

Issues: Qualification – Management Actions (Recruitment/Selection), and
Discrimination (Other); Ruling Date: March 18, 2015; Ruling No. 2015-4098;
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 2015-4098
March 18, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether his November 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 November 22, 2014 grievance to challenge the agency’s selection process for two Corrections Lieutenant positions.¹ He asserts that the agency preselected a candidate chosen for one of the two positions, failed to apply state policy correctly regarding veterans, and otherwise failed to comply with applicable policies during the selection procedure. He also asserts that the agency has discriminated against him based on his veteran status. The agency head denied the grievant’s request for qualification of his grievance for hearing, and he 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.²

Misapplication and/or 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

¹ To the extent the grievant argues that the agency has been noncompliant during the grievance procedure, those claims were required to be raised through the process set forth in § 6.3 of the *Grievance Procedure Manual*. As the grievance has now advanced to the qualification stage, any claims of noncompliance during the management resolution steps are now waived.

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

ascertain which candidate is best suited for the position, not just to determine who might be qualified to perform the duties of the position.³ Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.⁴

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.⁵

Pre-Selection

The grievant appears to allege that the agency misapplied policy by pre-selecting one of the two selected candidates. In support of his claim of pre-selection, the grievant asserts that although he and several other candidates were unable to answer one of the interview questions, another candidate was advised of the answer during the interview and given a second chance to answer the question. Following an investigation, the agency's second step-respondent did not find sufficient evidence to support the grievant's claims, concluding that although the successful candidate was advised of the correct answer, both panel members noted that he had been unable to answer the question.

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. Although it appears undisputed that the successful candidate was advised of the answer, there is no evidence to support the grievant's apparent contention that the successful candidate was improperly given credit for answering the question properly and/or that the successful candidate's answer was a favorable factor in his being selected.

The grievant also appears to assert that, by allegedly giving the successful candidate a second opportunity to answer the question, the agency violated Section B(1)(e) of DHRM Policy 2.10, *Hiring*, which requires that all candidates be asked the same set of questions. Assuming, for the purposes of this ruling only, that the successful candidate was allowed a second opportunity to respond to the question, such an action does not serve as a basis for qualification of this grievance for hearing. First, the interview notes reflect that the successful candidate did not receive credit for correctly answering the question at issue. Further, there does not appear to have been any adverse impact on the grievant as a result of the panel members' actions toward the successful candidate. During the course of EDR's investigation, the agency stated that,

³ See DHRM Policy 2.10, *Hiring*.

⁴ Va. Code § 2.2-2901(A) ("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)).

⁵ See *Grievance Procedure Manual* § 9 (defining "arbitrary or capricious" as a decision made "[i]n disregard of the facts or without a reasoned basis)."

notwithstanding the interview results, the primary basis for the grievant's non-selection for the lieutenant position was that the grievant has an active Written Notice. As the grievant has presented no evidence that would call into question the agency's discretion regarding this decision, any failure to comply with policy regarding the interview question does not give rise to a basis for qualifying this grievance for a hearing.

Veteran Status

The grievant also asserts that the agency failed to give him the appropriate preference for his veteran status during the hiring process. Specifically, he asserts that the agency's "deliberate and purposeful refusal to recognize the advantage of the grievant[']s service as required by Code and policy denied the grievant a practical advantage in the competitive process."

DHRM Policy 2.10, *Hiring*, provides that: "[c]onsistent with the requirements of the [Virginia] Code [Sections] 2.2-2903 and 15.2-1509, the veteran's military service shall be taken into consideration by the Commonwealth during the selection process, provided that such veteran meets all of the knowledge, skill, and ability requirements for the available position. Additional consideration shall also be given to veterans who have a service-connected disability rating fixed by the United States Veterans Administration."⁶ DHRM has provided policy guidance as to the application of this "veteran's preference." In pertinent part, the policy guide states:

In accordance with the Code of Virginia, which requires that state agencies give preference in the hiring process to veterans . . . the following is provided to guide agencies' application of the Veterans Preference provision of the Commonwealth's Hiring Policy.

....

Initial screening: Applicants are screened to identify those who meet the minimum requirements for the position – the equivalent of achieving a passing score on a test. No preference is given. Applicants must meet the required criteria at a minimum or better level on their own.

