

Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: December 1, 2015; Ruling No. 2016-4268; Agency: Virginia Community College System; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Virginia Community College System
Ruling Number 2016-4268
December 1, 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 June 9, 2015 grievance with the Virginia Community College System (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 Trades Technician IV. He initiated his June 9, 2015 grievance to challenge the agency’s selection process for a position as a Facilities Manager in which he participated unsuccessfully. Six candidates, including the grievant, were offered an in-person interview with a five-member selection panel for the position. The appointing authority served as a member of the selection panel. Each candidate was asked a standardized set of questions, and each panel member recorded notes based on the candidates’ answers. After interviewing all of the candidates, the selection panel identified three finalist candidates. The finalist candidates included the grievant and the successful candidate. After considering the recommendation of the selection panel and contacting references for the three finalist candidates, the appointing authority selected the successful candidate for the Facilities Manager position.

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 race and engaged in retaliation.¹ After proceeding through the management steps, the 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,

¹ The grievant also initially raised issues related to the agency’s decision to place him on paid administrative leave pending an investigation of alleged misconduct. After the grievance was initiated, the grievant was issued disciplinary action, challenged the discipline in a separate grievance, and ultimately received an administrative hearing. *See* Decision of Hearing Officer, Case No. 10655, October 1, 2015. As such, the grievant’s allegations regarding administrative leave appear to have been addressed and/or resolved, and the only remaining issues relate to the agency’s selection process for the Facilities Manager position.

unwarranted discipline, or a misapplication or unfair application of policy.² Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment action.”³ 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.”⁴ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁵ 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 he was the “best qualified candidate” for the Facilities Manager position and that the agency “unfairly applied or misapplied the selection policies and/or procedures” in selecting the successful candidate for hiring. In support of this argument, the grievant claims that the selection panel did not complete an Interview and Selection Report setting forth its hiring recommendation and that he was best suited for the position because he “receiv[ed] the highest ratings and/or ranking from the interview panel members” and “served successfully as Acting Facilities manager” The grievant further argues that the agency improperly considered “private information” that he disclosed in connection with an internal investigation into allegations that he had sexually harassed a co-worker.⁶

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

² Va. Code § 2.2-3004(C); *see Grievance Procedure Manual* §§ 4.1(b), (c).

³ *Grievance Procedure Manual* § 4.1(b).

⁴ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁵ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁶ Though the grievance states that the grievant believes he was not selected for the position as the result of “discrimination based on [his] . . . sexual orientation,” the grievant later clarified that he was alleging the agency “discriminated against [him] because of private information . . . in violation of his right to privacy.” Because the grievant does not allege the agency engaged in discrimination based on a protected status in relation to this claim, *see DHRM Policy 2.05, Equal Employment Opportunity*, his assertion that the agency improperly considered personal information “in violation of his right to privacy” is more appropriately considered as a question of whether the agency properly applied policy in assessing his suitability for the position.

⁷ *See DHRM Policy No. 2.10, Hiring*. EDR is unaware of any internal agency recruitment policy to supplement the procedures set forth in *DHRM Policy 2.10, Hiring*.

resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.⁸

DHRM Policy 2.10, *Hiring*, provides that “[a] set of interview questions must be developed and asked of each applicant” who is interviewed, that those “[q]uestions should seek information related to the applicant’s knowledge, skills, and ability to perform the job,” and that “[i]nterviewers must document applicants’ responses to questions to assist with their evaluation of each candidate’s qualifications.”⁹ Though the grievant asserts that the agency’s failure to complete the Interview and Selection Report is “evidence of a violation of the [agency]’s hiring policies,” there is no provision of DHRM policy that states such a specific document be filled out by the selection panel. While there is some evidence to show that the agency’s recruitment process typically includes the completion of an Interview and Selection Report for the appointing authority’s review, and completing the Interview and Selection Report could be a best practice for selection panels, EDR cannot conclude that the failure of the selection panel to do so in this case violates any mandatory policy provision or is otherwise inconsistent with the requirements of the applicable policy.¹⁰ EDR finds that the failure of the panel to fill out an Interview and Selection Report in this case does not indicate that the selection process as a whole was conducted in a manner that resulted in an unfair or inaccurate assessment of the grievant’s performance at the interview or his suitability for the Facilities Manager position.

The grievant also claims that he was identified by several members of the selection panel as the top candidate and had served as an Acting Facilities Manager for several months. As a result, he argues that he was the most qualified candidate and should have been selected for the position. Based on EDR’s review of the selection panel’s notes, it appears that several members of the panel scored the candidates’ responses to particular questions individually, another noted the three candidates he believed were most qualified, and yet another made no notes beyond recording the candidates’ answers to the interview questions. While the grievant is correct a raw scoring of the numbers assigned by several members of the panel indicates he was the top candidate, there is no policy provision that requires a selection panel or appointing authority to score the candidates’ responses to the questions, rank the candidates numerically, and select the individual with the highest score. DHRM Policy 2.10, *Hiring*, is designed to ascertain the candidate best suited for the position, not just to determine who might be qualified to perform the duties of the position. Reducing the selection process to a system based solely on the panel’s numerical scoring of the candidates could, in many cases, unreasonably limit management’s discretion by mandating the selection of a particular individual without regard to an assessment of his or her overall suitability for the position.

