

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: September 8, 2015; Ruling No. 2016-4202; 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 2016-4202
September 8, 2015

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 May 4, 2015 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 May 4, 2015 grievance to challenge the agency’s selection process for a position as a Corrections Sergeant at his facility in which he participated unsuccessfully. Twenty-one candidates, including the grievant, were offered an in-person interview with a three-member selection panel for two Corrections Sergeant positions.¹ Following the initial round of interviews, six finalist candidates were selected to proceed to a second round of interviews.² 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 six finalists noted that their answers led the selection panel to “Recommend” them for hiring. Based on the grievant’s responses, one member of the selection panel marked the appropriate area on his Applicant Evaluation to “Recommend” him for hiring, and the other two panel members marked the “Do not recommend” area. As a result, the grievant was not selected as one of the six finalist candidates.

In the grievance, the grievant claims that the agency misapplied its hiring policy and contends that he should have been selected for the position. He further asserts that the agency discriminated against him based on his age and race, did not comply with the requirements of the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”),³ and engaged in “retaliation and reprisal.” After proceeding through the management steps, the

¹ It appears that eighteen candidates were actually interviewed for the positions.

² The selection process at issue in this case was actually for two Corrections Sergeant positions at the grievant’s facility. Agency policy states that selection panels may actually submit the names of no more than three candidates to the appointing authority for hiring, and thus a total of six candidates were selected as finalists for the two positions in this case. See Department of Corrections (“DOC”) Operating Procedure 170.1, *Recruitment, Selection, and Appointment*, § IV(J)(13)(j).

³ 38 U.S.C. §§ 4301 *et seq.*; see also Executive Order No. 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.

grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.

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.⁴ Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment action.”⁵ 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.”⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁷ 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 would have been a promotion.

Misapplication/Unfair Application of Policy

In the grievance, the grievant asserts that two members of the selection panel “alter[ed] [his] response[s]” and/or “down grad[ed] [his] answers” to the questions asked at the interview, with the purpose of making his responses appear “inadequate” and as a means of choosing “other applicants of lesser qualifications” to advance to the second round of interviews. In effect, the grievant appears to argue that the selection panel did not comply with agency hiring policy by incorrectly recording his responses to the standardized questions, with the result that he was not recommended for promotion. The grievant further claims that the selection panel improperly weighed the candidates’ qualifications in making a decision as to which candidates should be recommended for hiring.

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.⁸ 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

⁴ Va. Code § 2.2-3004(C); *see Grievance Procedure Manual* §§ 4.1(b), (c).

⁵ *Grievance Procedure Manual* § 4.1(b).

⁶ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁷ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁸ *See* DHRM Policy No. 2.10, *Hiring*; DOC Operating Procedure 170.1, *Recruitment, Selection, and Appointment*, § IV(A)(1).

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.⁹

Agency policy provides that selection panels must use an Applicant Evaluation for “for all interviews,” and that the form “should document the reason for” the panel’s assessment of each candidate.¹⁰ EDR has not identified any information in the interview panel’s notes to support the grievant’s assertion that his answers to the questions asked were incorrectly recorded or altered so as to give the appearance that he was not qualified for the position such that the selection process was not conducted in accordance with agency policy. Indeed, the grievant has not specifically identified any part of the panel members’ notes that he believes were inaccurate, other than to argue that the panel recorded “very little on subject questions” or made “one line statements” about his answers. Though there is some variation among the panel members’ notes from the grievant’s interview, it would be unreasonable to expect them to record his responses to the questions verbatim. In addition, the three panel members’ notes are generally consistent in capturing the general tone and scope of all the grievant’s answers. Furthermore, the Applicant Evaluations discussing the grievant’s overall qualifications and suitability for the position, while admittedly brief, seem to be no shorter or less detailed than the panel members’ Applicant Evaluations for the other candidates. EDR’s review of the panel notes from the grievant’s interview does not indicate that the selection panel failed to comply with agency policy by either altering its record of his responses or improperly evaluating his qualifications, and it appears instead that the panel recorded and evaluated the grievant’s answers in the same manner as the other candidates.

