

Issues: Qualification – Management Actions (Recruitment/Selection) and Discrimination (Other); Ruling Date; April 29, 2014; Ruling No. 2014-3839; 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 2014-3839
April 29, 2014

The grievant has requested a ruling on whether his January 22, 2014 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 January 22, 2014 grievance to challenge the agency's selection process for an Institution Superintendent position in which he competed unsuccessfully. In this instance, the selection process consisted of two rounds of interviews, each with a different panel of interviewers. 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. Following the initial round of interviews, the grievant and four other individuals were selected to proceed to the second round of interviews. One finalist was selected for a job offer out of the five applicants interviewing in the second round; however, the grievant was not chosen as the finalist.

The grievant argues that the agency misapplied various hiring policies during this process, and contends that he was better qualified than the successful candidate. He also argues that agency engaged in discrimination against him, and preselected the successful candidate for this position. The agency disputes the grievant's claims, and indicates that the grievant's allegations are unsubstantiated.

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

¹ Va. Code §§ 2.2-3004(A), (C); *Grievance Procedure Manual* §§ 4.1(b), (c).

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 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 Institution 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 misapplied policy by pre-selecting, as the successful candidate for the position, an individual who was less qualified than he and not the best suited applicant for the position. In support of his claim of pre-selection, the grievant asserts that the successful candidate was bragging that he was going to be promoted to this position several months before the interviews occurred. Following an investigation, the agency’s third step-respondent did not find sufficient evidence to support the grievant’s claims and indicated that, while all of the candidates selected for interviews possessed the required knowledge, skills, and abilities, the candidate selected best complemented the agency’s needs, goals, and mission.

EDR’s review of the relevant documentation does not reveal evidence that would support the grievant’s assertion that the successful applicant was pre-selected, without regard to merit or suitability, for the Superintendent position. Of the fourteen candidates interviewed during the first round of the selection process, five proceeded to a second interview, including the grievant.

² See *Grievance Procedure Manual* § 4.1(b).

³ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁴ *Holland v. Washington 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.”

The interview panel for the second round of interviews consisted of the regional administrator and regional operations chief for the hiring facility. Both panel members recorded notes for all candidates detailing the candidates' responses to a standardized set of questions, and also completed an "Applicant Evaluation" for each candidate. The notes recorded by the panel appear to reflect a good faith consideration of the relative merits of all candidates interviewed.

Based upon the notes for all candidates in the second round of interviews, it appears that the agency was presented with a number of highly qualified candidates for this position. Indeed, one panel member appears to have noted "Recommend" for each candidate interviewing in the second round. Attributes noted by the panel as weighing in favor of the successful candidate included comments such as "very strong job knowledge," "extremely articulate," and "true leadership responses." Both panel members consistently noted his experience at multiple facilities. In contrast, one panel member wrote that the grievant possessed the "basic job knowledge" and "necessary KSAs," and did well on "most" questions. Even assuming as true the grievant's claim that the successful candidate was boasting about being promoted to this position before the interviews occurred, 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 panel members' failure to fully complete evaluation forms and notes constitutes a misapplication of policy. 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, and one panel member failed to consistently check the "Recommend" or "Do Not Recommend" box on the Applicant Evaluation. 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.

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 candidates in the second round of interviews, EDR can find nothing to indicate that the grievant was so clearly a better candidate that the selection of the finalist for this position 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 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 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 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

⁷ See, e.g., Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *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 No. 2010-2436. 2010-2484.

¹⁰ Va. Code § 2.2-1202.1(5).