

Issues: Qualification – Management Actions (recruitment/selection) and Discrimination (sex/sexual harassment); Ruling Date: July 7, 2014; Ruling No. 2014-3899; 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 2014-3899
July 7, 2014

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 February 26, 2014 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency at Facility A as a Corrections Lieutenant. His wife is employed by the agency as the Human Resource Officer (“HRO”) at Facility B. The grievant applied for two positions at Facility B, one as a Unit Manager and the other as a Corrections Captain.

The grievant was selected for a first-round interview for a Unit Manager position at Facility B. He was recommended for a second interview by the interview panel. Several days later, the grievant was notified by the agency that the appointing authority at Facility B had removed him from the list of candidates who had been selected for a second interview. The agency explained that the Unit Manager position would require the grievant to serve as Facility B’s duty officer on a rotational schedule. When acting as the duty officer, the grievant would have been in a supervisory position over his wife, Facility B’s HRO. The agency stated that this would be a violation of policy and that, as a result, he could not be promoted to the Unit Manager position.

Shortly thereafter, the grievant participated in the first-round interview for a Corrections Captain position at Facility B. He was recommended for a second interview by the interview panel and participated in the second interview. The second interview panel provided Facility B’s appointing authority with a list of recommended candidates for hiring. The grievant was the top candidate on the second panel’s list. However, the grievant was notified that the Regional Operations Chief had not approved his promotion to the Corrections Captain position. The agency again cited to the fact that the grievant is married to Facility B’s HRO as the reason for its decision.

The grievant initiated his February 26, 2014 grievance to challenge the agency's selection processes for both positions. The grievant claims that: (1) agency policy regarding conflicts of interest and family relationships does not disqualify him from occupying the Unit Manager position; (2) based on the panel's recommendation, he was more qualified than the successful candidate for the Corrections Captain position and should have been selected; (3) he has been treated inconsistently as compared to other agency employees who are married to co-workers; and (4) the agency has discriminated against him based on his marital status. After proceeding through the management resolution steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination 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.¹ Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve an "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 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 positions for which he applied would have been promotions.

Misapplication/Unfair Application of Policy

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 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

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

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

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

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

⁵ *See DHRM Policy No. 2.10, Hiring.*

resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.⁶

The grievant argues that the agency improperly determined that he was ineligible for the Unit Manager position because he would be required to supervise his spouse in violation of agency policy. If promoted to that position, the grievant would have occasionally served as Facility B's duty officer, during which time he have been the acting manager of the facility. In other words, as duty officer he would have had supervisory authority over his spouse. Agency policy states that "[n]o employee shall be employed in a position where they serve as a direct supervisory or administrative role to their spouse"⁷ The policy further states, however, that "[t]here may be periodic or emergency situations of short duration in which a supervisor may be required to supervise" his spouse, and, as an example, specifically provides that an employee may serve as a duty officer at a facility and "have management responsibilities for" his spouse while carrying out that duty.⁸ As a result, there is no basis for EDR to conclude that this agency policy would specifically bar the grievant from occupying a position as a Unit Manager.

The agency's recruitment policy states that its employment decisions are based on an individual's "merits, qualifications, . . . and suitability" for the position.⁹ It appears that the agency determined the grievant was not suitable for either position because he is married to Facility B's HRO. Specifically, the agency concluded that the HRO position is "unique in its relationship to all staff at the facility" and that if the grievant "were employed in a management position" at Facility B, it would "negatively affect" the ability of both the HRO and the grievant to perform their jobs because "[m]any staff would not feel comfortable" approaching the HRO. While the agency did not explain its decision to the grievant as a determination about his suitability for the positions, this is the only policy-based claim EDR has identified that would support the agency's actions. The question to be answered, then, is whether the grievant's relationship with Facility B's HRO was a sufficient reason for the agency to determine that he was not the best suited candidate for a management position at Facility B.

In this case, the agency stated that it could not promote the grievant to either position because he is married to the HRO at Facility B. During the management resolution steps, agency management explained to the grievant that the HRO "deal[s] with sensitive and confidential issues" and that the "perception" of the HRO by facility staff "is very important." HROs "must be approachable by all staff," "must provide objective and fair advice to employees, supervisors, and management," and "must be perceived as independent, fair, and unbiased." The agency was not "confident this could occur if [the grievant] were in a management position at the same facility that [his] wife is the [HRO]." Most importantly, the agency was not certain that staff or

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

⁷ Department of Corrections ("DOC") Operating Procedure 101.3, *Standards of Ethics and Conflicts of Interest*, § IV(E)(1).

⁸ *Id.* § IV(E)(2).

⁹ DOC Operating Procedure 170.1, *Recruitment, Selection, and Appointment*, § IV(A)(1) (emphasis added). DHRM Policy 2.10, *Hiring*, further defines "selection" as "[t]he result of the hiring process that identifies the applicant best suited for a specific position."

agency management would feel comfortable discussing confidential personnel matters, some potentially relating to the grievant, with the HRO. In short, the agency did not believe that placing the grievant, the HRO, and other agency staff in such a position was “appropriate” and believed that “the perception of others would be less than positive.”

The agency’s recruitment policy sets forth detailed procedures for the screening of applications, the interview process, and the appointment of candidates.¹⁰ EDR has been unable to identify any specific policy provision that either grants or denies agency management the authority to remove a candidate from the applicant pool during the interview process for reasons and in the manner at issue here. The grievance procedure, as well as state and agency hiring policy, however, accords much deference to management’s exercise of judgment and assessment of candidates’ qualifications and suitability in a selection process. It is clear that the agency determined the grievant’s relationship with the HRO would create significant issues at Facility B, and as a result the agency determined the grievant was not a suitable candidate for the Unit Manager or Corrections Captain positions.

