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QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2020-5049
March 9, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management¹ on whether her October 22, 2019 grievance with the Virginia Department of Transportation (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 offices as an Engineering Technician III in Pay Band 4. In July 2019, the agency posted an advertisement for an Architect/Engineer I position in Pay Band 5 at the grievant’s office location. The job posting stated that “multiple positions may be filled from this applicant pool.” Five candidates, including the grievant, were interviewed for the position. During interviews with a five-person selection panel, 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 her interview, the panel determined that she did not meet the requirements for the position and declined to recommend her for hiring. The panel recommended two candidates as finalists for the position: an Engineering Technician III in Pay Band 4 at the grievant’s office (“Candidate 1”), and an agency employee from another office location (“Candidate 2”). The agency ultimately offered the advertised Architect/Engineer I position to Candidate 1, who accepted the job.

Following Candidate 1’s selection for the Architect/Engineer I position, the agency determined that Candidate 1’s former job should be reclassified as an Architect/Engineer I. Instead of posting a second advertisement for Candidate 1’s former position, the agency offered the job to Candidate 2, based on its assessment of Candidate 2 during the interview process for the posted Architect/Engineer I position. On or about September 25, 2019, the grievant was informed that she

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.

had not been selected for the advertised Architect/Engineer I position, and that Candidate 2 had been selected for Candidate 1's former position.²

On October 22, 2019, the grievant initiated a grievance challenging the agency's recruitment process for the Architect/Engineer I positions, arguing that she should have been selected based on her education and experience and claiming that the agency preselected one or both of the successful candidates. In support of her position that the successful candidates were preselected, the grievant notes that Candidate 1's spouse is a manager at the grievant's office and that Candidate 2 has only been employed by the agency since 2016. The grievant also appears to have alleged during the management steps that the agency discriminated against her based on her age. As relief, the grievant requested a salary increase, reclassification of her current position to an Architect/Engineer I, additional training to assist with future promotional opportunities, and "protection from retaliation and harassment."

During the management steps, the agency supported the grievant's request for additional training and encouraged her to meet with her supervisor to develop a training plan that would address her needs. Following the management resolution steps, the agency head determined that the grievance record did not contain evidence demonstrating that a misapplication or unfair application of agency policy had occurred or evidence supporting the grievant's allegation of discrimination. As a result, the agency head declined to qualify the grievance for a hearing. 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.³ Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve an "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, EDR will assume 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

The grievant essentially alleges that the agency misapplied and/or unfairly applied state and agency policy by declining to select her for either of the Architect/Engineer I positions. More

² It appears the grievant was initially unaware that Candidate 1's former position had been reclassified as an Architect/Engineer I, and later discovered that information when reviewing her office's organizational chart.

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).

specifically, the grievant argues that she was more qualified for the Architect/Engineer I positions than Candidates 1 and 2 and that the agency preselected one or both of the successful candidates. The grievant contends that she has worked for the agency for over 25 years, possesses advanced degrees and certifications, and was otherwise the most qualified candidate for one or both of the positions. The grievant questions whether Candidate 1's spouse played a role in the selection process and whether there was "any influence" from Candidate 2's management that affected the selection decision. The grievant further challenges the agency's decision to reclassify Candidate 1's former Engineering Technician III position to an Architect/Engineer I position in a higher Pay Band and offer the job to Candidate 2 without posting a new advertisement, suggesting that this action shows Candidate 2 was improperly preselected.⁷

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 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

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."¹⁰ The agency's recruitment policy also provides that selection panels must complete a Candidate Evaluation Form "for each candidate interviewed," and that the form "should provide enough detail to . . . distinguish one candidate from another and understand why each candidate was or was not selected for further consideration."¹¹ Here, a review of the panel's notes from the grievant's and the successful candidates' interviews shows that the panel's decision to not recommend the grievant was consistent with its assessment of her suitability for the position.

