

Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: December 15, 2016; Ruling No. 2016-4278; 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 Virginia Correctional Enterprises  
Ruling Number 2016-4278  
December 15, 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 her October 13, 2015 grievance with Virginia Correctional Enterprises (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a Financial Services Manager I. She initiated her October 13, 2015 grievance to challenge the agency’s selection process for a position as an Accounting Manager in which she participated unsuccessfully. Nine candidates were offered an in-person interview with the hiring manager for the Accounting Manager position. Following the initial round of interviews, three finalist candidates, including the grievant and the successful candidate, were selected to proceed to a second round of interviews with the hiring manager and the agency’s Chief Executive Officer (“CEO”). At the first interview, the hiring manager recorded notes based on the candidates’ answers to the questions asked and identified the successful candidate and the grievant as among the top three candidates who should receive a second interview. This process was repeated for the second interview with the CEO, after which the agency selected the successful candidate for hiring.<sup>1</sup>

In the grievance, 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 age and race.

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<sup>1</sup> The human resource policies promulgated by DHRM do not apply to employees of the agency because they are not covered by the Virginia Personnel Act. (“VPA”). DHRM Policy 1.01, *Introduction* (stating that DHRM policies “address[] the rights and responsibilities of Executive Branch agency employees covered by the [VPA]”); Va. Code § 2.2-2905(21) (stating that employees of the agency are exempt from the provisions of the VPA but “shall remain subject to the provisions of the State Grievance Procedure . . . .”) As a result, the selection process for agency positions differs from the process described under DHRM policy in certain respects. For example, it appears that interviews are not typically conducted by a selection panel and standardized questions must not always be asked of all candidates. Virginia Correctional Enterprises (“VCE”) Policy 03.04, *Interviewing and Selection*, §§ III(3)(4), III(4)(1) (stating that “[p]anel interviews should only be used” in certain situations and that “[i]t is not a requirement that every [interview] question be asked”).

## 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.<sup>2</sup> Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment action.”<sup>3</sup> 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.”<sup>4</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>5</sup> 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. The agency’s 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.<sup>6</sup> 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.<sup>7</sup>

In this case, the grievant asserts that she is better qualified than the successful candidate who was offered the Accounting Manager position and that she should have been selected for the position instead. Specifically, the grievant claims that she had experience working with several fiscal and accounting programs, and that this experience was not considered by the agency in making a selection decision. According to the grievant, the hiring manager told her after the interviews that the successful candidate was selected because of her knowledge of those same programs. As a result, the grievant argues that the agency’s selection decision was flawed and that she should have been selected for the position.

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<sup>2</sup> Va. Code § 2.2-3004(C); *See Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>3</sup> *Grievance Procedure Manual* § 4.1(b).

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

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

<sup>6</sup> *See VCE Policy* 03.04, *Interviewing and Selection*, §§ IV(1)(2), IV(1)(3).

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

EDR's review of the grievant's application and interview materials indicates she is correct that she has some experience working with the fiscal and accounting programs that would account for part of the Accounting Manager's job duties. It further appears that the hiring manager was aware of and considered the grievant's experience based on his notes from her interview, and as a result there is no basis for EDR to conclude that the grievant's qualifications for the position were disregarded or improperly considered. Indeed, it appears the agency determined that the grievant was among the most qualified of the candidates for the Accounting Manager position, as shown by the hiring manager's decision to select her as one of three finalist candidates. Though the grievant's contention about her level of experience is correct, however, a review's of the interviewers' notes from the grievant's and the successful candidate's interviews show that there were distinctions between their respective qualifications that ultimately led the agency to determine the successful candidate was better suited for the position.

Although the grievant may reasonably disagree with the panel's assessment, EDR has reviewed nothing that would suggest the agency's determination disregarded the pertinent facts or was otherwise arbitrary or capricious. A review of the interviewers' notes from the grievant's and the successful candidate's interviews shows that the selection decision in this case was consistent with an assessment of their suitability for the position. For example, the hiring manager commented that the successful candidate was "[e]xperienced in all functional area[s] required of the position" and had "hands on job experience directly related [and] required for" the position. The hiring manager further noted that the successful candidate "did a very good job communicating her skills and interest in the position" and had "[g]ood interpersonal skills." In contrast, the hiring manager noted that, while the grievant had "considerable knowledge" of certain areas of the position, she had less direct experience working with some of the agency's accounting processes than the successful candidate. As a result, the hiring manager determined that the grievant was "highly qualified for" the position and "did a very good job expressing her interest in the position and describing her qualifications." Although both the grievant and the successful candidate were clearly well qualified for the Accounting Manager position, the agency ultimately selected the successful candidate because she had more direct experience with the functional areas of the position.

The recruitment policy for the agency states that the selection process is intended to ascertain an individual's "knowledge and skill sets, as compared to the requirements, qualifications and demands" set forth in the position description, and further notes that "[t]he selection process must also consider the candidate who is *best suited*" for the position.<sup>8</sup> 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. The grievant has not presented sufficient evidence to support an assertion that she was so clearly a better candidate that the agency's selection of the successful candidate disregarded the facts or was otherwise arbitrary or capricious. Instead, it appears that the interviewers' assessment of the candidates and subsequent selection decision were motivated by anything other than a good faith assessment of the candidates based on their performance at the interview. Accordingly, the

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<sup>8</sup> VCE Policy 03.04, *Interviewing and Selection*, §§ IV(1)(2), IV(1)(3) (emphasis added).


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 her race and age. 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.<sup>9</sup> 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.<sup>10</sup>

Even assuming that the grievant was qualified for the position, there are no facts that raise a question as to whether she was denied the position due to a discriminatory reason. As discussed above, the grievant was not selected as best suited based on the hiring manager's and CEO's assessment of her responses to the questions asked at her interviews and their determination as to her 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.

EDR's qualification rulings are final and nonappealable.<sup>11</sup>



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Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

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

<sup>10</sup> 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).

<sup>11</sup> Va. Code § 2.2-1202.1(5).