

Issue: Qualification/grievant claims agency misapplied and/or unfairly applied policy and has discriminated and/or retaliated against him by failing to promote; Ruling Date: February 24, 2004; Ruling #'s 2003-131, 2003-132, 2003-135, 2003-178; Agency: Department of Corrections; Outcome: issues of retaliation and pre-selection/misapplication or unfair application qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
EDR Ruling Nos. 2003-131, 132, 135 and 178
February 24, 2004

The grievant has requested rulings on whether four grievances initiated on May 9, 2003 (two separate grievances), May 26, 2003 and June 20, 2003 with the Department of Corrections (DOC or the agency) qualify for a hearing. The grievant claims that the agency misapplied and/or unfairly applied policy and has discriminated and/or retaliated against him by failing to promote him to the position of Lieutenant. For the following reasons, the June 20, 2003 grievance qualifies for hearing, but the remaining three do not.

FACTS

The grievant is a Corrections Sergeant within the Western Region of DOC.¹ On April 30, 2003, the grievant initiated a grievance against his current facility.² Subsequently, from May 2003 through August 2003, the grievant applied for a number of openings for the position of Lieutenant in the Western Region. Although he was selected to interview for nine Lieutenant openings at six different facilities, he was not the successful candidate for any of these positions.³ The grievant timely initiated four separate grievances, each challenging his non-selection for a Lieutenant's position at a different facility.⁴ Three grievances allege his non-selection was based upon his race and that the administrators in the Western Region continually overlook qualified African American applicants for promotional opportunities. All four grievances claim that he was not selected in retaliation for his prior grievance activity. Also, two of the grievances present facts that allege management misapplied or unfairly applied policy in

¹ The Department of Corrections is divided into three Regions: Western, Central and Eastern.

² The grievant had also filed a grievance in April of 2002.

³ During the investigation for this ruling, the grievant informed the investigating consultant that he now has applied and interviewed for a total of twelve positions, but has not been selected for promotion.

⁴ Each grievance was initiated within 30 calendar days of his notification by DOC that he had not been selected for the position. *See Grievance Procedure Manual* § 2.2, page 5 ("...the written grievance must be initiated within 30 calendar days of the date that the employee knew or should have known, of the event that formed the basis of the dispute").

the selection process.⁵ Lastly, the fourth grievance also asserts that an African American less qualified than the grievant was improperly pre-selected by the facility administration.

While the facts are specific to each grievance, some overlap exists in the evidence presented by the grievant. For example, all his claims of management retaliation are premised upon his prior grievance activity. Additionally, in support of his claims of discrimination in the selection process, he notes that no African American has ever been promoted to the position of a security supervisor at any of the three facilities against which he filed his grievances. Also, during the investigation for this ruling, the grievant claimed that he has been subjected to racial slurs. Most of the alleged incidents occurred in the mid-1990s. After one incident in 1995 or 1996, the grievant states that he reported it to the Superintendent, who requested an investigation by internal affairs. However, the grievant indicated that there is still at least one co-worker at his current facility who continues to address him using an extremely derogatory term, but he has not reported his co-worker's conduct. This individual is not in his chain of command and was not involved in the selections at issue in this ruling.

In response to the grievant's allegations regarding discrimination, retaliation and misapplication or unfair application of policy, DOC management states repeatedly that such claims by the grievant are without merit because all promotional opportunities within DOC are processed in accordance with federal and state statutes, as well as administrative policies and procedures. Also, DOC claims the lack of African American security supervisors in the Western Region is, in part, because of the very low minority population in the area, less than 1%.

Each selection challenged by the grievant had a different three-member panel consisting of two Caucasian members and one African American. Eleven applications were submitted for the Lieutenant positions at Facilities #1 and #2, thirteen applications for the position at Facility #3 and nine at Facility #4. All applicants were deemed minimally qualified and were offered the opportunity to interview.⁶ In each case, all applicants other than the grievant were Caucasian, with the exception of the position at Facility #4 where one other applicant was African American. The facts of each grievance are presented separately below.

Facility #1

With respect to his interview at Facility #1, the grievant states that the chairman of the selection panel told the grievant he gave excellent responses to the questions posed during the interview, even answering some questions correctly which other applicants found difficult. However, he was not granted a second interview, and the position was offered to and accepted by a Corrections Officer. The grievant asserts he was more

⁵ While not designated with specificity, sufficient facts are present from which this Department can conclude the grievant was raising the issue of unfair application or misapplication of policy. Additionally, agency management addresses the issues raised as potential misapplications of policy.