The grievant also claims that he possessed “Preferred Skill[,] Knowledge[,] and Abilities” that made him more qualified for the position than the finalist candidates and which were not considered by the selection panel, and argues that the panel relied on the finalist candidates’ level of education and “diversity security experience” in selecting them to recommend for hiring, both of which the grievant alleges are inconsistent with the agency’s hiring policy. He asserts that an employee with the agency’s Human Resources Office confirmed the finalist candidates were chosen for those reasons. While the grievant has provided some information to support his claim that education and “diversity security experience” were considered as part of the agency’s determination as to which candidates were best suited for the position, a review of the panel’s notes from the grievant’s and the finalists’ interviews shows that the panel’s decision was not based on those factors alone, but was instead supported by its assessment of their overall suitability for the position. For example, the panel members commented that the six finalist candidates demonstrated, among other things, such qualities as “a firm grasp of the position,” a “high level of understanding and competency,” an “excellent level” of relevant skills and abilities, and “clear, concise, [and] comprehensive” communication skills. With regard to the grievant’s interview, the panel members wrote that the grievant possessed only a “basic knowledge” of the position, demonstrated a “satisfactory level” of relevant skills and abilities, and “average/acceptable communication skills.” Based on this assessment, all three

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

¹⁰ DOC Operating Procedure 170.1, *Recruitment, Selection, and Appointment*, § IV(J)(9).

panel members noted that the grievant was “qualified” to carry out the duties of the position, but two of them determined that he should not be recommended for hiring, with the result that he was not selected as a finalist.¹¹

The agency’s recruitment policy states that its employment decisions are based on an individual’s “merits, qualifications, eligibility, and suitability” for the position.¹² 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 or even a second interview, 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 not selected to advance to the second round of interviews for an improper reason or that the panel members intentionally manipulated the Applicant Evaluations to make the grievant appear less qualified than other candidates. In short, 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, the 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

In addition, the grievant argues that the agency has engaged in discrimination based on his age and race. 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.¹³ 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 he: (1) was a member of a protected class;¹⁴ (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.¹⁵ Where the agency,

¹¹ The grievant also appears to assert that he should have been selected for the position based on his seniority and length of employment with the agency, and that selection panel did not properly consider these factors in determining that he should not be recommended for hiring. Although seniority and direct work experience may be important qualifications to be considered, they are not the sole determinants in a selection panel’s decision as to which candidate is best suited for a particular position.

¹² DOC Operating Procedure 170.1, *Recruitment, Selection, and Appointment*, § IV(A)(1) (emphasis added).

¹³ See, e.g., Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.

¹⁴ See DHRM Policy 2.05, *Equal Employment Opportunity*.

¹⁵ See *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 851 (4th Cir. 2001); EDR Ruling No. 2010-2436, 2010-2484.

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.

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. 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. Similarly, the grievant has not identified the basis of his claim of race discrimination or presented facts to support that allegation. 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.

USERRA Violation

The grievant claims that the agency's selection process in this case did not comply with certain provisions of USERRA, and specifically alleges that USERRA required the agency to return the grievant "back from military active duty . . . as if he . . . never left," including "promotion[,] pay[,] and benefits . . ." In effect, the grievant appears to argue that the agency was obligated by USERRA to select him for promotion to the Corrections Sergeant position for which he competed in this case.