In particular, the panel determined that the grievant did not have recent experience with project management, that her answers to questions about technical skills indicated that her knowledge did not meet the requirements of the position, and that she would have needed additional training and supervision to perform successfully in the position. As the appointing authority explained to the grievant during the management steps, technical skills and experience

⁷ In attachments to her grievance, the grievant raised a number of specific questions about the selection process, including what criteria the selection panel used for assessing the candidates, how many candidates were interviewed, and when were Candidates 1 and 2 offered the positions. The agency answered at least some of these questions during the management steps, and EDR interprets the grievance as generally challenging the agency's selection decision.

⁸ See DHRM Policy No. 2.10, *Hiring*, at 21; VDOT HR Procedural Memorandum, *Talent Acquisition Toolkit*, at 26.

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

¹⁰ DHRM Policy 2.10, *Hiring*, at 8.

¹¹ VDOT HR Procedural Memorandum, *Talent Acquisition Toolkit*, at 24.

with project management tools and programs were important considerations during the selection process. The selection panel further noted in its assessment of the grievant's interview that other candidates performed more favorably than the grievant in those areas, with the result that it chose not to recommend the grievant for hiring. EDR does not disagree that the grievant's education, seniority, and work experience were important qualifications to be considered as part of a selection process; indeed, the agency appears to have taken those factors into account. They are not, however, the sole determinants in a selection panel's decision as to which candidate is best suited for a particular position. It appears that the panel determined that the grievant should not be recommended for an Architect/Engineer I position based on its assessment of the responses to the interview questions and overall qualifications, including her education and experience.

Although the grievant argues that Candidate 1's spouse, other members of agency management, or some other improper motive influenced the selection decision, the evidence reviewed by EDR does not suggest that the successful candidates were preselected. During the management steps, the agency denied that it considered factors other than the candidates' application materials and their performance at the interviews. For example, Candidate 1's spouse is employed at the grievant's office location, but did not participate in the interview process and does not appear to have had any other role in the selection decision. Furthermore, the panel's assessment describes Candidate 1's extensive experience in project management, knowledge of the agency's project development process, and familiarity with the agency's project management programs. The panel also noted that Candidate 1 would not need additional training to begin immediately carrying out the functions of the Architect/Engineer I position. Although the grievant's concerns about the fairness of the recruitment process 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 that Candidate 1 was the best suited applicant for the position.

Likewise, EDR finds no evidence of preselection or impropriety in the agency's selection of Candidate 2 for Candidate 1's former position. The advertisement for the vacant Architect/Engineer I position stated that multiple positions could be filled from the pool of applicants. The agency's recruitment policy provides that it may hire additional candidates from an applicant pool if a position "becomes vacant during the recruitment period or within 90 calendar days from the original advertisement closing date" and "the additional positions to be filled are in the same career group, organizational work unit, and geographical location."¹² The agency has indicated to EDR that it conducted a classification review of Candidate 1's former Engineering Technician III position after it determined Candidate 1 should be offered the advertised Architect/Engineer I position. The classification review identified an agency business need for additional staff to perform work at the level of an Architect/Engineer I. The agency compared the anticipated workload for Candidate 1's former position with two other Architect/Engineer I positions and found that the job duties for the three positions were substantially similar.¹³ As a result, the agency reclassified Candidate 1's former position on or about September 23, 2019. Under these circumstances, the agency appears to have appropriately exercised its discretion to assign job duties among employees and modify position classifications as warranted.

¹² VDOT HR Procedural Memorandum, *Talent Acquisition Toolkit*, at 13.

¹³ One of the positions used for comparison was the advertised Architect/Engineer I position that is the subject of this case. This does not mean that the two jobs are identical or have been assigned the same job duties, but rather that the general work to be performed by the two positions is similar.