Preference applied after initial screening phase: After the initial screening, veteran status is noted for the candidates. The state application provides

⁶ DHRM Policy 2.10, *Hiring*, § B(1)(b). The Glossary of DHRM Policy 2.10, *Hiring*, defines a "veteran" as "[a]ny person who has received an honorable discharge and has (i) provided more than 180 consecutive days of full-time, active-duty service in the armed forces of the United States or reserve components thereof, including the National Guard, or (ii) has a service-connected disability rating fixed by the United States Department of Veterans Affairs." Virginia Code Section 2.2-2903(B) states that, "[i]n a manner consistent with federal and state law, if any veteran . . . applies for employment with the Commonwealth that is not based on the passing of any examination, the veteran . . . shall be given preference by the Commonwealth during the selection process, provided that the veteran . . . meets all of the knowledge, skill, and ability requirements for the available position."

preliminary notice of veteran status; the agency may need to follow up to identify the exact status of veteran applicants. At this stage, preference shall be given by treating veteran status as a preferred qualification. Further preference shall be given if the veteran applicant also has a service-connected disability rating by treating the veteran's disabled status as a second preferred qualification. Adding a preferred qualification criterion for veteran status and, if applicable, a second preferred criterion for disabled veteran status will therefore result in the veteran applicant and the disabled veteran applicant receiving the additional preference required by Code.

The additional credit for veteran, or disabled veteran status, remains with the applicant throughout the hiring process, and ultimately becomes a part of the hiring manager's final decision. This process is comparable to how preference or credit is applied in situations where scored examinations are used. For example, applicants take a scored examination *one time*, and applicants who are veterans receive the additional points *one time*. Those points, like our credit for having a preferred qualification, remain with the applicants throughout the process.⁷

This policy language and guidance only require an agency to consider the preferred qualification of veteran status and/or a veteran's service-connected disabled status during screening for interviews.⁸ In this case, the grievant was interviewed for the lieutenant position. Contrary to the grievant's assertions, DHRM Policy 2.10, *Hiring* does not require the agency to have considered his veteran status at any point other than screening for interviews. As the grievant was screened in for an interview, the agency cannot be found to have failed to provide the veteran's preference as set forth in state policy.

Other Alleged Policy Violations

The grievant also asserts that two interview panel members violated policy by failing to complete his interview evaluation forms, and that one of the panel members improperly shared information regarding the interview with one or more of his co-workers. A review of the interview panel's notes for the grievant shows that he is correct in his assertion that the evaluation forms are incomplete. However, we are unable to find where the failure to complete all parts of an evaluation form constitutes a misapplication of a mandatory policy provision, when the panel's notes on the candidate's responses are otherwise detailed and complete.⁹

It appears the grievant may be correct that a panel member shared some information regarding the content of interviews with a co-worker.¹⁰ However, even if EDR were to assume

⁷ The Policy Guide on Veteran's Preference for hiring is available at <http://www.dhrm.virginia.gov/docs/default-source/hrpolicy/policyguides/veteranpreferencepolicyguide.pdf?sfvrsn=2>.

⁸ See, e.g., EDR Ruling Nos. 2010-2502, 2010-2553.

⁹ See EDR Ruling 2014-3839.

¹⁰ In its second step response, the agency admits that "a general conversation stating 'everyone missed that question'" occurred between a panel member and another employee. Although the agency asserts that no "confidential information about any one applicant" was disclosed, it nevertheless appears that the panel member in

this action to be a violation of policy, qualification would not be warranted on this basis, as there is no effective relief that could be granted by a hearing officer to remedy this action. EDR has recognized that, even if a grievance challenges a management action that might qualify for a hearing, there are some cases when qualification is inappropriate. For example, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In this case, the grievant appears to seek disciplinary action against the panel member and an increase in pay “to offset the continued loss and diminished opportunity” However, the *Grievance Procedure Manual* provides that a hearing officer does not have the authority to “[take] any adverse action against an employee,” except to uphold or reduce disciplinary action(s) challenged in a grievance.¹¹ Similarly, a hearing officer has no authority to award monetary damages.¹² As a result, even if the grievant’s challenge to the disclosure of confidential information qualified for a hearing, a hearing officer would be unable to grant any relief. Accordingly, for these reasons, the grievant’s claims of misapplication and/or unfair application of policy in the hiring process do not qualify for a hearing.

Discrimination

In addition, the grievant asserts that the agency has engaged in discrimination based on his veteran status. 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.¹³ 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.

The grievant has alleged membership in a protected class and established that he applied for two open positions. However, even if EDR were to assume the grievant was otherwise qualified for the positions, there is no evidence showing that the agency’s stated reason for its decision—the grievant’s active disciplinary action—was pretextual. As a result, we find that the grievance does not raise a sufficient question as to whether the agency engaged in discrimination based on the grievant’s veteran status, and the grievance does not qualify for a hearing on this basis.

effect advised another employee that the grievant (among other applicants) was unable to answer a particular question.

¹¹ *Grievance Procedure Manual* § 5.9(b).

¹² *Id.*

¹³ See *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 851 (4th Cir. 2001); EDR Ruling Nos. 2010-2436, 2010-2484.

CONCLUSION

For all the foregoing reasons, the grievant's request for qualification of his grievance for hearing is denied. EDR's qualification rulings are final and nonappealable.¹⁴



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¹⁴ Va. Code § 2.2-1202.1(5).