

Issue: Qualification/Recruitment/Selection; Ruling Date: January 7, 2003; Ruling #2002-166; Agency: Department of Environmental Quality; Outcome: not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Environmental Quality/ No. 2002-166
January 7, 2003

The grievant has requested a ruling on whether his June 4, 2002 grievance with the Department of Environmental Quality (DEQ) qualifies for a hearing. The grievant claims that the agency has discriminated against him, misapplied state and agency selection policy, and engaged in a pattern of retaliatory acts against him. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is an Environmental Engineer Consultant with DEQ. Prior to August 2001, the grievant divided his time between the agency's Federal Facilities program and its Superfund program.¹ In August 2001, the agency assigned the grievant to only the Superfund program.² In March/April 2002, he applied and interviewed for an Office Director position.³ Only ten individuals applied for the position, so DEQ decided to interview all applicants, rather than screen the applications prior to interview. All candidates were notified at the beginning of their interviews that because there was no prior screening process, it was important to emphasize their qualifications during the interview.

When he was not selected for the position, the grievant filed a grievance on June 4, 2002, claiming that the agency misapplied hiring policy, discriminated against him, and continued to retaliate against him for prior grievance activity. He claims that DEQ shows favoritism to certain employees and that the interview process was unfair, because some applicants were provided with information about the position while other applicants were not. Furthermore, the grievant claims a history of "arbitrary and retaliatory" acts

¹ The grievant claims that he was assigned to the Federal Facilities program, but provided technical assistance to the Superfund program because of his expertise in the field. DEQ claims that he was not assigned to either program, but divided his time equally between the two. He did not report to the Federal Facilities Program Director, but to the Office Director.

² DEQ determined that the grievant's technical skills were better applied in the Superfund Program. Management felt that the grievant's interpersonal skills, which are important in the Federal Facilities Program, were not as strong.

³ The Office Director has oversight over both the Federal Facilities and Superfund programs.

against him, the latest being his non-selection for the Office Director position. He claims that these actions were a result of his successful challenge to his termination in 1993.

DISCUSSION

By statute and under the grievance procedure, management has the authority to determine who is best suited for a particular position by determining the knowledge, skills, and abilities necessary for the position and by assessing the qualifications of the candidates. Accordingly, claims relating to a selection process do not qualify for a hearing unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced the process, or whether policy may have been misapplied.⁴ In this case, the grievant alleges that the selection policy has been misapplied or unfairly applied and that he has been discriminated and retaliated against.

Misapplication 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.⁵ It is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.⁶

In support of his claim, the grievant claims that certain candidates were provided with key information about the position requirements prior to the interview while he was not. He further claims that DEQ engages in the practice of favoritism and that individuals with less certification and experience are being promoted over him. The agency asserts that it merely provided the Employee Work Profile (EWP) to those candidates who requested a copy prior to the interview and that the grievant did not request a copy.

The applicable policies are Department of Human Resource Management (DHRM) Policy 2.10 and DEQ Policy 3-1.⁷ Neither of these policies expressly forbids the agency from providing this information to applicants upon request. Thus, while the

⁴ Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1, pages 10-11.

⁵ Department of Human Resource Management (DHRM) Policy No. 2.10, pages 1-2 (defining selection as the final act of determining the best-suited applicant for a specific position; and knowledge, skill, and ability as components of a position's qualification requirements).

⁶ Va. Code § 2.2-2901 (stating, in part, that "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).

⁷ DHRM Policy 2.10 "Hiring," effective 9/25/00 and DEQ Policy 3-1 "Recruitment and Selection," effective 4/5/02.

better practice might be to provide all applicants with the EWP rather than to provide it to only some applicants, the agency's actions do not appear to rise to the level of a misapplication or unfair application of policy.

The grievant further claims that DEQ shows favoritism to certain employees, placing him at a disadvantage. He states that the successful candidate is one of several employees who have received preferential treatment from management. DEQ provided a legitimate business reason for selecting this applicant over the grievant for this position. It noted that the successful applicant had the best combination of technical and managerial skills and had a strong interview. Management claims that the grievant's technical skills are very strong, but that his interview performance was not as strong. Management further claims that interpersonal and communication skills were critical for the Office Director position. It appears that the agency, wholly within its discretion, placed a great deal of weight on interview performance and notified all applicants of the importance of the interview process. The grievant has provided no evidence that the interviews were conducted in an unfair manner. There is insufficient evidence that management improperly favored one candidate over another.

