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**QUALIFICATION RULING**

In the matter of the Department of Juvenile Justice  
Ruling Number 2020-5053  
March 17, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management<sup>1</sup> on whether her November 22, 2019 grievance with the Department of Juvenile Justice (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 probation officer at one of the agency’s offices. In September 2019, she participated in the agency’s recruitment process for a probation supervisor position at her office. A three-member selection panel interviewed seven candidates, including the grievant, for the position. The grievant was on approved leave on the date that interviews were held. As a result, she participated in a telephone interview instead of an in-person interview. During their 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 her interview, the panel decided not to recommend her for hiring. The panel recommended one candidate as a finalist. The finalist candidate was ultimately selected for the probation supervisor position.

On November 22, 2019, the grievant initiated a grievance alleging “[u]nfair bias/practices” in the agency’s recruitment process for the probation supervisor position. In support of her position, the grievant argues that, despite her qualifications, two managers at her office were members of the selection panel and did not recommend her for the position as a form of retaliation because she filed a grievance in 2018. Finally, the grievant appears to contend that the agency’s selection decision constituted discrimination based on her veteran status. As relief, the grievant requests a transfer to a different position in her office with a new supervisor.

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<sup>1</sup> 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.

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 allegations of discrimination and retaliation. 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.<sup>2</sup> Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve an "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, 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 not selecting her for the probation supervisor position. In particular, the grievant argues that the agency inappropriately determined she should not be selected for the position. The grievant further asserts that the scheduling of interviews was "[d]eliberate and unfair" because they took place while she was on approved leave, and that she was inappropriately asked to provide detailed information about her travel plans when discussing arrangements for a telephone interview. In addition, the grievant contends that she was "really never considered for the position" because the agency did not ask her to complete a background check form as part of the interview process.

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.<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

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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 DHRM Policy No. 2.10, Hiring*, at 21.

resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.<sup>7</sup>

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.”<sup>8</sup> 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. For example, the panel described the grievant’s experience with the agency, her education, and her previous management experience outside of state employment. The panel also noted that the grievant displayed “good communication/organizational skills” and an “ability/process to manage staff compliance and difficult issues.”

In contrast to the grievant, the selection panel described the successful candidate’s previous experience “in Quality Assurance for staff and management,” as well as with “training and coaching” employees. The panel further considered that the successful candidate has previously worked as a supervisor for the agency, “articulated . . . organizational skills very well” and demonstrated an “ability to handle/address personnel issues.” It appears from EDR’s review of the selection panel’s notes that both the grievant and the successful candidate could be considered qualified for the probation supervisor position; however, the agency could only select one candidate because a single position was available. Faced with this difficult decision, the selection panel concluded that the successful candidate would be more suitable for the position. Having thoroughly reviewed the information provided by the parties, EDR finds that the grievant has not presented sufficient evidence to show that she was so clearly a better candidate that the panel should have recommended her for hiring instead of the successful candidate, or that the panel’s decision disregarded the facts or was otherwise arbitrary or capricious.

With regard to the grievant’s arguments regarding the scheduling of her interview and the completion of background check forms, EDR has reviewed nothing to indicate that such issues negatively impacted the agency’s consideration of her suitability for the position or resulted from an improper motive. Based on the selection panel’s availability, the agency decided to conduct interviews while the grievant was on approved leave. The agency asked about the grievant’s ability to be interviewed by telephone in an attempt to accommodate her schedule. Furthermore, the agency appears to have explained the reason for its questions about her travel plans when contacting the grievant to schedule her interview. Though the grievant was understandably frustrated about her inability to be interviewed in person, DHRM Policy 2.10 permits agencies to conduct interviews by telephone in situations like this one.<sup>9</sup> Likewise, background checks are a standard part of agency selection processes.<sup>10</sup> Employees often complete a background check form as part of the job interview process. It appears the grievant was not asked to submit such a form in this case because she was not interviewed in person. The evidence reviewed by EDR does not

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

<sup>8</sup> DHRM Policy 2.10, *Hiring*, at 8.

<sup>9</sup> *Id.* at 7 (“Although telephone interviews are not prohibited, it is strongly recommended that the candidate meet with the hiring authority before a job offer is made.”).

<sup>10</sup> See *id.* at 9-10.

suggest that the agency's failure to provide the grievant with a background check form resulted from anything other than the necessity of conducting her interview by telephone.

In summary, DHRM Policy 2.10 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.<sup>11</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. 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. 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.

Although the grievant may reasonably disagree with the panel's decision not to recommend her for the probation supervisor position, 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 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.

#### *Discrimination/Retaliation*

In addition, the grievant alleges that she was not selected for the probation supervisor position as a form of discrimination and/or retaliation. DHRM Policy 2.05, *Equal Employment Opportunity*, requires that "all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability." For a claim of discrimination on any of these grounds to qualify for a hearing, the grievance must present facts that raise a sufficient question as to whether the issues describe an adverse employment action that has resulted from prohibited discrimination.<sup>12</sup> However, if the agency provides a legitimate, nondiscriminatory business reason for the acts or omissions grieved, the grievance will not be qualified for hearing absent sufficient evidence that the agency's proffered justification was a pretext for discrimination.<sup>13</sup>

Similarly, a claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether the grievant's protected activity is causally connected to a subsequent adverse employment action against her.<sup>14</sup> Ultimately, a successful retaliation claim must raise a sufficient question as to whether, but for the grievant's protected activity, the adverse action would not have occurred.<sup>15</sup>

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<sup>11</sup> See *id.* at 21.

<sup>12</sup> See *Strothers v. City of Laurel*, 895 F.3d 317, 327-28 (4th Cir. 2018).

<sup>13</sup> See *id.*; see, e.g., EDR Ruling No. 2017-4549.

<sup>14</sup> See *Felt v. MEI Techs., Inc.*, 584 Fed. App'x 139, 140 (4th Cir. 2014) (citing *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)).

<sup>15</sup> *Id.*

Here, the grievant engaged in protected activity by filing a grievance with the agency in 2018. She alleges that, because two managers at her office were involved in the grievance and also participated in the selection panel for the probation supervisor, their decision not to recommend her for hiring was retaliatory. Moreover, the grievant appears to allege that the agency's selection process was discriminatory, noting that she is a veteran and was not selected for the position despite the agency's stated commitment to hiring and retaining veterans. As discussed above, however, the selection panel determined that the grievant should not be recommended for hiring based on its assessment of her qualifications and her responses to the questions asked at her interview. EDR has been unable to identify any evidence, and the grievant cites none, that raises a sufficient question whether the agency's justification for its decisions was mere pretext for discrimination or that the grievant's protected activity was a but-for cause of the agency's selection process. Even though the grievant may reasonably disagree with the agency's assessment of the candidates and its selection decision, this in itself does not raise a sufficient question whether discrimination or retaliation motivated the agency's actions in this case. Consequently, EDR cannot qualify the grievance for a hearing on either of these grounds.

EDR's qualification rulings are final and nonappealable.<sup>16</sup>



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<sup>16</sup> Va. Code § 2.2-1202.1(5).