After the reclassification of Candidate 1's former position, the agency then offered that job to Candidate 2. The agency has denied that it had any contact with Candidate 2's management or that any improper influence played a role in its decision to offer the position to Candidate 2. The selection panel described Candidate 2 as having experience with project management and contract administration and training in the agency's software systems for project management. As with Candidate 1, the panel concluded that Candidate 2 would be able to begin performing the job without additional training, which was an important consideration in the agency's selection decision here. According to the agency, Candidate 2 was an alternate choice for the initial advertised Architect/Engineer I position. When the agency needed to fill a second position in the same Role after the reclassification of Candidate 1's former position, it chose to offer the job to Candidate 2.

While the agency could have conducted a classification review of Candidate 1's job while she still occupied that position and separately advertised for the vacant Architect/Engineer I position, the grievant has not identified a policy provision that would require this approach, and EDR is not aware of any such policy mandate. Indeed, the agency's recruitment policy appears to authorize filling multiple positions from a single posting in situations like this one. Furthermore, and based on the panel's assessment of the candidates' performance at their interviews, it is not clear that an alternative recruitment method would have resulted in a different outcome from what actually occurred in this case: Candidate 1 and Candidate 2 both occupying Architect/Engineer I positions. Accordingly, and under the circumstances presented here, 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 their interviews.

In summary, the agency's recruitment policy states that its employment decisions are based on "a holistic assessment of a candidate's *overall suitability* for a position within the organization during the evaluation process."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.

Although the grievant may disagree with the panel's decision not to recommend her for hiring, EDR's review of the grievance record indicates that the selection panel concluded the successful candidates would be more suitable for the available positions. The grievant has not presented evidence to demonstrate that she 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.

¹⁴ VDOT HR Procedural Memorandum, *Talent Acquisition Toolkit*, at 26 (emphasis added).

Alleged Breach of Confidentiality

In addition, the grievant alleges that “confidential information” about her was shared with Candidate 1’s spouse, who appears to have been the grievant’s immediate supervisor at the time. During the management steps, the agency explained that the appointing authority decided to inform the grievant of the panel’s decision not to recommend her for the Architect/Engineer I position in person. The appointing authority explained to the grievant’s supervisor (*i.e.*, Candidate 1’s spouse) that the grievant had not been selected for the position and asked whether the supervisor would support additional training and skill development for the grievant. According to the agency, no additional information about the recruitment process was shared with Candidate 1’s spouse.

DHRM Policy 6.05, *Personnel Records Disclosure*, generally prohibits disclosure of an employee’s personal information—including applications for employment and other personal information—without the written consent of the subject employee.¹⁵ However, certain individuals, including an employee’s supervisor and other managers in an employee’s chain of command, have access to personnel records without the subject employee’s consent.¹⁶ Accordingly, it appears that the agency’s decision to notify the grievant’s supervisor of the selection panel’s decision was not, by itself, a prohibited disclosure of confidential information as contemplated under Policy 6.05. To the contrary, it appears that the appointing authority’s motivation was to provide additional support for the grievant to acquire skills that would assist her when competing for future advancement opportunities. While it is clear the grievant was reasonably concerned by what she believes to be an improper handling of her personal information, EDR cannot conclude that the alleged breach of confidentiality, if any occurred here at all, had a materially detrimental effect on the grievant’s employment status or was otherwise improper.

Discrimination

During the management steps, the grievant also questioned whether the agency’s decision not to select her was based on her age. The grievant noted that some of the agency’s reasons for selecting the successful candidates suggested that younger candidates were viewed more favorably than the grievant. 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, disability, or veteran status.¹⁷ 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.¹⁸

¹⁵ DHRM Policy 6.05, *Personnel Records Disclosure*.

¹⁶ *Id.*

¹⁷ *See, e.g.*, Executive Order 1, *Equal Opportunity* (2018); DHRM Policy 2.05, *Equal Employment Opportunity*.

¹⁸ *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)).

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 its review of her qualification and her responses to the questions asked at her interview, and EDR has found no reason to dispute that decision. EDR has been unable to identify any evidence, and the grievant cites to none, that would raise a sufficient question that the agency's justification for its decisions was mere pretext. Consequently, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.¹⁹



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¹⁹ Va. Code § 2.2-1202.1(5).