⁶ At Facilities #1 and #3, one applicant failed to appear for the scheduled interview.

qualified than the successful candidate because he is a Corrections Sergeant. Therefore, the grievant claims he was not selected because of retaliation and/or his race, alleging that the Superintendent is "enforcing the tradition of the Western Region" in failing to promote an African American to be a supervisor in security.⁷

In response, the third resolution step respondent notes that it was the responsibility of the panel members to recommend three applicants to the Superintendent for the final interview based upon the applications and interview responses received.⁸ The Regional Director claims that the Superintendent had no influence on their decision. During the investigation for this ruling, the investigating consultant spoke with two of the three panel members who each stated that the Superintendent was not involved in, nor did he influence, the selection process of the three candidates for the final interview.⁹

Facility #2

In this case, the grievant states the Human Resource Officer (the HRO) was aware that he had initiated two grievances in the past year, and he believes that she influenced the panel to eliminate him from the interview process in retaliation for his grievance activity and/or discrimination. In response to the grievant's allegations, management maintains the HRO made no attempt to influence the panel. During the investigation for this ruling, the investigating consultant spoke with two of the three panel members who both stated that the HRO never discussed the candidates with either of them and she did not influence the recommendation process.¹⁰

Facility #3

In this instance, the grievant claims the interview chairperson (the Western Regional Program Manager) was aware of his grievance activity and even had participated in a discussion concerning one of the grievances. The grievant asserts that she then influenced the other panel members to eliminate him from the interview process. To the contrary, management maintains the panel chairperson in no way attempted to influence the deliberations of the panel members and it was the consensus of all three members as to which three candidates would be selected for a second interview. During the investigation for this ruling, the investigating consultant spoke with one of the two panel members allegedly influenced by the chairperson.¹¹ He stated that the chairperson

⁷ See Grievance Form A, Attachment, dated May 9, 2003.

⁸ A review of the applications and panel evaluation forms by the investigating consultant confirm that, while the grievant apparently performed well in the interview (two of the three reviewers recommended him "Highly" and the third gave him a "Recommend"), three other applicants were rated higher by the panel. The successful candidate received a rating of "Recommend Very Highly" from one panel member and the other two members recommended him "Highly."

⁹ The third panel member, an African-American, has not supported the grievant's race-based challenges to his non-selections, according to the grievant.

¹⁰ Again, the third panel member, the African-American who was also on the panel for Facility #1, has not supported the grievant's race-based non-selection challenges, according to the grievant.

¹¹ The other panel member was not available because he is retired and is only at the facility occasionally.

did not discuss the grievant's prior grievance activity, nor did she attempt to improperly influence the panel members. Additionally, the panel member (who is an African American himself) maintains the panel's decision was not discriminatory and was based upon recommending the three candidates with the best knowledge, skills and abilities to perform the job.

Facility #4

At Facility #4, the grievant claims management failed to notify him of his interview and, thus he missed the interview. Management maintains the grievant was notified by telephone, and when he failed to arrive for the scheduled interview, attempts were made to reach him. Subsequently, the grievant initiated a grievance against the facility alleging management intentionally failed to contact him. DOC agreed to reconvene the hiring panel, and the grievant closed his grievance. After the review of the applications and the evaluation of the initial interviews, the panel recommended a total of four applicants, including the grievant, to proceed in the selection process. These four applicants were granted second interviews conducted by the facility Superintendent and each were given a written scenario and asked to complete a Serious Incident Report (SIR).¹² The Superintendent rated the successful candidate, an African American, as "Recommend Very Highly." One other candidate was rated similarly. Both the grievant and another candidate were rated "Recommend Highly."

In this instance, in addition to his claim of retaliation, the grievant claims the facility improperly engaged in pre-selection when management promoted an African American because management believed the grievant would initiate another grievance challenging his non-selection as discriminatory if an African American was not chosen as the successful candidate. Additionally, he claims management failed to follow policy by selecting an African American who was less qualified than the grievant -- the successful candidate was a Corrections Officer and the grievant is a Corrections Sergeant.