The grievant asserts that his knowledge, skills, and abilities exceed those of the selected applicant. However, education and experience are only some of the factors considered by management that ultimately determine who is best suited for a position.⁸ The grievant's assertions merely reflect that the grievant's perception of his qualifications and suitability for the position differ from that of management. Because policy gives management the discretion to determine who is best suited for the job, the grievant's perceptions of his qualifications and suitability cannot support a claim that management misapplied or unfairly applied policy. Accordingly, this issue does not qualify for a hearing.

Discrimination

For a claim of discrimination in the hiring or selection context to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. The grievant must present facts that raise a sufficient question as to whether he was not selected for the position *because of* his membership in a protected class.⁹ A grievant may accomplish this by coming forward with evidence: (1) that he is a member of the protected class; (2) that he is qualified for the position; and (3) that in spite of his qualification, he was rejected for the position.

Even if the grievant can demonstrate that he is a member of a protected class and that he is qualified for the position, he does not provide sufficient evidence that the agency failed to select him for the position because of his membership in a protected class. Moreover, during this Department's investigation for this ruling, the grievant

⁸ Under DHRM Policy 2.10, knowledge, skills, and ability (KSA) is defined as "a component of a position's qualification requirements."

⁹ See *Hutchinson v. INOVA Health System, Inc.*, 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998) (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)).

stated that he is uncertain of the basis of his claim of discrimination and that he was hoping to learn more about the agency's intent at hearing.¹⁰ However, an allegation of discrimination, without more, is not appropriate for adjudication by a hearing officer. Therefore, this issue does not qualify for a hearing.

History of Retaliation

The grievant claims that DEQ has retaliated against him in various actions taken over the years. Specifically, he claims that since filing a grievance in 1993, DEQ has targeted him and denied him an opportunity for advancement. As evidence of retaliation, he describes "a history of arbitrary, retaliatory, and sometimes severe actions against [him] in previous position transactions."¹¹

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 Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹⁴

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 sufficient evidence to support his claim that he was not selected because he had used the grievance procedure. The actions taken by DEQ from 1993 through 2001 simply amount to the agency's exercising its statutory authority to manage the affairs and operations of state

¹⁰ The grievant could not state whether the agency discriminated against him based on his race, gender, or other protected class. He merely stated his belief that he was being denied the opportunity for promotion by a higher level manager.

¹¹ See Grievance Form A. Specifically, the grievant claims that (1) after winning his grievance his 1993, DEQ reinstated him to a position in a section that was being phased out; (2) he was later assigned to a "tolerable" position as project manager in Federal Facilities; (3) another employee was promoted to Program Director, so he began splitting his time between Federal Facilities and Superfund; (4) the agency arbitrarily changed his duties to 100% Superfund; and (5) most recently, did not select him for promotion to Office Director.

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 *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 656 (4th Cir. 1998).

¹⁴ See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

government.¹⁵ Inherent in this authority is the discretion to direct the means, methods, and personnel by which work activities are undertaken, including the reassignment of duties. The grievant has provided insufficient evidence that the events following his 1993 grievance up through his 2002 non-selection for the Office Director position constitute a “chain” of retaliatory acts. Moreover, he noted during this Department’s investigation that the 2002 hiring authority for the agency was not even aware of his 1993 grievance activity.¹⁶ In sum, this grievance fails to raise a sufficient question as to whether retaliation against his 1993 grievance activity was the reason for the grievant’s non-selection.

APPEAL RIGHTS AND OTHER INFORMATION

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 the qualification 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.

Claudia T. Farr
Director

Leigh A. Brabrand
Employment Relations Consultant

¹⁵ See Va. Code § 2.2-3004(B).

¹⁶ The hiring authority also reported that she became the Waste Division Director two years ago and is not familiar with the circumstances surrounding the 1993 grievance. Moreover, she noted that the former manager, who is no longer a manager at DEQ, was not involved in the selection process.