

Issues: Qualification – Management Actions (recruitment/selection), and Retaliation (Other Protected Right); Ruling Date: October 1, 2013; Ruling No. 2014-3693; 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 2013-3693
October 1, 2013

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 March 22, 2013 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 March 22, 2013 grievance to challenge the agency’s selection process for a Corrections Sergeant position.¹ He asserts that the decision not to grant him a second interview for the position was ongoing retaliation for a previous incident for which he was verbally counseled and given a due process notice. 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 In this case, the grievance has effectively raised claims of misapplication or unfair application of policy and retaliation.

Misapplication and/or Unfair Application of Policy: Selection

Fairly read, the grievance asserts that the agency misapplied and/or unfairly applied policy by denying him a second interview for the Corrections Sergeant position. For an

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).

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.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

Here, the grievant argues that he was not selected for a second interview in retaliation for an incident for which he was counseled and issued a due process notice. The agency states that the grievant was not selected because there was an ongoing investigation regarding the prior incident and potential disciplinary action. Although the grievant may disagree with the agency's decision to take the previous incident and ongoing investigation into consideration during the selection process, the decision was well within the agency's discretion in determining the best suited candidate for the position. Agency decision-makers deserve appropriate deference in making such determinations. The grievant has not presented any indication that the agency's actions were inconsistent with its actions in similar cases or that the assessment was otherwise arbitrary or capricious. Therefore, the grievant's claim of misapplication and/or unfair application of policy in the hiring process does not qualify for a hearing.

Retaliation

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;⁶ (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.⁷ Evidence establishing a

³ See (DHRM) Policy 2.10, *Hiring*.

⁴ Va. Code § 2.2-2901 (stating, in part, that "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 (arbitrary or capricious is defined as a decision made "[i]n disregard of the facts or without a reasoned basis)."

⁶ See Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

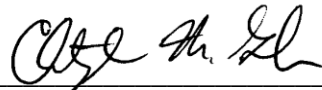
⁷ See, e.g., *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005).

causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.⁸

In this case, it not clear that the grievant's claim of retaliation is based on his having engaged in a protected activity.⁹ Assuming, for the purpose of this ruling only, that the grievant did in fact engage in protected activity, the agency has provided a legitimate business reason for its decision not to advance the grievant to a second interview—the ongoing investigation and potential disciplinary action against him. The grievant has failed to present sufficient indication that this reason was a mere pretext for an improper motive. Accordingly, his claim of retaliation is not qualified for hearing.

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.¹⁰



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⁸ See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n. 10 (1981).

⁹ See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: “participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.” *Grievance Procedure Manual* § 4.1(b).

¹⁰ Va. Code § 2.2-1202.1(5).