

Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: March 6, 2018; Ruling No. 2018-4675; Agency: Department of Game and Inland Fisheries; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Game and Inland Fisheries
Ruling Number 2018-4675
March 6, 2018

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) on whether his November 21, 2017 grievance with the Department of Game and Inland Fisheries (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant initiated his November 21, 2017 grievance to challenge the agency’s selection process for a total of four Lieutenant positions in which he competed unsuccessfully.¹ On October 31, 2017, he received interviews with two separate panels, one for an Academy Operations Manager position and one for three available Conservation Police Lieutenant positions. Following the initial round of interviews, the grievant was not selected to proceed to the second round of interviews for any of the positions. In the November 21, 2017 grievance, the grievant argues that the agency misapplied hiring policy during the selection process. After proceeding through the management resolution steps, the agency head denied the grievant’s request for qualification of his grievance for hearing, and he now appeals that decision to EEDR.²

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.³ Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve

¹ The grievant applied for two job postings, Academy Operations Manager and Conservation Police Lieutenant, from which a total of four Lieutenant positions would be filled.

² To the extent that the grievant also argues that the agency did not comply with the time requirements in the grievance procedure for rendering its third step response, EEDR notes that any noncompliance as to timeliness of response has been remedied, and thus, any claim of noncompliance at the third resolution step is now moot.

³ Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

“adverse employment actions.”⁴ Thus, typically, the 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.”⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁶ For purposes of this ruling only, we will assume that the grievant’s non-selection constitutes an adverse employment action in that his selection for any of the Lieutenant positions would have been a promotion.

The grievant asserts that the agency misapplied and/or unfairly applied policy during the recruitments for each Lieutenant 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.⁷ Further, it is the Commonwealth’s policy that hiring and promotions be competitive and based on merit and fitness.⁸ 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.⁹

The grievant asserts that the agency misapplied policy by allowing a Major, the majority of the candidates’ direct supervisor, to serve on the first interview panel. The agency policy states that “[t]he appointing authority, immediate supervisor, or anyone in the direct line of supervision will not be members of the first panel.”¹⁰ The grievant states that this provision prohibited the Major from being on the interview panel. In response, the agency asserts that its hiring policy also provides its Executive Director the authority to deviate from its provisions, if necessary, which occurred in this instance due to lack of suitable subject matter experts to participate on the panels. Given the policy itself grants the Executive Director the authority to deviate from the provisions of the policy, EEDR cannot find that the agency has misapplied or unfairly applied the agency policy in this instance where the Executive Director approved of the

⁴ See *Grievance Procedure Manual* § 4.1(b).

⁵ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁷ See DHRM Policy No. 2.10, *Hiring*.

⁸ Va. Code § 2.2-2901 (“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)).

⁹ 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.”)

¹⁰ DGIF Recruitment Policy at 11.

panel. Importantly, the panel membership challenged by the grievant was permissible under state policy.¹¹ Furthermore, during the course of its investigation, EEDR has reviewed the interview materials prepared by the agency, including interview notes and interview summaries. From this review, there is nothing apparent from the panel's assessment of the candidates' performance at the interviews to indicate that the selection process as a whole was conducted in a manner that resulted in an unfair or inaccurate assessment of the grievant's qualifications and suitability for either position at issue.

DHRM Policy 2.10, *Hiring*, provides that “[a] set of interview questions must be developed and asked of each applicant” who is interviewed, that those “[q]uestions should seek information related to the applicant’s knowledge, skills, and ability to perform the job,” and that “[i]nterviewers must document applicants’ responses to questions to assist with their evaluation of each candidate’s qualifications.”¹² In this case, after interviews by the first panel, the grievant was not recommended for a second interview for any of the available positions. EEDR has thoroughly reviewed the grievance information, including the interview notes made by each panel. The grievant was rated as “Recommend with Reservation” for the Academy Lieutenant position, and “Do Not Recommend” for the Region Lieutenant positions. In contrast, all of the candidates that received a second interview were rated “Recommend Highly” or “Recommend Very Highly.” It was noted by the panel that the grievant’s “[r]esponses lacked depth, thoroughness, and demonstrated experience,” while other applicants provided “[i]nnovative and analytical responses” and “thorough responses that met and exceeded expectations of elements sought in interview questions.”

DHRM Policy 2.10, *Hiring*, is designed to ascertain the candidate best suited for the position, not just to determine who might be qualified to perform the duties of the position. Agency decision-makers deserve appropriate deference in making determinations regarding a candidate’s knowledge, skills, and abilities. As a result, EEDR 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. EEDR has not reviewed any information to suggest that may have been the case here, or that the selection of the successful candidate was anything other than a reasonable exercise of discretion based on a good faith assessment of which of the candidates was most suitable for the position based on their performance at the interview.

Although the grievant may reasonably disagree with the panel’s decision not to select him, EEDR has reviewed nothing that would suggest the agency’s determination disregarded the pertinent facts or was otherwise arbitrary or capricious. Likewise, EEDR has reviewed no information to suggest that the grievant was not selected for an improper reason or that the panel members failed to follow the provisions of DHRM Policy 2.10, *Hiring*, in evaluating the grievant’s suitability for the position. In reviewing the panel’s interview notes for the grievant and the successful candidates, EEDR can find nothing to indicate that the grievant was so clearly a better candidate that the selection of the successful candidates disregarded the facts or was

¹¹ See DHRM Policy 2.10, *Hiring*.

¹² *Id.* § B(1)(e).

motivated by anything other than a good faith assessment of the candidates based on their performance at the interviews. EEDR has reviewed nothing that would suggest the agency's selection process, as a whole, violated any mandatory policy or disregarded the intent of policy, for any of the positions for which the grievant applied. Accordingly, the 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.

CONCLUSION

For the foregoing reasons, the grievant's request for qualification of his grievance for hearing is denied. EEDR's qualification rulings are final and nonappealable.¹³



Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

¹³ Va. Code § 2.2-1202.1(5).