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**QUALIFICATION RULING**

In the matter of the Department of Corrections  
Ruling Number 2020-5100  
June 1, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”)<sup>1</sup> at the Virginia Department of Human Resource Management (“DHRM”) on whether his May 8, 2020 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a unit manager at one of the agency’s facilities. On or about March 15, 2020, he applied for a position as an assistant warden at the facility where he works. The grievant subsequently learned that he had not been selected to receive an interview for the position. The grievant filed a grievance on or about May 8, challenging the agency’s decision not to interview him for the assistant warden position. In his grievance, the grievant argues that he has “used the same application for four other assistant warden positions and receive[d] interviews” in the past, that the agency improperly selected applicants to be interviewed based on their job titles, and that his previous experience as a chief of security and acting assistant warden were not considered as part of the agency’s application screening process. As relief, the grievant requests to be “reevaluated and rescreen[ed] based on my experience, knowledge, skills and abilities expressed on my state application.”

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 and declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

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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.

## 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 he applied for would have been a promotion.

In this case, the grievant essentially asserts that the agency misapplied and/or unfairly applied policy when it did not select him to receive an interview for the assistant warden position. 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> Further, it is the Commonwealth’s policy that hiring and promotions be competitive and based on merit and fitness.<sup>7</sup>

In addition, 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 applicant screening decision at issue 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.<sup>8</sup> Here, the grievant argues that the agency improperly selected candidates to interview based on their job titles instead of assessing the candidates’ knowledge, skills, and abilities as required by policy. The grievant alleges that he

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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*; Department of Corrections Operating Procedure (“OP”) 102.2, *Recruitment, Selection, and Appointment*, at 5 (stating that the agency “makes employment decisions based on an individual’s merits, qualifications, eligibility, and *suitability*” for the position (emphasis added)).

<sup>7</sup> Va. Code § 2.2-2901 (“In accordance with the provision of this chapter all appointments and promotions to and tenure in positions in the service of the Commonwealth *shall be* based upon merit and fitness, to be ascertained, as far as possible, by the competitive rating of qualifications by the respective appointing authorities.” (emphasis added).)

<sup>8</sup> See *Grievance Procedure Manual* § 9 (arbitrary or capricious is defined as a decision made “[i]n disregard of the facts or without a reasoned basis”).

satisfied the minimum requirements of the position, was improperly screened out of the applicant pool because he is currently employed by the agency as a unit manager, and should have been offered an interview for the position.

EDR has thoroughly reviewed the application materials for the assistant warden position and found no evidence that raises a question as to whether that the agency's screening process was inconsistent with policy or otherwise improper. With regard to the screening of candidates who have applied for a position, DHRM Policy 2.10, *Hiring*, states as follows:

The agency must screen applications according to the minimum qualifications established for the position. Additional screening to appropriate preferred job-related qualifications and veterans' preference may also be used. All criteria in any screening must be applied consistently to all applicants.<sup>9</sup>

The agency's Operating Procedure 102.2, *Recruitment, Selection, and Appointment*, similarly provides that "[s]creening is based on duties, requirements, and minimum and preferred qualifications as stated in the vacancy posting."<sup>10</sup>

In this case, it appears that the agency received applications from many highly qualified candidates for the assistant warden position. During the applicant screening process, the agency determined that many candidates, including the grievant, satisfied the minimum qualifications the position. Due to the large number of qualified applicants, the agency further assessed the applicants' skill level and experience, as reflected by their current position with the agency, and selected nine candidates to interview for the assistant warden position.<sup>11</sup> These nine candidates occupied comparable senior management positions at their respective facilities. The agency's screening process resulted in some candidates who satisfied the minimum qualifications for the position, like the grievant, not receiving an interview because the applicant pool was highly competitive.

The grievant argues that the agency's method of screening applicants based on their job title was inconsistent with state and agency hiring policy, that the agency failed to consider his previous experience as a chief of security and acting assistant warden, and that another unit manager was interviewed for the assistant warden position whereas he was not.<sup>12</sup> The grievant is correct that agencies must consider each applicant's knowledge, skills, and abilities as part of the applicant screening process. In this case, the agency did so, determined that the pool of qualified applicants was too large to reasonably interview all of them, and further reviewed the applicants' qualifications as described above.

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<sup>9</sup> DHRM Policy 2.10, *Hiring*, at 7.

<sup>10</sup> Department of Corrections Operating Procedure ("OP") 102.2, *Recruitment, Selection, and Appointment*, at 10.

<sup>11</sup> The nine candidates who were offered interviews were agency employees.

<sup>12</sup> In his response to the agency head's qualification, the grievant alleges that the chain of command at his facility does not have a senior management position that was among those held by the candidates who were offered interviews for the assistant warden position. While the grievant describes this issue as "discrimination," he has not identified a protected status on which an allegation of discrimination could qualify for a hearing under the grievance procedure. *See Grievance Procedure Manual* § 4.1(b). This claim appears instead to be related to his allegation that the agency improperly screened the candidates' applications based on their job title.

An agency's determination as to which candidates should be offered an interview for a vacant position will necessarily depend on a comparison of the individuals who apply, and meet the qualifications, for the job. In cases where there are many qualified applicants for a position, an agency may appropriately conduct further screening to narrow the group of candidates to be interviewed, so long as the screening criteria used are consistent and based on the candidates' qualifications.<sup>13</sup> While position title is not, by itself, a basis for offering or denying an applicant an interview, a candidate's current position may be a valid indicator of their experience, level of responsibility, and other job-related qualifications. Although the grievant's application indicates that he has previously held positions as a chief of security and acting assistant warden, the agency noted during the management steps that the grievant has been a unit manager since 2012, and that it screened candidates with current senior management experience at that level to be interviewed. Finally, EDR has reviewed the agency's screening materials and confirmed that the unit manager whom the grievant alleges received an interview is not one of the nine candidates who were offered an interview.

In summary, the information provided to EDR indicates that the agency selected and consistently applied a reasonable method for further reviewing the qualified candidates' level of skill and experience, as indicated by their current senior management experience, to narrow the applicant pool to nine candidates to be interviewed for the assistant warden position. While the grievant may disagree with the agency's assessment of his qualifications and its decision not to offer him an interview, EDR has reviewed nothing that would suggest the agency's selection process, as a whole, violated any mandatory policy, disregarded the intent of policy, or was otherwise arbitrary or capricious. The grievant has not identified any policy violated by the agency's manner of screening applications for the position, and the agency's actions appear to fall within the discretion granted under state hiring policy.<sup>14</sup> Agency decision-makers deserve appropriate deference in making such determinations. 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.

EDR's qualification rulings are final and nonappealable.<sup>15</sup>



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<sup>13</sup> See DHRM Policy 2.10, *Hiring*.

<sup>14</sup> See *id.*; Department of Corrections OP 102.2, *Recruitment, Selection, and Appointment*.

<sup>15</sup> Va. Code § 2.2-1202.1(5).