

Issues: Qualification – Management Actions (recruitment/selection) and Retaliation (other protected right); Ruling Date: July 24, 2013; Ruling No. 2014-3648; Agency: Department of State Police; 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 State Police
Ruling Number 2014-3648
July 24, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) on whether his May 29, 2013 grievance with the Department of State Police (“agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed by the agency as a special agent. On or about March 12, 2013, the grievant applied for an open special agent position in another geographic area. The grievant was interviewed for the position but was not selected. The individual selected for the position, as well as the other candidates interviewed, were employed in ranks lower than special agent.

On May 29, 2013, the grievant initiated a grievance to challenge his non-selection. After the agency head failed to qualify the grievance for hearing, the grievant appealed to EDR. The grievant asserts that the agency failed to follow its internal policies regarding transfer to a special agent position, improperly designated to the hiring committee a supervisor biased against him, and failed to select the candidate with the best knowledge, skills, and abilities. The agency disputes the grievant’s claims and states that it properly followed policy in selecting the best-suited candidate.

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

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

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

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,” in that it appears the position he applied for could have resulted in higher pay.

Failure to Follow Policy Regarding Transfer

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. In this case, the grievant alleges that the agency misapplied and/or unfairly applied General Order ADM 8.02 § 9(b) in denying him transfer into the open special agent position. He asserts that the agency failed to post the position for transfer as required by the policy, and that the agency allowed another agent in similar circumstances to transfer without having to engage in a competitive process. Each of these arguments is considered below.

i. Posting

The grievant first argues that the agency was required by General Order ADM 8.02, *Promotion to Special Agent*, to post the vacant special agent position for transfer prior to advertising the position to candidates seeking a promotion. Specifically, he alleges that he should not have been required to submit an application for the position and engage in the competitive selection process with candidates seeking promotion, but instead have been allowed to transfer into the vacant position.

The policy provision at issue provides that:

Prior to advertising the promotional opportunity [to special agent], the Human Resource Director will advertise the vacant special agent position Department-wide, for personnel eligible for transfer who wish to apply. Applications for transfer received on or after the date of the written promotional announcement will not be given consideration. In the event there are less than five applicants for transfer, eligible personnel on the current year’s Promotional List may also apply for the vacant position.⁵

The grievant apparently interprets this provision to require that the position first have been posted to allow for transfer through a non-competitive appointment process. In contrast,

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 General Order ADM 8.02 § 9(b), *Promotion to Special Agent*, effective 11/1/2010 (emphasis in original). This policy was subsequently revised on July 1, 2013.

the agency interprets this provision, in the context of the larger policy, to provide that a vacant special agent position is advertised to personnel eligible for transfer, who may then apply through the submission of a Qualification Summary Sheet.⁶ The candidate seeking transfer to the vacant position is then added to the pool of candidates to be interviewed for the position.

EDR is persuaded by the agency's interpretation of its policy. It appears that the intent of the policy is to allow special agents who have not previously sought transfer to a vacant position through the transfer process described in General Order ADM 6.0, *Transfers and Assignments*, to nevertheless apply for a vacant position and automatically be granted an interview. There is no evidence that the policy is intended or has been applied to allow candidates who have not previously submitted a letter for transfer for a position to do so once a position is internally posted.

An agency's interpretation of its own policies is generally afforded great deference. EDR has previously held that where the plain language of an agency policy is capable of more than one interpretation, the agency's interpretation of its own policy should be given substantial deference *unless* the agency's interpretation is clearly erroneous or inconsistent with the express language of the policy.⁷ In reviewing the agency policies we cannot find that the agency has made an erroneous interpretation. Indeed, we agree with the agency's assessment, which appears to be consistent with the policy language. Accordingly, this claim is not qualified for hearing.

ii. Unfair Application of Policy

The grievant further argues that the agency has unfairly applied General Order ADM 8.02. In particular, the grievant alleges that the agency allowed Special Agent A to transfer into a vacant position without either previously requesting transfer under the process set forth in General Order ADM 6.0 or going through a competitive selection process. According to the grievant, Special Agent A was granted a transfer to another special agent position without satisfying the requirements of General Order ADM 8.02 at a time that Special Agent A had an active grievance against the agency and had initiated complaints regarding a "pattern of harassment" by Supervisor W.

For this claim to qualify for hearing, the grievant must present sufficient evidence that the agency's action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. The grievant has failed to make this showing. While he asserts that the agency has treated him in a manner inconsistent with the manner in which it treated Special Agent A, the facts alleged by the grievant indicate that Special Agent A was not, in fact, similarly situated to the grievant. The grievant identifies a single complaint he had lodged in March 2012, more than a year earlier, against his supervisor for a dispute regarding the

⁶ The grievant also argues that the agency erred by not giving him notice of the position through a posting or other internal advertisement. This issue is moot in light of EDR's finding that the agency appropriately interpreted policy to require the grievant to go through a competitive interview process. It is undisputed that the grievant learned of the position in sufficient time to submit a Qualification Summary Sheet and in fact was then interviewed in accordance with policy.

