

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: February 20, 2019; Ruling No. 2019-4847; Agency: Department of Corrections; 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 Corrections
Ruling Number 2019-4847
February 20, 2019

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 her December 4, 2018 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 her December 4, 2018 grievance to challenge the agency’s selection process for a Grievance Coordinator position in which she competed unsuccessfully. While she was selected for a final interview, another candidate was ultimately selected for the position. In the December 4, 2018 grievance, the grievant argues that she was better qualified, having performed grievance duties in the past unlike the selected candidate. She also alleges that the selected candidate is a friend of the hiring manager. The grievant has additionally asserted a discriminatory basis (race and/or age) for the hiring decision. After proceeding through the management resolution steps, the agency head denied the grievant’s request for qualification of his grievance for hearing, and she now appeals that decision to EEDR.

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.¹ The grievant’s claims will be analyzed both as an allegation of misapplication of policy and discrimination.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”² 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.”³ Adverse employment

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

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

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

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, we will assume that the grievant's non-selection constitutes an adverse employment action.

Misapplication and/or Unfair Application of Policy

The grievant asserts that the agency misapplied and/or unfairly applied policy during the recruitment for the Grievance Coordinator 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 Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.⁶ 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.⁷

During the course of its investigation, EEDR has reviewed the interview materials prepared by the agency, including interview notes and interview summaries for the grievant and the selected candidate. 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 the position at issue. It appears that both the grievant and the selected candidate were rated well and recommended for the position. The hiring panel ultimately chose the selected candidate unanimously for the position. The panel's basis for this determination was the candidates' respective responses to interview questions and, principally, the candidates' respective demonstration of their abilities to work with others and accept guidance or supervision.

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

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

⁵ See DHRM Policy No. 2.10, *Hiring*.

⁶ 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)).

⁷ 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").

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. 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.

Discrimination

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) she was a member of a protected class; (2) she applied for an open position; (3) she was qualified for the position, and (4) she was denied the position under circumstances that create an inference of unlawful discrimination.⁸ 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.

Here, the information reviewed fails to raise a sufficient question that the grievant was denied the Grievance Coordinator position under circumstances that create an inference of unlawful discrimination. While the grievant may disagree with the panel's assessment of her interview and qualifications, this disagreement alone does not render that selection decision discriminatory. It appears that both candidates were rated positively by the panel and recommended for the position. The panel, however, unanimously chose the selected candidate based on their respective interview responses. The simple fact that the person selected may have been of a different race and age than the grievant does not, without more, indicate pretext sufficient to overcome the agency's legitimate non-discriminatory reasons for its selection decision. Here, there is insufficient evidence that the agency failed to select the grievant for the position because of her race or age. An allegation of discrimination, without more, is not appropriate for adjudication by a hearing officer.

CONCLUSION

For the foregoing reasons, the grievant's request for qualification of her grievance for hearing is denied. EEDR's qualification rulings are final and nonappealable.⁹



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⁸ See EEOC v. Sears Roebuck & Co., 243 F.3d 846, 851 (4th Cir. 2001); EDR Ruling Nos. 2010-2436, 2010-2484.

⁹ Va. Code § 2.2-1202.1(5).