In this case, it is clear that the selection panel determined the grievant and the successful candidate were both qualified, as they made up two of the three finalists recommended to the appointing authority. Furthermore, a review of the panel’s notes from the grievant’s and the successful candidate’s interviews shows that the panel’s and the appointing authority’s decision was supported by a reasonable assessment of their overall suitability for the position. In particular, the successful candidate indicated during his interview that he had greater experience

⁸ See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as “[i]n disregard of the facts or without a reasoned basis.”).

⁹ DHRM Policy 2.10, *Hiring*, § B(1)(e).

¹⁰ See EDR Ruling No. 2014-3837.

working in a management position with the agency at a larger, more complex facility. Though the grievant had served as an Acting Facilities Manager for several months, his supervisory experience was more limited. According to information provided by the agency regarding the appointing authority's decision, management experience and leadership were important factors in his selection of the successful candidate. The grievant's technical background with the agency and more limited experience as an Acting Facilities Manager led the appointing authority to conclude that the successful candidate would be more suitable for the position.

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. EDR has not reviewed any information to suggest that such may have been the case here, or that the selection of the successful candidate was anything other than a reasonable exercise of discretion based on a good faith assessment of which of the candidates was most suitable for the position based on their performance at the interview.

The grievant's assertion that the selection panel and/or appointing authority improperly considered "private information" in assessing his suitability for the Facilities Manager position is also unpersuasive. Before he was interviewed for the position, the grievant was placed on administrative leave while the agency investigated an allegation that he had engaged in misconduct. He continued to be on administrative leave throughout the selection process. The grievant alleges that he revealed "private information" during the course of the agency investigation and that the selection panel and/or appointing authority did not select him for promotion because of this information. In support of this assertion, the grievant appears to claim that a manager who was involved in the investigation somehow directed the selection of the successful candidate. The manager in question, however, was not a member of the selection panel nor was he the appointing authority. The grievant further argues that the appointing authority "was aware that [the grievant] was on paid administrative leave at the time of the interviews." While it appears the grievant is correct that the appointing authority was aware he was on administrative leave when he was interviewed, the appointing authority was hired after the initial allegation of misconduct and was not involved in the investigation itself. EDR has reviewed no evidence that would raise a question as to whether the appointing authority knew of any "private information" that the grievant disclosed in connection with the investigation or that any such information was a factor in the selection decision.

Though we do not disagree that it could, in some cases, be improper for a selection panel to consider private information about a candidate that is not related to his/her qualifications and suitability for the position, there is no indication that the investigation or any "private information" disclosed by the grievant played a part in the appointing authority's assessment of his suitability for the position or hiring decision in this case. However, the fact that a candidate is on administrative leave and could be subject to disciplinary action for serious misconduct at the time of his interview for a position could be a relevant factor to be considered by a selection panel in determining whether that candidate is suitable for promotion. To the extent the appointing authority may have considered the grievant's status with the agency in making his decision, EDR has no basis to conclude that his actions were improper in this case.

Although the grievant may reasonably disagree with the panel's decision not to select him for the Facilities Manager position, 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 for an improper reason or that the panel members failed to follow the provisions of DHRM Policy 2.10, *Hiring*, in evaluating the grievant's suitability for the position. In reviewing the panel's interview notes for all nine candidates, EDR can find nothing to indicate that the grievant was so clearly a better candidate that the selection of the successful candidates disregarded the facts or was motivated by anything other than a good faith assessment of the candidates based on their performance at the interview. Rather, it appears the agency based its decision on a good faith assessment of the relative qualities of all candidates. 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 race. Grievances that may be qualified for a hearing 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 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 grievant was not selected as a result of the appointing authority's assessment of his responses to the questions asked at his interview and suitability for the position, and we have found no reason to dispute that decision. 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.

Retaliation

Finally, the grievant alleges that he was not selected for the position because as a form of retaliation “for reporting the misconduct of another employee under [his] supervision and/or for fully cooperating in an internal investigation” For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee


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).

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

For purposes of this ruling only, EDR will assume the grievant's actions in reporting an employee's misconduct and participating in an internal agency investigation constituted protected activity under the grievance procedure. Even inferring a causal connection between the grievant's assumed exercise of protected activity and his interview for the Facilities Manager position, however, we conclude that the agency has provided legitimate, nonretaliatory business reasons for its action. As discussed above, the selection panel determined that the grievant was not the best suited candidate because the successful candidate had greater management experience and leadership qualities, 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.

EDR's qualification rulings are final and nonappealable.¹⁶



Christopher M. Grab
Director
Office of Employment Dispute Resolution

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).

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).