviews. The grievant was not selected to proceed to the second round.

The grievant argues that the agency misapplied various hiring policies during this process, and also contends that the agency engaged in discrimination against him. The agency states that while there may be aspects of their interview process that could be improved, no misapplication of policy occurred such that the selection process for this position should be considered tainted.

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.[1] Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[2] 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

[1] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[2] *See Grievance Procedure Manual* § 4.1(b).

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 employment.[4] 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 and/or Unfair Application of Policy

In this case, the grievant alleges that policy was misapplied during the selection process for the Assistant Superintendent position. 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] 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.[6]

The grievant asserts that the agency's selection panel misapplied policy during this process by 1) ignoring his qualifications for the job in rendering its determination of those candidates that would proceed to the second interview, 2) failing to fully complete evaluation forms and notes, 3) asking questions irrelevant to determining if the candidates had the requisite knowledge, skills, and abilities, 4) allotting only fifteen minutes per interview, and 5) failing to fully train agency staff on best practices for serving on an interview panel. Following an investigation, the agency's second step-respondent concluded that, while several elements in the selection process could be improved, such as "training, evaluation documentation, question design, and interview duration," that alone does not constitute a misapplication of policy that would taint the interview process. For the reasons outlined below, we agree.

Of the nine candidates interviewed during the first round of the selection process, three were chosen to proceed to a second interview. All three candidates chosen had been recommended unanimously by the panel. In contrast, the grievant had been recommended by only two out of three members of the panel. The grievant alleges that the panel member who did not recommend him recorded different answers from the other two panel members in her notes

[3] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[4] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[5] *See* Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.
[6] *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." *Id.*

regarding the grievant, and appears to have ignored his qualifications as outlined on his state application for the position. He asserts that the notes for one question in particular reference a comment allegedly made by the grievant about a calendar looking "like a Christmas tree," and disputes that he made such a statement during the interview.

In reviewing the selection panel's notes regarding the grievant's interview, we cannot agree that the notes of the panel member who did not recommend the grievant varied significantly from those of the other members. Many commonalities exist between the notes of all three panel members, such as the recording of the titles of many publications the grievant referenced in answering questions, as well as specific key phrases utilized by the grievant in responding to questions, such as "experience," "delegation," and "audit and investigation." With respect to the question where one panel member noted the grievant's response as stating that his "calendar already looks like a Christmas tree," the grievant is correct that only the one panel member recorded that particular phrase. However, all panel members recorded other similarities in this particular response, such as noting that the grievant stated he would rely on delegation, maintain communication, and stay current with training.

Further, the notes recorded by the panel appear to reflect a good faith consideration of the relative merits of all candidates interviewed. Factors noted by the panel as weighing in favor of the candidates advancing to the second round included comments such as "a high level of undersanding and competency," and "a firm grasp of the position and would be able to work independently," and consistently recorded the skills and abilities of the advancing candidates as "above average," "outstanding" or "exceptional." In contrast, one panel member wrote that the grievant possessed only basic skills and abilities, as well as limited exposure to the complexities of the position; another recorded only that the grievant had "some good responses" regarding his skills and abilities. While it does appear that one panel member formulated a different opinion from the other two panel members regarding the grievant's ability to do the job, this fact alone is not sufficient to raise a sufficient question as to whether the decision of the selection panel was arbitrary or capricious.

"Arbitrary or capricious" means that management made a decision without regard to the facts, by pure will or whim, one that no reasonable person could make after considering all available evidence. If a selection is fairly debatable (meaning that reasonable persons could draw different conclusions), it is not arbitrary or capricious. As the grievance procedure accords much deference to management's exercise of judgment, including management's assessment of applicants during a selection process, EDR will not second-guess management's decisions regarding the administration of its procedures absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.

The grievant further argues that the manner in which the interviews were conducted constitutes a misapplication of policy, specifically, by the panel members' failing to fully complete evaluation forms and notes, asking irrelevant questions during the interview, allotting only fifteen minutes per interview, and undergoing only basic levels of training regarding best practices in serving on an interview panel. A review of the interview panel's notes for all

candidates shows that the grievant is correct in his assertion that the evaluation forms are incomplete for all candidates insofar as the panel members did not consistently check the ratings boxes for each answer provided by the applicants in responses to questions asked by the panel. However, we are unable to find where the failure to do so constitutes a misapplication of a mandatory policy provision, when the panel's notes on the candidates' responses are otherwise detailed and complete. Likewise, providing a longer timeframe for interviews and more detailed training for staff participating on a panel may be a best practice, but we are unable to find where a misapplication of a mandatory policy provision has occurred based on the facts presented here. Finally, with respect to the relevancy of questions asked of the candidates, this question is a subjective one, and one to which management's approach should be accorded a great degree of deference. EDR will not second-guess management's decisions regarding the administration of its procedures absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.

While the grievant may disagree with the panel's assessments, he has presented insufficient evidence to suggest that the agency's selection decision disregarded the facts or was otherwise arbitrary or capricious. Indeed, in reviewing the panel's interview notes for all nine candidates, EDR can find nothing to indicate that the grievant was so clearly a better candidate that the selection of the three applicants to advance to a second round of interviews disregarded the facts. Rather, it appears the agency based its decision on a good faith assessment of the relative qualities of all candidates. As such, the grievance does not qualify for hearing on the basis of a misapplication of policy.

Discrimination

Grievances that may be qualified for a hearing also include actions that occurred due to discrimination on the grounds of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, disability, or veteran status.[7] For a claim of race discrimination in the hiring or selection context to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, an employee must present evidence raising a sufficient question as to whether he: (1) was a member of a protected class;[8] (2) applied for an open position; (3) was qualified for the position; and (4) was denied promotion under circumstances that create an inference of unlawful discrimination.[9] 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 evidence that raises a sufficient question as to whether the agency's stated reason was merely a pretext or excuse for race discrimination.

Here, the grievant states that he feels he is being discriminated against for a reason of which he is unaware. However, he has presented no facts that indicate discrimination on any of the bases protected by law, policy, or Executive Order. Consequently, the grievant has not shown evidence sufficient to raise a question as to whether discrimination has occurred. An

[7] *See, e.g.*, Executive Order 1, *Equal Opportunity* (2014); DHRM Policy2.05, *Equal Employment Opportunity*.
[8] *See* DHRM Policy 2.05, *Equal Employment Opportunity.*
[9] *See* EEOC v. Sears Roebuck & Co., 243 F.3d 846, 851 (4th Cir. 2001); EDR Ruling Nos. 2010-2436, 2010-2484.

allegation of discrimination, without more, is not appropriate for adjudication by a hearing officer. Therefore, the grievance does not qualify for hearing on that basis.

EDR's qualification rulings are final and nonappealable.[10]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[10] Va. Code § 2.2-1202.1(5).