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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2020-5025
January 16, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management¹ on whether his October 2, 2019 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 as a sergeant at one of the agency’s facilities. He initiated his October 2, 2019 grievance² to challenge the agency’s selection process for a position as a lieutenant in which he participated unsuccessfully. Following an initial interview with a selection panel, the grievant was recommended for a second interview as a finalist candidate. At both interviews, the candidates were asked a standardized set of questions, and each panel member recorded notes about the candidates’ answers. Based on the grievant’s responses to the questions asked at the second interview, both panel members marked the appropriate area on his applicant evaluation to indicate that he was “Not Recommended for Hire.” As a result, the grievant was not selected for the lieutenant 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 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.” Following the management resolution steps, the agency head

¹ The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

² Although the grievance form is dated October 2, 2016, it challenges events that occurred in August and September 2019, as confirmed by the grievant’s description of the disputed management action(s) and the documentation provided to EDR by the agency. EDR will therefore consider the grievance to have been initiated on or about October 2, 2019.

³ 38 U.S.C. §§ 4301 through 4335; *see also* Executive Order No. 1, *Equal Opportunity* (2018); DHRM Policy 2.05, *Equal Employment Opportunity*.

determined that the grievance record did not contain evidence demonstrating that a misapplication or unfair application of agency policy had occurred or supporting the grievant's allegations of discrimination and/or retaliation. As a result, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.⁴

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.⁵ Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve an "adverse employment action."⁶ 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."⁷ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁸ For purposes of this ruling only, EDR will assume 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

The grievant alleges that he was more qualified than the successful candidate and that the successful candidate was preselected for the lieutenant position. In support of these arguments, the grievant contends that he has over thirty years of experience with the agency, that he has been working in an acting lieutenant position for several years, and that the warden promised to hire the successful candidate for the position if he transferred to the grievant's facility from another work location. The grievant further claims that the successful candidate could not be selected for the lieutenant position under agency policy because he had been employed as a sergeant for less than one year.

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

⁴ In the grievance, the grievant states that this case has been "fil[ed] . . . in connection with" legal appeals relating to previous grievances he has initiated with the agency. In his appeal of the agency head's qualification decision, the grievant also seeks to have the grievance "turned over to" the circuit court in the locality where the grievance arose. While the grievance procedure previously allowed an employee to appeal EDR's rulings to a circuit court, that provision was removed from the Code of Virginia in 2012. This ruling will address the grievant's claims consistent with EDR's authority under the grievance procedure. Va. Code §§ 2.2-1202.1, 2.2-3004(D).

⁵ Va. Code § 2.2-3004(C); see *Grievance Procedure Manual* §§ 4.1(b), (c).

⁶ *Grievance Procedure Manual* § 4.1(b).

⁷ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁸ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

qualified to perform the duties of the position.⁹ 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.¹⁰

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.”¹¹ The agency’s recruitment policy further provides that selection panels must use an applicant evaluation “for all interviews,” and that the form “should document the reason for” the panel’s assessment of each candidate.¹² Here, a review of the panel’s notes from the grievant’s and the successful candidates’ second interviews shows that the panel’s decision to not recommend the grievant was consistent with its assessment of his suitability for the position. For example, the panel members commented that the successful candidate was “very capable” and “very knowledgeable,” “would require little training,” and displayed “excellent communication skills.” With regard to the grievant’s responses, the panel members wrote that the grievant possessed “basic knowledge” of the position and provided “average/acceptable” answers that were “short yet comprehensive” but did not demonstrate sufficient knowledge, skills, and abilities to perform the duties of the position. Based on this assessment, both panel members at the second interview determined that the grievant should not be recommended for hiring.

EDR is also not persuaded by the grievant’s contention that he should have been selected for the position based on his seniority, length of employment with the agency, and/or alleged status as an acting lieutenant. Indeed, the agency noted during the management steps that the grievant does not work in an acting lieutenant position, but has instead been employed as a sergeant since 2016. Copies of the grievant’s job description confirm that he works in a sergeant position and reports to a lieutenant at his facility. With regard to the grievant’s seniority and work experience more generally, EDR does not disagree that these qualities may be important qualifications to be considered as part of a selection process. They are not, however, the sole determinants in a selection panel’s decision as to which candidate is best suited for a particular position. In addition, EDR has not identified any requirement under state or agency policy that an employee must work in a particular position for a specific period of time before they may be selected for a promotional opportunity, though the agency has indicated that it generally requires employees to complete their one-year probationary period before competing for advancement.¹³ While the successful candidate has been employed as a supervisor for the agency for a shorter length of time than the grievant, he

⁹ See DHRM Policy No. 2.10, *Hiring*, at 21; DOC Operating Procedure 102.2, *Recruitment, Selection, and Appointment*, at 3 (effective Sept. 1, 2018). The agency’s recruitment policy has been updated since the selection process at issue in this case. This ruling will refer to the version of the policy that was in effect at the time of the selection.

¹⁰ See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as “[i]n disregard of the facts or without a reasoned basis.”).