As evidence, the grievant states that he was advised prior to his final interview that the other African American applicant was going to be selected. Also, he maintains the Superintendent did not adequately consider his qualifications because, although the Superintendent asked him approximately ten questions, he allegedly made no written notes of the grievant's responses to the questions.¹³ Furthermore, after his interview with the Superintendent, he claims a Major at the facility stated that management does not want to hire personnel who have filed grievances and, if the grievant was not careful, he could be "blackballed."¹⁴

¹² There was a period of several weeks between the first interview and the second interview because the Superintendent was out on sick leave.

¹³ With three other candidates being interviewed and ten questions posed to each candidate, the grievant contends that the Superintendent could not remember which candidate gave what response without taking notes during the interviews. The grievant maintains that the Superintendent saw no need to take notes because he had already pre-selected the successful candidate.

¹⁴ See Grievance Form A, Attachment, dated June 20, 2003.

Management disputes the grievant's allegations. Specifically, the Superintendent denies that the successful candidate was selected based upon his race and indicates that he completed an Applicant Evaluation Form for each of the four candidates selected for second interviews during the interviews. Additionally, the Superintendent asserts he had no knowledge of the grievant's prior grievance activity until the grievant informed him in the interview. During the investigation for this ruling, the Superintendent advised the investigating consultant that he asked the grievant to "tell him a little bit about himself," and the grievant then indicated he had filed a grievance. However, the Superintendent denies knowledge of any additional grievances until well after he had made the hiring decision and that he was not influenced by the grievant's statement. Furthermore, while the Major acknowledges having a discussion with the grievant regarding the grievant's initiation of grievances, he claims he does not recall advising the grievant management could "blackball" him for such activity.

The grievant disputes the Superintendent's claim, insisting he did not raise, nor did he discuss, the issue of pending grievances during his interview. Further, he claims the Superintendent had to have known of the grievance filed against the Superintendent's own facility at the time of his interview because, although the Superintendent went out on sick leave, he knew the panel had been reconvened to interview the grievant.

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 or unfairly applied.¹⁵ In this case, the grievant alleges that he has been retaliated and discriminated against and that the selection policy has been misapplied or unfairly applied.

Retaliation

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;¹⁶ (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,

¹⁵ Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1, pages 10-11.

¹⁶ 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."

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.¹⁷ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹⁸

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, with respect to the grievances filed against Facilities #1, #2 and #3, while there is a close proximity in time between his prior grievance activity and his non-selection for the Lieutenant's position at these facilities, the grievant has not presented sufficient evidence to support his claim that he was not selected because he had used the grievance procedure. Basically, he has merely alleged that certain individuals may have improperly influenced the hiring process, but has provided no evidence of such. Nor did this Department's investigation indicate that retaliation might have played any part in these selections. All panel members interviewed concurred that the candidates recommended for second interviews were those individuals who possessed the requisite knowledge, skills and abilities for the positions and that there was no improper influence exerted by anyone in the process, including those individuals named by the grievant.

However, with respect to Facility #4, potential material facts remain in dispute. For example, the grievant claims the Major told him DOC would "blackball" him for his grievance activity. On the other hand, while the Major acknowledges speaking with the grievant and discussing his grievances in general, he asserts that he has no recall of such a comment. Additionally, the Superintendent claims that during the interview (i) he carefully evaluated the grievant's responses and completed the evaluation form and (ii) the grievant raised the issue of his grievance activity. To the contrary, the grievant emphatically denies both of these assertions. Furthermore, the grievant maintains a DOC employee informed him that management had pre-selected the other African American applicant as the successful candidate in order to prevent the grievant from initiating another grievance alleging discrimination. During the investigation for this ruling, the grievant disclosed the identity of this witness to the investigating consultant.¹⁹ Although the consultant attempted to contact the grievant's witness, the telephone message was not returned. However, even if this witness denies the grievant's allegation, it would remain a disputed fact that could be material to the determination of whether there was an improper motive in the grievant's non-selection.

¹⁷ 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).

¹⁸ See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

¹⁹ This individual is someone who possibly could have "inside" information regarding the selection process.

Therefore, while the agency has provided a nonretaliatory business reason for the grievant's non-selection at Facility #4 -- the best suited candidate was selected -- this Department concludes, based upon the totality of the circumstances, that a sufficient question remains as to the existence of a causal link between the grievant's non-selection and his prior grievance activity. The hearing officer, as a fact finder, is in a better position to determine whether retaliatory intent contributed to the grievant's non-selection.²⁰ As such, the issue of retaliation with respect to Facility #4 is qualified for hearing.

