Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: November 24, 2015; Ruling No. 2016-4262; Agency: Virginia Commonwealth University; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of Virginia Commonwealth University
Ruling Number 2016-4262
November 24, 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 two grievances with Virginia Commonwealth University (the "University") qualify for a hearing. For the reasons discussed below, the September 11, 2015 and October 14, 2015 grievances do not qualify for a hearing.

FACTS

The grievant is employed by the University as a Plumber/First Responder. On September 11, 2015, the grievant initiated a grievance challenging the University's failure to select him for an interview for a vacant superintendent position.[1] On October 14, 2015, the grievant initiated a second, "amended" grievance, which challenged the University's selection of an allegedly less qualified candidate for the superintendent position. After the parties failed to resolve the September 11, 2015 grievance during the management resolution steps, the grievant requested qualification of the grievance for hearing by the University President.

At the qualification stage, the University appears to have considered the September and October grievances as a single amended grievance.[2] The grievant's request for qualification was denied, and he has appealed that determination to EDR. Although there is some confusion regarding whether the grievances should have been treated as a single grievance for purposes of qualification, in the interests of efficiency, EDR will address both grievances in this ruling.

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

[1] In an attachment to his September 11, 2015 grievance, the grievant describes interactions with management regarding his desire to take classes during his work hours. As these interactions date back to 2013-2014, well outside the 30 calendar day period for initiation of a grievance, EDR considers this information to have been provided in support of the grievant's claims regarding the selection procedure, rather than as stand-alone claims. However, even if the grievant intended to grieve the University's actions regarding his work hours, EDR's review indicates that such a claim would not qualify for hearing, as the grievant has not presented sufficient evidence to show that the denial of preferred work hours is an adverse employment action or a misapplication or unfair application of policy.

[2] The University states that it "agreed to [the grievant's] request to join his amended grievance with his original grievance," and "[t]he agency head considered both the original and amended grievance documents when making his determination of non-qualification."

not proceed to a hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[3] Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment action."[4] 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6] 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 his grievances, the grievant asserts, in effect, that he was the best suited candidate for the superintendent position and the University misapplied and/or unfairly applied policy by failing to select him. 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.[7] 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.[8]

In this case, the grievant asserts that he should have been selected for the superintendent position because he holds more certifications and licenses than the selected candidate. The grievant further alleges that he should have been selected for an interview as he was "better qualified" than many of those selected for interviews. The grievant also appears to argue that he was not selected for an interview because the hiring manager was angry that he had previously elected to work on the night shift in order to take classes.

The University has presented evidence that, among those candidates who met the screening criteria,[9] selection for interviews was based primarily on the candidates' level of previous supervisory experience. The University determined that compared to those

[3] Va. Code § 2.2-3004(C); *see Grievance Procedure Manual* §§ 4.1(b), (c).
[4] *Grievance Procedure Manual* § 4.1(b).
[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] *See* DHRM Policy No. 2.10, *Hiring.*
[8] *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as "[i]n disregard of the facts or without a reasoned basis.").
[9] The screening criteria used by the University appear to have been a Virginia driver's license, a high school diploma or GED, the number of years of experience, and experience with a computerized maintenance management system. In addition, the University considered a Virginia Journeyman's License in Electrical, Plumbing, HVAC or Gas Fitting to be a preferred qualification.

interviewed, the grievant had less management experience in a "multi-craft environment." It appears that, in addition to the grievant, another three otherwise qualified candidates did not receive interviews for a similar reason. In contrast, the selected candidate already held a similar position at the University.

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. In this case, although the grievant may disagree with the University's decisions, EDR has reviewed nothing that would reasonably suggest that the University's selection process disregarded the pertinent facts or was otherwise arbitrary or capricious. Accordingly, the grievance does not raise a sufficient question as to whether the University misapplied and/or unfairly applied policy, and therefore does not qualify for a hearing on this basis.

Discrimination

In addition, the grievant argues that the University has engaged in discrimination based on his race.[10] 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.[11] For a claim of discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, 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. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[12]

Even assuming that the grievant was qualified for the superintendent 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 University determined that the grievant was not as experienced in multi-craft supervision as other qualified applicants, and ultimately selected for the position an applicant who was working for the University in a similar position. EDR has been unable to identify any evidence to support the grievant's allegation that he was denied the position based on his race. As stated, 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

[10] The University argues that the grievant is barred from raising his allegation of race discrimination at the qualification stage. EDR's precedents have allowed a grievant to raise later in a grievance additional theories, including discrimination, as to why the management actions or inactions challenged in a grievance were improper, even if those theories were not raised in the initial filing. *See, e.g.*, EDR Ruling No. 2007-1444 n.1. For this reason, the grievant's assertion of discrimination as to the management actions or inactions grieved is proper. *See* EDR Ruling No. 2016-4212.

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

[12] *See* Hutchinson v. INOVA Health Sys., Inc., Civil Action No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *4 (E.D. Va. April 8, 1998).

status. There are no such facts here. Consequently, the grievance does not qualify for a hearing on this basis.

Retaliation

Finally, the grievance, fairly read, appears to assert that the grievant was retaliated against for his interactions with management regarding his work hours. 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;[13] (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.[14] 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.[15]

In this case, even assuming there was a causal link between the grievant's protected activity and his nonselection for an interview, the University has provided legitimate, nonretaliatory business reasons for its action. As discussed above, the University determined that the grievant was not as experienced in multi-craft supervision as other qualified applicants, and the individual ultimately selected for the position was already working for the University in a similar capacity. 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.

EDR's qualification rulings are final and nonappealable.[16]

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[13] *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). For purposes of this ruling only, EDR will assume that the grievant's interactions with management were a protected activity.
[14] *See, e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[15] *See id.* (citing Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013)).
[16] Va. Code § 2.2-1202.1(5).