

Issues: Qualification – Management Actions (recruitment/selection) and Discrimination (other); Ruling Date: July 7, 2014; Ruling No. 2014-3908; 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 2014-3908
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 27, 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 at one of the agency’s facilities as a Corrections Officer Senior. He initiated his February 27, 2014 grievance to challenge the agency’s selection process for a position as a Corrections Sergeant at his facility in which he participated unsuccessfully.

Seventeen candidates were offered an in-person interview with a three-member selection panel for the Corrections Sergeant position. Following the initial round of interviews, three finalist candidates were selected to proceed to a second round of interviews. At the first interview, each candidate was asked a standardized set of questions, and each panel member recorded notes based on the candidates’ answers. The Applicant Evaluations for all three finalists noted that their answers led the selection panel to “Recommend” them for hiring. Based on the grievant’s responses, all three members of the selection panel marked the appropriate area on his Applicant Evaluations to “Recommend” him for hiring as well. The grievant was not, however, selected as one of the three finalist candidates.

The grievant claims that the agency misapplied its hiring policy and contends that he is better qualified than the successful candidate. He further asserts that the agency discriminated against him based on his age and military status. The agency disputes the grievant’s claims and argues that his allegations are unsubstantiated.

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the 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 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 she applied for would have been a promotion.

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

In this case, the grievant asserts that he is better qualified than the successful candidate who was offered the Corrections Sergeant position and that he should have been selected for the position instead. The grievant further claims that he is “automatically denied” a position “each time an interviewer asks a question about [his] rank” and length of military service or about his length of employment with the agency. The grievant also appears to argue that he has not been selected for promotion because of a perception that he is only interested in advancing within the agency for “pay and retirement.”

A review of the panel’s notes from the grievant’s and the finalists’ interviews shows that the panel’s decision to not recommend the grievant was consistent with its assessment of his suitability for the position. While it appears that the agency was presented with a number of highly qualified candidates for this position, as shown by all three panel members’ decision to “Recommend” the grievant and all three finalist candidates for hiring, agency policy states that

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.*

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

selection panels may actually submit the names of no more than three candidates to the appointing authority for hiring.⁷ The panel members commented that the finalist candidates demonstrated, among other things, such qualities as “extensive” and “excellent knowledge” of the position, “excellent communication skills,” “great experience” for the position, supervisory skills from previous employment, and knowledge of agency policies and procedures. With regard to the grievant’s interview, the panel members wrote that the grievant possessed a “good” knowledge of the position and of agency policy, was “very confident” and an “excellent communicator,” and that he had conveyed experience from leadership and training.

The agency’s recruitment policy states that its employment decisions are based on an individual’s “merits, qualifications, eligibility, *and suitability*” for the position.⁸ A candidate’s suitability for a particular position is not always readily apparent by a plain reading of the comments recorded during an interview. Agency decision-makers deserve appropriate deference in making determinations regarding a candidate’s knowledge, skills, and abilities. As a result, EDR 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.

Although the grievant may reasonably disagree with the panel’s decision not to recommend him to the appointing authority for hiring, EDR has reviewed nothing that would suggest the agency’s determination disregarded the pertinent facts or was otherwise arbitrary or capricious. Likewise, EDR has reviewed no information to suggest that the grievant was “automatically denied” the position or that the panel’s assessment of him was negatively influenced by his military service, length of employment with the agency, or a perception that he is seeking “pay and retirement” benefits from opportunities for promotion. While it is clear that, in this case, the grievant and the finalists could all be considered qualified for the Corrections Sergeant position, there is no basis for EDR to conclude that the panel’s assessment of the candidates and subsequent recommendation to the appointing authority were motivated by anything other than a good faith assessment of the candidates based on their performance at the interview. 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.

Discrimination

Grievances that may be qualified for a hearing also include actions that occurred due to discrimination on the grounds of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, genetics, disability, or veteran status.⁹ 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. Rather, an employee must present

⁷ See Department of Corrections Operating Procedure 170.1, *Recruitment, Selection, and Appointment*, § IV(K)(3)(c).

⁸ *Id.* § IV(A)(1) (emphasis added).

⁹ See, e.g., Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.

evidence raising a sufficient question as to whether he: (1) was a member of a protected class;¹⁰ (2) applied for an open position; (3) was qualified for the position; and (4) was denied promotion under circumstances that create an inference of unlawful discrimination.¹¹ 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 evidence that raises a sufficient question as to whether the agency's stated reason was merely a pretext or excuse for race discrimination.

Here, the grievant states that the agency has engaged in discrimination based on his age and military status. Even assuming that the grievant was qualified for the position, there are no facts that raise a question as to whether the grievant was denied the position due to a discriminatory reason. As discussed above, the selection panel determined that the grievant should not be recommended to the appointing authority for hiring based on his responses to the questions asked at his interview, and we have found no reason to dispute that decision. Furthermore, one of the three finalist candidates was also a veteran of the armed forces. As a result, it would appear that there is no basis for EDR to conclude that the military status may have negatively influenced the selection process in any way. Similarly, EDR has been unable to identify any evidence to support the grievant's allegation that he was denied the position based on his age, other than his claim that he is qualified for the position, was not selected, and is over the age of forty. A grievance must present more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. There are no such facts here. Consequently, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.¹²



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¹⁰ See DHRM Policy 2.05, *Equal Employment Opportunity*.

¹¹ See *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 851 (4th Cir. 2001); EDR Ruling No. 2010-2436. 2010-2484.

¹² Va. Code § 2.2-1202.1(5).