Although the agency’s choice to remove the grievant from both applicant pools in the manner it was done may not be specifically authorized by policy, it would appear that the agency determination that the grievant was not best suited for the position because he is married to Facility B’s HRO can be consistent with the state and agency hiring policy. As a result, its method of informing the grievant of that decision and putting it into effect, while perhaps not the most advisable way of notifying an employee that he is not suitable for a particular position, was adequate in this case. While the grievant may reasonably disagree with the agency’s assessment of his suitability for the Unit Manager and Corrections Captain positions, EDR has reviewed nothing that would suggest the agency’s determinations disregarded the pertinent facts or was otherwise arbitrary or capricious. Agency decision-makers deserve appropriate deference in making determinations regarding a candidate’s knowledge, skills, abilities, and suitability for a particular position. It appears that the agency based its decision on a good faith assessment of the grievant and the unique circumstances of this case. Accordingly, this 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.

The grievant further argues that the agency has inconsistently applied its recruitment and selection policy to him as compared with other similarly situated employees. Specifically, he claims that the HRO at another facility is married to a supervisor who also works at the same facility. Having reviewed the information presented by the parties, it does not appear that the grievant and the comparator employees are sufficiently similarly situated such that the agency’s action here should be considered inconsistent. The grievant is married to the HRO at Facility B and applied for positions as a Unit Manager and Corrections Captain there. The comparator employee is married to the HRO at his facility and is employed as a Buildings and Grounds Supervisor. While all three positions are managerial in nature, the overall level of supervisory responsibility for a Buildings and Grounds Supervisor is not the same as to that of a Unit Manager or Corrections Captain. The positions for which the grievant applied are responsible

¹⁰ See DOC Operating Procedure 170.1, *Recruitment, Selection, and Appointment*, §§ IV(G), (H), (J), (K), (L), (M).

for managing greater numbers of employees, and are charged with a greater level of accountability for the operation of the facility as a whole, than a Buildings and Grounds Supervisor. In other words, the overall level of management required from a Unit Manager or Corrections Captains is not similar to that of a Buildings and Grounds Supervisor. Based on these facts, there is a reasonable basis to consider these situations differently. As such, the grievance does not raise a question as to whether the agency's decision that the grievant was not suitable for the Unit Manager and Corrections Captain positions was inconsistent with its treatment of other similarly situated employees. Accordingly, the grievance does not qualify for a hearing on this basis.

Discrimination

In addition, the grievant asserts that the agency has engaged in discrimination based on his marital status because it determined he was not suitable for the Unit Manager and Corrections Captain positions because of his marriage to Facility B's HRO. Agency policy forbids discrimination based on sex, which the agency has defined to include "sexual harassment, pregnancy, and marital status."¹¹ 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) he was a member of a protected class, (2) he applied for an open position, (3) he was qualified for the position, and (4) he was denied the position under circumstances that create an inference of unlawful discrimination.¹² 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.

The grievant has alleged membership in a protected class and established that he applied for two open positions. Even assuming that the grievant was qualified for, and thus would have been selected for, one or both positions, an allegation of discrimination based on marital status must contain "factual assertions of a difference in the treatment of married and unmarried employees."¹³ In this case, it is apparent that the agency determined the grievant was not suitable for hiring because the person to whom he is married occupies a unique position at Facility B, not

¹¹ DOC Operating Procedure 101.2, *Equal Employment Opportunity*, § III.

¹² See *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 851 (4th Cir. 2001); EDR Ruling Nos. 2010-2436, 2010-2484.

¹³ See *Arnold v. Merit Sys. Prot. Bd.*, 360 F. App'x 151, 153 (Fed. Cir. 2010); see also *Dvortsin v. Dep't of Homeland Sec.*, 314 F. App'x 307, 309 (Fed. Cir. 2008) ("In order to allege marital status discrimination, [an employee] must assert facts, which if proven, demonstrate that unmarried employees were treated differently from married employees." (citing *Stokes v. Fed. Aviation Admin.*, 761 F.2d 682, 685 (Fed. Cir. 1985)); cf. *Marynowski v. Dep't of the Navy*, 2012 M.S.P.R. 321, 325-26 (2012) (holding that an individual claiming that she was terminated from employment with a federal agency because of her marital status "must allege facts which, taken as true, would show that she was treated differently because of her marital status or facts that go to the essence of her status as married, single, or divorced"). Courts have also held that employment policies that take an employee's marriage into account or impose "workrelated restriction[s] with incidental effects" on an employee's marriage do not violate the Fourteenth Amendment of the United States Constitution. *Waters v. Gaston County*, 57 F.3d 422, 426 (4th Cir. 1995); see *Woodard v. County of Wilson*, 393 F. App'x 125, 127-28 (4th Cir. 2010).

because he is a married person. There is no evidence, for example, to suggest that another married employee would have been denied the positions solely because of his or her marital status. Likewise, the agency's stated for its conclusion that the grievant was not suitable for the positions would seem to apply equally to employees who might have a comparable, non-marital relationship with the HRO, regardless of their marital status. In short, it is clear that the agency's decision was based on the effect that the grievant's relationship with the HRO would have had on the perception of the HRO "as independent, fair, and unbiased," not his status as a married person. As a result, we find that the grievance does not raise a question as to whether the agency engaged in discrimination based on the grievant's marital status, and the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.¹⁴



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¹⁴ Va. Code § 2.2-1202.1(5).