

Issue: Qualification/Recruitment/Selection; Ruling Date: March 14, 2003; Ruling #2002-183;
Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services;
Outcome: Not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling Number 2002-183
March 14, 2003

The grievant has requested a ruling on whether her June 28, 2002 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) qualifies for a hearing. The grievant alleges that the agency misapplied policy by failing to fill a vacant position through the seniority system. Additionally, she claims she was the superior candidate for the vacant position, but was denied the job due to improper pre-selection.¹ For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The grievant has been employed by the agency for over twenty years and is a first shift Medication Assistant in one of the agency's mental health facilities. Medication assistants administer medication and conduct procedures under the supervision of a registered nurse and pharmacist and provide facility clients with basic personal care and therapeutic treatments.² The first shift position of primary Medication Assistant ("primary position") in the grievant's center became available when the person holding the position retired. Primary positions do not offer any additional compensation and are not promotions for those employees who are already medication assistants; the differentiating feature of the two positions is that a primary Medication Assistant works in one medication room and reports there daily, while other medication

¹ In advancing the grievance to the third step, the grievant wrote a five page rebuttal (Attachment C) to the second step response in which she raised for the first time the violation of many other agency policies (page 1) and challenged management's actions as being the result of racial discrimination (page 2). These claims are not noted on the original Form A. Management challenged the grievant's ability to raise additional misapplication of policy claims and the discrimination claim after the initiation of the grievance (*see* Request for Qualification Agency Head's Determination, page 2). In the requested relief section of the Form A, the grievant seeks to be appointed to the primary Medication Aide position and asks for "harassment" to stop. In Attachment B and during the investigation for this ruling, the grievant clarified the term "harassment" as describing supervisory conflict and, thus, at the initiation of the grievance she did not allege racial discrimination. Therefore, this ruling will only address those claims raised on the original Form A. (*See Grievance Procedure Manual* § 2.4, page 6. "Once the grievance is initiated, however, additional claims may not be added.")

² *See* Employee Work Profile (1-01) for Direct Service Associate II.

assistants move between medication rooms in different buildings on an as needed basis (“floaters”).

In March 2002, the agency advertised the open first shift primary position for internal recruitment.³ In the past, there had been an established practice by management of filling a vacant primary position by offering the vacancy to the most senior medication assistant floater on that shift. If that staff member declined, then the next senior floater would be offered the position.⁴ After a floater accepted the vacant primary position, then the floater position would be advertised.⁵ A primary position on first shift was last vacant several years ago, and ultimately was filled through the recruitment process because no floater on the list elected to fill the position.⁶ At the time this grievance was initiated, management continued to follow the practice of using the seniority system to fill vacant primary positions on second and third shifts.⁷ When the vacancy was announced, the grievant questioned management’s decision to utilize a competitive recruitment process rather than offering the position to the most senior medication assistant on first shift. Management has acknowledged confusion among staff members concerning the policy for filling vacant primary positions on first shift.⁸

Six applicants, including the grievant, applied for the position. All six were deemed qualified and were interviewed. The interview panel consisted of two employees, the second shift supervisor and the nurse on first shift who would be working with the successful candidate. In her grievance, the grievant states she is qualified for the primary medication assistant position based on over twenty years of experience at the facility. The successful applicant had been with the facility for more than twelve years.

DISCUSSION

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.⁹ It is generally the Commonwealth’s policy that hiring and promotions be competitive and based on merit—knowledge, skills, and abilities. Thus, pre-selection (merely going through the motions of the selection process when the outcome has been predetermined), regardless of merit or

³ The position was advertised from March 18, 2002 through March 29, 2002 as one of three Medication Assistant vacancies (one on first shift and two on second shift). Applicants may note their interest in more than one job and, thus, interview for several positions simultaneously.

⁴ For purposes of this ruling only, this Department will assume that the grievant would have been offered the primary position had the agency filled the position based upon seniority.

⁵ See Second Resolution Step Response, dated July 30, 2002.

⁶ *Id.*

⁷ See *id.* and see Memorandum to Medication Aides, Second Shift, dated June 27, 2002, announcing a Primary Medication Position on second shift and explaining it is the practice of the center to offer the position based upon seniority. During the investigation for this ruling, however, the agency informed the investigating consultant that the new policy requires any vacant primary medication positions on all shifts to be filled through a competitive recruitment process.

