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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2020-5050
March 23, 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 November 25, 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 senior corrections officer at one of the agency’s facilities. She initiated her November 25, 2019 grievance to challenge the agency’s selection process for a sergeant position, in which she participated unsuccessfully. The grievant contends that “no female officers moved forward” to the second-interview phase, even though some had “more experience and training” than the male candidates who did receive a second interview. As relief, she requested: “If I cannot be promoted then a pay band adjustment.” She also stated that at least one female candidate should move forward to the second interviews and that a certain male candidate should receive no further interviews. The agency denied that its selection process had violated any policy, and 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.² Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve an “adverse

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

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, 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 alleges that, in advancing some candidates to second interviews for the position in question, the agency did not properly consider their respective knowledge, skills, and abilities (“KSAs”). 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.⁶ 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 interview process 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.⁷

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.”⁸ 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.⁹

Here, the agency advanced seven of the fifteen candidates who participated in the first interview to a second interview opportunity. A review of the panel’s notes from the grievant’s and the advanced candidates’ first interviews shows that the interview panelists evaluated not only the candidates’ respective knowledge, skills, and abilities, but also how well the candidates

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 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.

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

⁸ DHRM Policy 2.10, *Hiring*, at 8.

⁹ DOC Operating Procedure 102.2, *Recruitment, Selection, and Appointment*, at 10.

communicated during the interview and how much training they would need in order to successfully perform the duties of a sergeant. The panel recognized that the grievant's KSAs were sufficient to make her qualified for the position. However, while the grievant may have had more years of experience than the candidates who advanced, the interview panelists concluded that she was "capable of learning [the] job" but nevertheless would "require considerable training" to perform in a supervisory role. Based on the interview panelists' notes for each of the candidates, it appears that the interview panelists advanced the seven candidates who, in the panelists' judgment, would require the least training if selected and whose communication skills were most apparent during the 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.¹⁰ 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. Here, while the grievant's years of experience may be an important qualification to be considered as part of a selection process, this metric is not the sole determinant in a selection panel's decision as to which candidate is best suited for a particular position. Having reviewed the first interview panel notes for all candidates, 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 candidates might be most suitable for the position, based on their performance at the first interview.

Similarly, the grievant seeks a "pay band adjustment" to the extent the agency declines to promote her at this time.¹¹ In-band adjustments are governed by DHRM Policy 3.05, *Compensation*. This policy allows agencies to grant an employee an in-band adjustment, which is a "non-competitive pay practice that allows agency management flexibility to provide potential salary growth and career progression within a Pay Band or to resolve specific salary issues."¹² Like all pay practices, in-band adjustments are intended to emphasize merit rather than entitlements, such as across-the-board increases, while providing management with great flexibility and a high degree of accountability for justifying their pay decisions.¹³ While Policy 3.05 reflects the intent that similarly situated employees should be comparably compensated, it also reflects the intent to invest agency management with broad discretion for making individual pay decisions and corresponding accountability in light of each of 13 pay factors: (1) agency business need; (2) duties and responsibilities; (3) performance; (4) work experience and education; (5) knowledge, skills, abilities and competencies; (6) training, certification, and licensure; (7) internal salary alignment; (8) market availability; (9) salary reference data; (10) total compensation; (11) budget implications; (12) long-term impact; and (13) current salary.¹⁴ Because agencies are afforded great flexibility in making pay decisions, EDR has repeatedly held that qualification is warranted only

¹⁰ DOC Operating Procedure 102.2, *Recruitment, Selection, and Appointment*, at 3 (emphasis added).

¹¹ EDR interprets the grievant's request as seeking a pay increase within her current role. A true adjustment to her pay band would be a promotion, which was the selection process challenged and addressed above.

¹² DHRM Policy 3.05, *Compensation*, at 7.

¹³ See DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

¹⁴ See DHRM Policy 3.05, *Compensation*, at 19-24.

where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.¹⁵

Here, while the grievant points to her years of experience, the agency's apparent denial of a pay band adjustment at this time is also valid. DHRM policy does not mandate that employees with longer work experience be paid at a rate higher than the rate paid to employees with a shorter tenure; experience is just one of the 13 pay factors an agency must consider in making the difficult determinations of whether, when, and to what extent salary adjustments should be made in individual cases and throughout the agency. The question is not whether the applicable policy might support an in-band adjustment to the grievant's salary; indeed, the facts might support such a pay action. The question instead is whether the applicable policy mandates that the grievant receive a salary increase such that the agency's failure to provide it disregards the facts or is otherwise arbitrary or capricious. Although the grievant may disagree with the agency's conclusions as to this issue at this time, EDR has reviewed nothing that would suggest that the agency's decision not to increase the grievant's pay disregarded the pertinent facts, unfairly considered any of the 13 pay factors, or was otherwise arbitrary or capricious.

In summary, and although the grievant may reasonably disagree with the agency's decisions, EDR's review of the grievance record indicates that the selection panel reasonably concluded that seven other candidates would be more suitable for the position than the grievant. She has not presented evidence to demonstrate that the agency's determinations disregarded pertinent facts or were 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 advance her to a second interview in the selection process was motivated by discrimination based on her sex. 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.¹⁶ 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.¹⁷

EDR has thoroughly reviewed the information provided by the parties and finds that the facts do not raise a sufficient question as to whether the grievant was denied the position for a discriminatory reason. The grievant points out that none of the four female candidates who

¹⁵ See *Grievance Procedure Manual* § 9 (defining an "arbitrary or capricious" decision as one made "[i]n disregard of the facts or without a reasoned basis"); see also, e.g., EDR Ruling No. 2008-1879.

¹⁶ See, e.g., Executive Order 1, *Equal Opportunity* (2018); DHRM Policy 2.05, *Equal Employment Opportunity*.

¹⁷ 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)).

participated in the first interview advanced to the second interview. However, as discussed above, the selection panel chose not to recommend the grievant for hire based on the panelists' assessment of how much training she would require relative to other candidates and her relative communication skills apparent from her interview. In addition, EDR's review of the panel notes from the first interview indicates that the panelists identified legitimate, non-discriminatory reasons for advancing each of seven candidates to a second interview, and for declining to advance the other candidates (both men and women). While the grievant perhaps understandably questions why no female candidates advanced beyond the first interview for the position she sought, a grievance must present more than a mere allegation of discrimination in order to qualify for a hearing on that basis. Rather, the available facts must raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. Under the circumstances of this case, the coincidence between candidate sex and advancement to second interviews does not rise to this level. Consequently, the grievance does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.¹⁸



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¹⁸ Va. Code § 2.2-1202.1(5).