¹¹ DHRM Policy 2.10, *Hiring*, at 8.

¹² DOC Operating Procedure 102.2, *Recruitment, Selection, and Appointment*, at 10.

¹³ This stated requirement does not appear to be listed in the agency’s recruitment policy.

had successfully completed his probationary period when the selection process for the lieutenant position took place.

Finally, the evidence reviewed by EDR does not suggest that the successful candidate may have been preselected by the warden at the grievant's facility. The grievant argues that the warden promised positions to the successful candidate and other employees in return for transferring to the grievant's facility. In response, the agency denies that its decision about which candidate was most suitable for the lieutenant position was improperly influenced in any way. Although the grievant's concerns about the fairness of the recruitment process in this case are understandable, EDR has thoroughly reviewed the application materials and has not identified anything to indicate that preselection or some other improper motive tainted the agency's determination, as the grievant asserts. For example, the successful candidate's job application indicates that he had many years of experience working in supervisory positions before being hired by the agency and, as discussed more fully above, the successful candidate's answers to the questions asked at the second interview led the selection panel to recommend him for hiring. Significantly, the warden also did not participate in the interview process for either the grievant or the successful candidate. Under these circumstances, EDR can find nothing to indicate that the grievant was so clearly a better candidate that the selection panel's recommendations disregarded the facts or were 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 second interview.

The agency's recruitment policy states that its employment decisions are based on an individual's "merits, qualifications, eligibility, *and suitability*" for the position.¹⁴ 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.

In summary, and although the grievant may reasonably disagree with the panel's decision not to recommend him for hiring, EDR's review of the grievance record indicates that the selection panel concluded the successful candidate would be more suitable for the position. The grievant has not presented evidence to demonstrate that he was not selected for an improper reason or that the agency's determination disregarded the pertinent facts or was otherwise arbitrary or capricious. 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

The grievant additionally argues that the agency's decision not to select him for the lieutenant position constitutes discrimination based on his age and/or other status protected by Title VII of the federal Civil Rights Act. 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 or expression, age, political affiliation, genetics,

¹⁴ DOC Operating Procedure 102.2, *Recruitment, Selection, and Appointment*, at 3 (emphasis added).

disability, or veteran status.¹⁵ 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.¹⁶

EDR has thoroughly reviewed the information provided by the parties and finds that 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 for hiring based on his responses to the questions asked at his second interview, and EDR has 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 further claims that the agency has discriminated and/or retaliated against him for exercising his rights under USERRA. 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.¹⁷ 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.”¹⁸ 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.¹⁹ 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.²⁰

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

¹⁵ See, e.g., Executive Order 1, *Equal Opportunity* (2018); DHRM Policy 2.05, *Equal Employment Opportunity*.

¹⁶ See *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 852 (4th Cir. 2001) (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993)).

¹⁷ 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.

¹⁸ 38 U.S.C. § 4311(a).

¹⁹ *Id.* § 4311(c)(1); 20 C.F.R. § 1002.23.

²⁰ *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 312 (4th Cir. 2001).

determination, and if so, (ii) whether the agency would not have made the same determination in the absence of his military status.²¹ However, there is no indication here 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 lieutenant position. As discussed above, it appears that the selection panel chose not to recommend the grievant for hiring based on his responses to the questions asked at his second interview, and EDR has 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 lieutenant position as a form of retaliation. 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;²² (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.²³ 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.²⁴

Here, the grievant engaged in protected activity by challenging previous agency selection processes in which he competed unsuccessfully.²⁵ However, even inferring a causal connection between the grievant's assumed exercise of protected activity and the agency's decision not to select him for the lieutenant position, EDR concludes that the agency has provided legitimate, nonretaliatory business reasons for its action. As discussed above, the selection panel determined that the grievant should not be recommended for hiring based on his responses to the questions asked at his second interview, and EDR has found no reason to dispute that decision. Furthermore, there are no facts that would indicate the grievant's protected activity was a but-for cause of the allegedly retaliatory selection process. Accordingly, EDR finds 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.²⁶

²¹ *See id.*

²² *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 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).

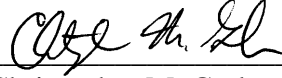
²³ *See, e.g.,* Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).

²⁴ *See id.* (citing Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013)).

²⁵ In connection with his retaliation claim, the grievant argues that he is protected under the state's Fraud and Abuse Whistle Blower Protection Act, *see* Va. Code §§ 2.2-3009 through 2.2-3014. Section 2.2-3012(a) of the Code provides that "[a]ny whistle blower covered by the state grievance procedure . . . may initiate a grievance alleging retaliation and requesting relief through that procedure." This ruling only addresses the grievant's allegations as a matter of the grievance procedure and makes no determination about the availability of additional remedies under the Act.

²⁶ In reference to his claims, 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, and 42 U.S.C. Section 1981, which prohibits

EDR's qualification rulings are final and nonappealable.²⁷



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certain types of discrimination. EDR has no authority to enforce or rule upon any legal issues relating to these assertions. 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 remedies.

²⁷ Va. Code § 2.2-1202.1(5).