⁸ See Second Resolution Step Response, dated July 30, 2002.

⁹ DHRM Policy No. 2.10, effective 9/25/2000, pages 1, 2 (revised 3/01/2001)(defining selection as the final act of determining the best suited applicant for a specific position and discussing knowledge, skills, and abilities as components of a position’s qualification requirements).

suitability violates that policy. 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 or unfairly applied.¹⁰ In this case, the grievant alleges that management misapplied or unfairly applied policy by (1) failing to fill the vacant primary position based upon seniority and (2) pre-selecting the successful candidate.

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. Furthermore, because the General Assembly has limited issues that may be qualified for a hearing to those that involve “adverse employment actions,” any misapplication of policy by the agency also must constitute an “adverse employment action.”¹¹ Thus, in this instance, the threshold question for determining qualification becomes whether or not the grievant has suffered an adverse employment action. An adverse employment action is defined as a “tangible employment act constituting 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.”¹² As a matter of law, adverse employment actions include any misapplication of policy if, but only if, that misapplication results in an adverse effect *on the terms, conditions, or benefits* of one’s employment.¹³

In this case, there is some evidence that could support the contention that the agency misapplied the selection policy when filling the vacant primary position on first shift (whether by failing to utilize a seniority system and/or by pre-selecting the successful candidate).¹⁴ However, even if the agency misapplied selection policy, such misapplication could not be considered an “adverse employment action” in this case because there has been no major change in the grievant’s employment status as defined above. Significantly, the primary position would not be a promotion for the grievant or afford additional opportunities for further advancement.¹⁵ Nor is there an increase in salary associated with the position.¹⁶ The differentiating factor in the

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

¹¹ Va. Code § 2.2-3004(A).

¹² *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

¹³ *Von Gunten v. Maryland Department of the Environment*, 243 F.3d 858, 866 (4th Cir 2001)(citing *Munday v. Waste Management of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997).

¹⁴ For years the agency has consistently utilized a standard procedure of filling primary vacancies by offering these vacancies to the most senior medication assistant on the shift (first, second or third) with the vacancy. If there was a change in this policy, there is little evidence that the change was communicated to personnel prior to the vacancy at issue here. The grievant also asserts that the successful candidate was allowed to take the written portion of the interview process away from the interview area, to be returned later that day while all other candidates were required to complete the written portion immediately upon the conclusion of their interviews, a charge which the agency has neither confirmed nor denied.

¹⁵ The primary position is in the same Role (Direct Service Associate II) and has the same Core Responsibilities as the grievant’s current position as a Medication Assistant. During the investigation for this ruling, both the agency and the grievant concurred that the primary position would not be a promotion for an employee who is currently a medication assistant.

¹⁶ *See Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999) (in the analogous case of a denial of a lateral transfer finding there is no adverse employment action or actionable injury if there is no diminution in pay or benefits and no

primary position, and the reason the grievant sought the position, is the stability and consistency the position provides -- reporting to one supervisor and working in a single location rather than reporting to several different supervisors and changing locations on an "as-needed" basis. Therefore, while transfer to or selection for the primary position would have been the grievant's preference and may have provided more consistency in her work environment,¹⁷ any misapplication of policy by management did not significantly alter the status of her employment, as there as been no change in her compensation, benefits or job duties.¹⁸ Accordingly, there was no adverse employment action and thus this grievance does not qualify for a hearing.

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 this determination to the circuit court, she 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 notifies the agency that she does not wish to proceed.

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Director

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other materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities so that an employee has suffered objectively tangible harm); *Wagstaff v. City of Durham*, 2002 U.S. Dist. LEXIS 23167 (M.D. NC 2002) at 18 (noting no significant change in employment status where the primary components of the job -- rank, wages and number of hours -- remained the same).

¹⁷ *Brown v. Brody* at 457 (indicating that "[m]ere idiosyncracies of personal preference are not sufficient to state an injury").

¹⁸ *Wagstaff v. City of Durham* at 19 (analogous transfer situation where interview process involved an employer's refusal to transfer found not to be an adverse employment action when wages, promotional opportunity, and job responsibilities remain unaffected)(citing *Steward v. Ashcroft*, 211 F. Supp. 2d 166, 174-175 (D.C.C. 2002)).