

Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: March 28, 2016; Ruling No. 2016-4312; 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 2016-4312  
March 28, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management on whether his December 8, 2015 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 8, 2015 grievance to challenge the agency's selection process for a Corrections Captain/Training Administrator 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 was 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 three other individuals were selected to proceed to the second round of interviews. One finalist was selected for a job offer out of the four applicants interviewing in the second round; however, the grievant was not chosen as the finalist.

The grievant contends that he was better qualified than the successful candidate and that the agency preselected the successful candidate for this position. He states that he was the only candidate with full certifications necessary for the position. The agency disputes the grievant's claims, and indicates that a combination of factors, including the necessity to balance training experience with operations experience, led to the selection of another candidate for this position.

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.<sup>1</sup> Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."<sup>2</sup> Thus, typically, a threshold question is whether the grievant has

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

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

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” as to this grievance in that it appears the position he applied for would have been a promotion.

In this case, the grievant essentially alleges that policy was misapplied during the selection process for the Corrections Captain/Training Administrator 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.<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>

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 talking about obtaining this position before the recruitment was advertised. To this, the agency’s second step-respondent indicated that, at one time, the facility’s Warden had spoken to the successful candidate regarding a possible transfer into the position. However, the position was advertised to ensure that the agency considered all qualified candidates for this role, and the candidate selected best suited the agency’s needs.

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 Corrections Captain/Training Administrator position. Of the candidates interviewed during the first round of the selection process, four proceeded to a second interview, including the grievant. The interview panel for the second round of interviews consisted of three different panelists, including the facility’s Warden. 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.

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<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) (citation omitted).

<sup>5</sup> See Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*; DOC Operating Procedure 170.1, *Recruitment, Selection, and Appointment*, § IV(A)(1).

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

Based upon a comparison of the notes for all candidates in the second round of interviews, it appears that both the grievant and the successful candidate were highly qualified for this position. Both applicants received ratings of “Recommend” for the position. Attributes noted by the panel as weighing in favor of the successful candidate included comments such as “very good communication skills,” “very capable, strong understanding” and “very qualified.” In contrast, one panel member wrote that the grievant “has the job knowledge” but “wasn’t consistent in answer[ing] all the question[s] with [the] same level of detail . . . definitely got better as the interview progressed.” 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.<sup>7</sup>

“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.

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 the successful candidate against the notes regarding the grievant’s interview, 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.

EDR’s qualification rulings are final and nonappealable.<sup>8</sup>



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Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

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<sup>7</sup> To the extent that the grievant argues he was the only candidate with full certifications necessary for the position, it appears there is disagreement among the panel as to whether special certifications are actually required for this position. The third step respondent addressed this issue, stating that “training certifications are preferred qualifications and not the required qualifications.” Thus, even assuming as true the grievant’s argument regarding his certifications, EDR’s analysis of this issue remains unchanged.

<sup>8</sup> Va. Code § 2.2-1202.1(5).