

Issue: Compliance-documents; Qualification: Recruitment/Selection; Retaliation;
Ruling Date: August 5, 2002; Ruling #2002-055 and 2002-088; Agency: Department of
Social Services; Outcome: Agency in compliance; not qualified for hearing.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Social Services/ No. 2002-055, 2002-088
August 5, 2002

The grievant has requested a ruling on whether her November 7, 2001 grievance with the Department of Social Services (DSS) qualifies for a hearing. She claims that DSS misapplied selection/hiring policies and that it retaliated against her for participating in the grievance process. Furthermore, the grievant claims that the agency is out of compliance with the grievance procedure because it has refused to provide a document that she believes is relevant to her grievance. For the following reasons, this grievance does not qualify for a hearing. Moreover, this Department determines that DSS is not out of compliance with the grievance procedure.

FACTS

The grievant is employed as an Exception Manager with DSS. She has an MBA degree, and has been employed by the Commonwealth for twenty years, with twelve years in the Division of Child Support Enforcement. On September 4, 2001, she interviewed for a Program Specialist III position, but was not selected. The top applicant for the position declined the job offer, and DSS decided to re-advertise the position, rather than offer it to the second and third ranked applicants.¹ The grievant claims that it was an unfair practice to refer only one candidate to the hiring authority after interviews. DSS advertised the position a second time to state employees only.² When that selection process failed to yield a qualified applicant, the position was announced a third time. A candidate was selected from the third applicant pool. The grievant did not apply for the position the second or third time that it was advertised.

The grievant noted several perceived irregularities with the hiring process. First, the grievant was concerned that the hiring authority scored applicants during the interviews. Additionally, the grievant objected to her supervisor's presence on the panel, claiming that her supervisor could influence the other panel members, was biased against

¹ The second ranked applicant was a state employee from another agency, and the grievant ranked third.

² According to DSS, the purpose for re-announcing the position to state employees only was based on the fact that many applicants from the first process, which was open to the general public, lacked knowledge of state accounting processes.

her and, in the past, had made reference to her “tendency to file lawsuits” against the state, a possible reference to the grievant’s earlier grievances. The grievant further alleges that DSS retaliated against her for her earlier grievance activity.

DISCUSSION

Qualification

The grievance procedure recognizes management’s exclusive right to manage the operations of state government, including the hiring or promotion of employees within an agency.³ Inherent in this right is the authority to weigh the relative qualifications of job applicants and determine the “best-suited” person for a particular position based on the knowledge, skills, and abilities required. Grievances relating solely to the contents of personnel policies and the hiring of employees within an agency “shall not proceed to a hearing.”⁴ Accordingly, a grievance challenging the selection process does not qualify for a hearing unless there is evidence raising a sufficient question as to whether discrimination, retaliation, discipline, or a misapplication of policy tainted the selection process.⁵ In this case, the grievant claims that DSS misapplied policy and retaliated against her.

Misapplication of Policy

For an allegation of misapplication 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. The Commonwealth’s 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

In this case, the grievant claims that management should not have re-advertised the position, but should have offered it to another qualified candidate after the top applicant declined.

Department of Human Resource Management (DHRM) policy states that “agencies may reopen recruitment as necessary.”⁷ Neither DHRM nor DSS hiring policy states what should happen if the top candidate does not accept an offer of employment. Moreover, neither policy dictates that more than one candidate (or *any* candidate for that matter) be considered for hiring after the interview process. In this case, DSS elected to reopen recruitment. It appears that, under DHRM policy, this decision was wholly within

³ See Va. Code § 2.2-3004 (B).

⁴ Va. Code § 2.2-3004 (C).

⁵ *Grievance Procedure Manual* § 4.1 (c), page 10.

⁶ Department of Human Resource Management (DHRM) Policy No. 2.10, page 2 of 14.

⁷ DHRM Policy No. 2.10, page 3 of 14.

the discretion of DSS. Nothing in state or agency policy required DSS to have alternates or to offer the position to the “next candidate on the list.”