USERRA prohibits an employer from discriminating against a member of the armed forces and guarantees reemployment rights and benefits to any person who is absent from work because he is required to perform military service.¹⁶ A person cannot be "denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer" based on the employee's membership in a "uniformed service."¹⁷ An employer shall be considered to have violated USERRA only if the employee's military status was a motivating factor in the employer's action, and the action would not have been taken in the absence of the employee's military status.¹⁸ If the employee establishes that his military status was a motivating factor in the employer's action, USERRA shifts the burden of proof to the employer to show that the action would have been taken anyway, in the absence of his military status.¹⁹

¹⁶ 38 U.S.C. §§ 4311, 4312(a); 20 C.F.R. §§ 1002.18, 1002.32. States and their political subdivisions are employers for purposes of USERRA. 20 C.F.R. § 1002.39.

¹⁷ 38 U.S.C. § 4311(a).

¹⁸ *Id.* § 4311(c)(1); 20 C.F.R. § 1002.23.

¹⁹ *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 312 (4th Cir. 2001).

To qualify for a hearing, the grievance must present evidence raising a sufficient question as to (i) whether the grievant's military status was a "motivating factor" in the agency's determination, and if so, (ii) whether the agency would not have made the same determination in the absence of his military status.²⁰ However, there is no indication that the grievant's military status was any factor, much less a motivating factor, in the agency's decision not to select the grievant for promotion to the Corrections Sergeant position. Indeed, one of the six finalist candidates was also a veteran of the armed forces. As discussed above, it appears that the selection panel chose not to recommend grievant 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. Because there is no indication that the agency's non-discriminatory explanation for its selection decision was pretextual in this case, the grievant's USERRA claims do not qualify for a hearing.

Retaliation

Finally, the grievant alleges that he was not selected for the position as a form of "[r]etaliation and reprisal." 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;²¹ (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 employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.²² Ultimately, to support a finding of retaliation, EDR must find that the protected activity was a but-for cause of the alleged adverse action by the employer.²³

Although the grievant claims that the agency's selection process was retaliatory, the grievant has not identified a protected activity as the basis for his claim of retaliation and merely asserts that he is entitled to "bring [a] complaint forward under discrimination" and that "the State cannot dismiss or cover up [his] complaint" To the extent the grievant is asserting that the agency cannot retaliate against him because he has filed past grievances, he is correct.²⁴

However, if we assume without deciding that the grievant has raised a question as to whether he engaged in protected activity and experienced an adverse employment action, and even inferring a causal connection between the grievant's assumed exercise of protected activity and his interview for the Corrections Sergeant position, we conclude that the agency has

²⁰ *See id.*

²¹ *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 the 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)(4)*.

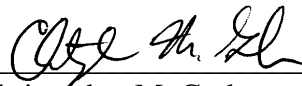
²² *See, e.g., Felt v. MEI Techs., Inc.*, 584 Fed. App'x 139, 140 (4th Cir. 2014).

²³ *See id.* (citing *Univ. Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013)).

²⁴ *See Va. Code § 2.2-3004(A)*.

provided legitimate, nonretaliatory business reasons for its action. 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, there are no facts that would indicate the grievant's protected activity, if any in fact occurred, was a but-for cause of the allegedly retaliatory selection process. Accordingly, we conclude that the grievant has not raised a sufficient question as to whether retaliation has occurred, and the grievance does not qualify for a hearing on this basis.²⁵

EDR's qualification rulings are final and nonappealable.²⁶



Christopher M. Grab
Director
Office of Employment Dispute Resolution

²⁵ In reference to his claim of retaliation, the grievant also asserts that the agency has violated Section 44-93.5 of the Code of Virginia, which relates to employment protections for certain veterans. That Code section specifically provides that, when an employer fails to comply with applicable legal requirements, the employee may file "a motion, petition, or other appropriate pleading" with "the circuit court having jurisdiction over the employer's place of business . . ." Va. Code § 44-93.5. EDR has no authority to enforce or rule upon any legal issues relating to this assertion. If the grievant wishes to pursue his claims through the courts based on any of the theories presented in the grievance, he is free to do so, but this ruling does not address and makes no determination about those issues or the availability of any legal remedy.

²⁶ Va. Code § 2.2-1202.1(5).