

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: September 9, 2014; Ruling No. 2015-3982; Agency: Department of Behavioral Health and Developmental Services; 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 Behavioral Health and Developmental Services
Ruling Number 2015-3982
September 9, 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 her June 27, 2014 grievance with the Department of Behavioral Health and Developmental Services (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 Registered Nurse Coordinator. She initiated her June 27, 2014 grievance to challenge the agency’s selection process for a position as a Registered Nurse Coordinator in Program C, a position for which she competed unsuccessfully. The grievant claims that the agency misapplied its hiring policy and contends that she is better qualified than the successful candidate. She further asserts that the agency discriminated against her based on her race. The agency disputes the grievant’s claims and argues that her 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

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).

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.

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 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

In this case, the grievant asserts that she is better qualified than the successful candidate who was offered the Registered Nurse Coordinator position and that she should have been selected for the position instead. A review of the hiring panel's notes from the grievant's and the selected candidate's interviews shows that the panel's decision was consistent with its assessment of her suitability for the position. While the grievant was, like others interviewed, qualified for the position, the panel concluded that the successful candidate's answers to the interview questions reflected a greater readiness and suitability for the position. For example, the panel described the successful candidate's answers as "thorough, thoughtful [and] reflect a recovery centered vision" In contrast, the panel noted that the grievant's answers "suggest[ed] a responsive/corrective approach to [management] of staff vs[.] a proactive, contemporary [management]/leadership model."

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 select her for the position, EDR has reviewed nothing that would suggest

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

⁵ See DHRM Policy No. 2.10, *Hiring*.

⁶ 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)).

⁷ See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as "[i]n disregard of the facts or without a reasoned basis.").

the agency's determination disregarded the pertinent facts or was otherwise arbitrary or capricious. 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.⁸ 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 evidence raising a sufficient question as to whether she: (1) was a member of a protected class;⁹ (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.¹⁰ 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 alleges that the agency has engaged in discrimination based on her race. As evidence, she notes that "[a]ll unit supervisory positions and RNs" in Program C are of the same race as the selected candidate. However, even assuming that the grievant can satisfy her burden to raise a question as to the elements of a claim of discrimination in the hiring context, the agency has asserted a non-discriminatory basis for its selection decision. As discussed above, the selection panel determined that, based on her answers during the interview, the grievant was not as well-suited for the position as the successful candidate, and we have found no reason to dispute that determination. Further, the grievant has not presented facts that raise a question as to whether the agency's stated reasons for her non-selection were pretextual. The mere fact that supervisory employees and RNs are of the same race as the selected candidate does not, in itself, constitute sufficient evidence that the agency's stated reason was a pretext for discrimination. Consequently, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.¹¹



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⁸ See, e.g., Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.

⁹ See DHRM Policy 2.05, *Equal Employment Opportunity*.

¹⁰ See *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 851 (4th Cir. 2001); EDR Ruling Nos. 2010-2436. 2010-2484.

¹¹ Va. Code § 2.2-1202.1(5).