In addition, while “there is no question that [the grievant is] qualified for the position,”⁸ management has the discretion under policy to determine who is *best-suited* for the job. State policy does not provide that any person who is qualified must also be deemed by management as best-suited for the position. Therefore, the grievant’s perceptions of her qualifications and suitability cannot support a claim that management misapplied or unfairly applied policy.

The grievant further notes that DHRM and DSS selection policies are vague, which resulted in her not being offered the Program Specialist III position. First, she suggests that policy should identify a specific number of applicants to be referred to the hiring authority. Second, she claims that the hiring authority should not be allowed to score applicants because the hiring authority ultimately selects the top applicants. Moreover, she states that employees’ supervisors should not sit on their interview panels because of their power to influence other panel members.

Applicable state and agency policies do not specify the number of applicants to be referred to the hiring authority for consideration after the panel interview. Nor do they prohibit an applicant’s supervisor from serving on the interview panel. In addition, the policy does not forbid the hiring authority to score applicants. Indeed, DSS policy states that “the hiring authority may sit on the interview panel.”⁹

Here, the grievant’s contentions essentially challenge state and agency hiring policies and seek their revision. Under the grievance procedure, claims that challenge the “contents of statutes, ordinances, personnel policies, procedures, rules, and regulations” do not qualify for a hearing.¹⁰ Therefore, these issues are not proper for adjudication by a hearing officer.

Retaliation

The grievant claims that DSS retaliated against her because of her prior participation in the grievance process. As evidence of retaliation, she notes that her supervisor was a panel member during her interview, and that her supervisor has a “predisposition that [the grievant is] a troublemaker.”¹¹ Furthermore, she notes that the hiring authority’s supervisor was a management step respondent during her earlier grievance.

⁸ Third Step Response, dated January 17, 2002.

⁹ DSS Policy “Recruitment and Selection,” Appendix A (III)(H)(3)(c), page 8.

¹⁰ *Grievance Procedure Manual* § 4.1(c)(2), page 11.

¹¹ See Grievance Form A Attachment.

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;¹² (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.¹³

The grievant's prior participation in the grievance process constitutes a protected activity. Furthermore, not being selected for a position could be viewed as an adverse employment action. However, the grievant has not presented any evidence to support her claim that she was not selected because she had used the grievance procedure. The notes and scores from the interviews provide no evidence that the applicants were considered unequally or scored unfairly. Moreover, the supervisor's scores for the grievant were consistent with the scores of the other panel members and were quite high, placing her third out of ten candidates. In sum, this grievance fails to raise a sufficient question as to whether the grievant's non-selection was the result of retaliation.

Compliance

The grievance statute provides that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to actions grieved shall be made available, upon request from a party to the grievance, by the opposing party."¹⁴ This Department's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided.

In this case, the grievant has requested a "justification memorandum" from the third recruitment for the Program Specialist III position.¹⁵ She claims that this memorandum considered more than one candidate for the position, whereas only one candidate was considered after the first recruitment. She has requested this document to demonstrate how there was a misapplication during the first process because the first and third processes differed.

¹² See *Grievance Procedure Manual* §4.1(b)(4), page 10. Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law."

¹³ See *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653 (4th Cir. 1998).

¹⁴ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2, page 21.

¹⁵ In her original request for a compliance ruling, the grievant requested a number of other documents that DSS provided before the issuance of this ruling. To date, the justification memorandum is the only document that she has not yet received.

This Department must conclude, however, that the requested document is not relevant to this grievance. The grievant did not apply for the position during the third recruitment process, so nothing in the justification memorandum pertains to her or to her employment. Even if it does show that the third process differed from the first, it does not change that fact that management did not misapply policy during the first process. Therefore, DSS is not required to provide this document to the grievant. This Department's rulings on matters of compliance are final and nonappealable.¹⁶

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this grievance does not qualify for a hearing. For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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¹⁶ Va. Code § 2.2-3003(G).