EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2020-5066
April 20, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management[1] on whether her November 28, 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 initiated her November 28, 2019 grievance to challenge the agency's selection process for an open position as an employee experience manager, for which she applied but was not selected for an interview. The grievant contends that, when the agency screened her application, it failed to consider a substantial amount of her relevant experience, causing her to be classified only as "potentially competitive" for the position even though her existing role overlapped with the one she sought. The agency maintains that all of the grievant's relevant experience was considered and that she did not meet all of the listed qualifications for the position. The agency denied that its selection process had violated any policy,[2] 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.[3] 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] During the management steps, the grievant alleged that the agency's faulty evaluation of her application not only misapplied state hiring policies but also resulted from unconscious bias that undermined diversity in the agency's workforce.

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

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]

As an initial matter, it does not appear that the issues presented by the grievance rise to the level of an adverse employment action. The grievant's current Role is classified as Human Resource Manager II, and she is compensated within Pay Band 6. The Role for the position she sought unsuccessfully is classified as Human Resource Manager I, with compensation within Pay Band 5. Therefore, the agency's second management step respondent advised the grievant that if she had been offered the position, her compensation would have stayed the same or decreased. Thus, the grievance record offers no tangible basis to view the agency's selection process as adverse to the grievant's terms, conditions, or benefits of employment.

Misapplication/Unfair Application of Policy

Even assuming that the grievant had alleged an adverse employment action, EDR cannot conclude that a sufficient question exists whether the agency's selection process was a misapplication or 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.

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.[7] 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 choosing candidates for an interview pool 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.[8]

DHRM Policy 2.10, *Hiring*, provides that agencies may screen applications to reduce the initial applicant pool for a position. Screening must proceed according to "the minimum qualifications established for the position" but may also include consideration of "appropriate preferred job-related qualifications," provided the criteria are "applied consistently to all applicants."[9] The agency's own Screening Methodology instructs that applicants should be sorted into four categories: "not qualified," "minimally qualified," "potentially competitive," and

[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).
[7] *See* DHRM Policy No. 2.10, *Hiring*, at 21.
[8] *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as "[i]n disregard of the facts or without a reasoned basis.").
[9] DHRM Policy 2.10, *Hiring*, at 7.

"interview." Screening personnel must provide "brief summary notes . . . to document an assessment of [each] candidate's level of competitiveness." A "potentially competitive" candidate is one that "meets some of the preferred qualifications and/or possesses some directly related experience, transferable skills and/or a combination of other relevant Screening Factors and Preferences." A candidate who meets these criteria may be offered an interview if the hiring manager for the position "wishes to interview a broader range of candidates" than only those initially rated as highly competitive.

Here, the grievant contends that the agency's screening process failed to account for her qualifications to an extent that may have caused her exclusion from the interview pool. The agency's job posting for an employee experience manager listed ten minimum qualifications, the first of which was "[e]xperience utilizing employee engagement and wellness programs by participating in and championing the Department of Resource Management (DHRM) program offerings." The posting also listed five preferred qualifications, including:

- Experience with Commonwealth engagement and wellness programs.
- Experience conducting employee engagement surveys and focus groups; creating action plans from results.
- Experience developing new programs that enhance the employee experience by creating a positive culture of engagement, respect, and inclusion.

The agency's hiring records indicate that it used each of the above-listed qualifications to screen the 85 applicants for the position. A thorough review of the screening summaries for each of the 15 top candidates (those rated either "highly competitive" or "potentially competitive") confirms that, consistent with the position posting, the agency prioritized experience with engagement of current (rather than prospective) employees, especially through wellness programs. The agency offered interviews to the candidates rated as "highly competitive" and ultimately hired an individual from that group to fill the employee experience manager position.

The grievant asserts that the screening summary for her application omitted "[t]he majority of [her] work experience," notably including her initiatives to engage veterans and individuals with disabilities. Indeed, the resume the grievant submitted for the employee experience manager position reflects her many years of experience in "program management, diversity and inclusion strategies, training, branding, change management and organizational leadership," as well as "business partnerships that support a strategic diverse and inclusive outreach and recruitment plan." The grievant further contends that the employee experience manager position is in the grievant's division and has responsibilities that significantly overlap with her work.

However, a minimum requirement for the employee experience manager position was experience with "utilizing employee engagement and wellness programs by participating in and championing the Department of Resource Management (DHRM) program offerings," with additional preferred qualifications related to such experience. While the grievant may reasonably perceive her recruitment-focused qualifications as readily transferrable to initiatives for current employees, the agency was entitled to prioritize direct experience with the latter and to offer interviews to candidates whose applications most clearly demonstrated that experience. 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 are otherwise arbitrary or capricious. Here, while the grievant's application may have reflected many of the minimum and preferred qualifications for the employee experience manager position, EDR can find nothing to indicate that the grievant was so clearly one of the most competitive candidates that the screening process disregarded the facts or was 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 application information.[10]Accordingly, the grievance does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.[11]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[10] Included in the relief sought by the grievant is diversity and inclusion training for certain agency personnel. To the extent that this relief and/or the grievant's arguments regarding lack of diversity can be read as allegations of racial discrimination, EDR cannot find that the record raises a sufficient question whether any such allegations would qualify for a hearing. If an agency provides a legitimate, nondiscriminatory business reason for its action, a grievance alleging discrimination will not be qualified for hearing absent sufficient evidence that the agency's professed business reason was a pretext for the discrimination alleged. *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)). Here, the agency's screening documents reflect that it advanced candidates to interviews based on its reasonable assessment of each applicant's qualifications for the position, consistent with the job posting.

[11] Va. Code § 2.2-1202.1(5).