⁷ See, e.g., EDR Ruling No. 2008-1956, 2008-1959.

grievant's participation in a party and gift for a transferring co-worker.⁸ In contrast, Special Agent A apparently had an active grievance pending against the agency at the time he was transferred and had alleged an ongoing pattern of harassment by his supervisor so extreme it had "led [Special Agent A] to believe he could no longer work under [Supervisor W]."⁹ Under these circumstances, we cannot conclude that the agency was so inconsistent in its application of General Order ADM 8.02 so as to constitute an unfair application of policy.

Composition of Hiring Committee

The grievant also argues that the agency erred by including Supervisor W on the hiring committee, as the grievant had previously initiated a complaint against that supervisor. The grievant has not identified any specific policy provision that would preclude a member of management from serving on a hiring panel where a candidate has previously initiated a complaint against that individual. As such, the grievant has failed to raise a sufficient question of a misapplication for qualification of his claim on this basis.

Misapplication of Hiring 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.¹⁰ Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.¹¹ 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

⁸ In a submission to EDR made in response to the agency head's denial of qualification, the grievant argues that in addition to those issues raised in his grievance, Supervisor W had interfered with his attempts to obtain outside employment by making "unreasonable and unnecessary demands that were in violation of the regulations outlined in the state police manual." This claim will not be considered independently in this ruling, as additional claims may not be added once a grievance had been submitted. *Grievance Procedure Manual* § 2.4. Further, while this issue may be considered as background evidence to the claims made in the May 29, 2013 grievance, the grievant has failed to provide sufficient information about the nature of this alleged conduct by his supervisor, such as the dates of the alleged conduct or any specific information regarding the supervisor's alleged demands.

⁹ The second-step respondent advised the grievant that while he could not talk about "the particulars" about Special Agent A's transfer, that transfer involved "unique circumstances" and "promotional opportunity considerations, posting/posting cancellations, SP-088s, on file or lack thereof and a re-posting, all of which had no adverse affect [sic] on any employee at the time...." Although the grievant challenges the agency's contention that there was no adverse effect because two troopers allegedly applied for promotion to the position to which Special Agent A transferred, this alone does not, under the circumstances otherwise apparently present in Special Agent A's situation, render the agency's application of General Order ADM 8.02 to the grievant unfair.

¹⁰ See Department of Human Resource Management Policy No. 2.10, *Hiring*.

¹¹ 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).

inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.¹²

The grievant asserts, in effect, that since he was the only candidate interviewed who had experience as a special agent, he was the candidate with the best knowledge, skills and abilities for the position. As such, he contends, the hiring committee misapplied policy when it selected another candidate for the position. A review of the hiring committee's recommendations indicates that in making its selection, the hiring committee considered the successful candidate's "very professional" presentation during the interview and his "outstanding interpersonal skills," as well as how his training and work experiences had prepared him. In contrast, committee members found that the grievant gave answers that were "brief, repetitive and often prefaced with catch phrases." In addition, they found that his responses did not "exemplify his experience as a veteran [] investigator," and that while he had the experience and training, "he lacked the necessary detail in his answers and failed to capitalize on his knowledge, skills, and abilities." These concerns were apparently shared by all committee members.

Although the grievant may disagree with the committee's assessment, EDR has reviewed nothing that would suggest the agency's determination was the result of preselection, disregarded the pertinent facts or was otherwise arbitrary or capricious. To the contrary, it appears that the selection was based on a reasoned analysis of the applicants' knowledge, skills and abilities. Agency decision-makers deserve appropriate deference in making such determinations. Therefore, the grievant's claim of misapplication and/or unfair application of policy in the hiring process does not qualify for a hearing.

Retaliation

Finally, the grievant also asserts that his non-selection was the result of retaliation by the chair of the hiring committee, Supervisor W. For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;¹³ (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.¹⁴ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹⁵

The grievant alleges that because he was the candidate with the best knowledge, skills, and abilities, his non-selection is evidence of retaliation against him by the hiring committee

¹² 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").

¹³ See Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

¹⁴ See, e.g., *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005).

¹⁵ See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255, n.10 (1981).

chairman for a previous complaint by the grievant. Initiating an internal complaint against a member of management is protected conduct.¹⁶ However, the grievance does not raise a sufficient question as to whether a causal link exists between the grievant's protected activity and his non-selection. He has not presented any evidence that would suggest that the hiring panel considered his previous complaint in rating him less favorably than the selected candidate. Further, EDR's review of the interview materials does not support the grievant's claim that his non-selection was the result of retaliation. Because the grievance does not raise a sufficient question as to the elements of a claim of retaliation, this claim does not qualify for a hearing.

CONCLUSION

For all the foregoing reasons, the grievant's May 29, 2013 grievance does not qualify for hearing. EDR's qualification rulings are final and nonappealable.¹⁷



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¹⁶ See Va. Code § 2.2-3000.

¹⁷ Va. Code § 2.2-1202.1(5).