Additional Theory for Non-selection at Facility #4

The grievant has advanced an alternative theory related to Facility #4's decision not to promote him -- pre-selection/misapplication or unfair application of policy. Because the issue of retaliation qualifies for a hearing, this Department deems it appropriate to send this ancillary issue for adjudication by a hearing officer as well, to help assure a full exploration of what could be interrelated facts and claims.

*Discrimination (Facilities #1, 2 & 3)*²¹

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.²² 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. If, however, the agency comes forward with a legitimate, non-discriminatory reason for its actions, the grievance should not qualify for a hearing, unless there is sufficient evidence that the agency's stated reason is merely a pretext or excuse for improper discrimination.²³

As an African American, the grievant is a member of a protected class. Additionally, it is undisputed that he is qualified for each position for which he applied and was not the successful candidate. He asserts that individuals at three different facilities (his current Superintendent, the HRO, and the panel chairperson, respectively) must have discriminated against him during the interview process because he is qualified for the position of Lieutenant, but has not been selected for promotion. Therefore,

²⁰ See *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364-365 (4th Cir. 1985), abrogated on other grounds, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) quoting *Morrison v. Nissan Motor Co., Ltd.*, 601 F.2d 139, 141 (4th Cir. 1979)("[r]esolution of questions of intent often depends upon the 'credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination'").

²¹ The grievance against Facility #4 does not allege discrimination.

²² 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)).

²³ See *id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); see also *Cabral v. Medical College of Virginia Hospital*, 1998 U.S. App. LEXIS 6610 (4th Cir. 1998).

management must put forth a legitimate, non-discriminatory reason for not selecting the grievant for the positions.

Management states that the applicants selected for second interviews were those deemed by the hiring panels to possess the requisite knowledge, skills and abilities for the jobs. Management maintains that none of the individuals named by the grievant improperly influenced the hiring panels or discriminated against him. During the investigation for this ruling, panel members from each of the three hiring panels reiterated management's statement that protocol was followed and no improper influence was exerted during the selection process. Furthermore, a review of the applications and applicant evaluation forms by the investigating consultant confirm that, although the grievant responded well to the questions posed to him, he was not one of the top three candidates.

Thus, in order to qualify for a hearing, the grievant must present evidence that management's reason was merely pretext – an excuse – for discrimination. In support of his position, the grievant notes that the Western Region has never had an African American security supervisor and, while he has applied for many Lieutenant positions, he has not been selected.²⁴ Additionally, he claims that, at times during his tenure with DOC, he has been subjected to improper racial slurs.

For the following reasons, we find the grievant's claim of pretext is not persuasive. First, with respect to the grievant's claim that he has been subjected to racial slurs, most of the alleged incidents occurred years ago. While the grievant asserts a co-worker at his current facility occasionally addresses him using a racially derogatory term, he is not in the grievant's chain of command nor in anyway involved in the selection processes challenged here by the grievant. While the alleged racial slurs are definitely inappropriate and are in no way condoned, such comments by a co-worker do not raise a sufficient question as to whether management discriminated against him by failing to promote him to Lieutenant.

Also, as management indicated, the Western Region has a small percentage of African Americans, possibly as low as 1%. Of the four selections challenged by the grievant, he was the only African American applicant in three of them, and one of only two in the fourth. Considering the interview pools ranged from between eleven and thirteen applicants, all of who were deemed minimally qualified to interview, the odds were not in the grievant's favor for selection. Furthermore, other than the general statement that he has now applied (and not been selected) for many Lieutenant positions in the Western Region, the grievant was unable to provide any specific evidence of racial discrimination. Moreover, while the grievant asserts that racial discrimination is

²⁴ As an African American applicant was the successful candidate at Facility #4, the Western Region now has an African American supervisor in security.

widespread in the Western Region, some African Americans in that region have recently been promoted.²⁵

In sum, the grievant's evidence has not presented a sufficient question as to whether management's failure to promote him was motivated by discrimination or that the business reason given was pretextual. Accordingly, this issue does not qualify for a hearing.

Misapplication or Unfair Application of Policy (Facilities #1, 2 & 3)

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.²⁶ It is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.²⁷

Management has presented a legitimate business reason for not selecting the grievant at each of the facilities – he was not deemed to be the best-suited candidate for the positions and other applicants were ranked higher during the interview process. The grievant asserts that his experience exceeds that of the selected applicants. Significantly, however, experience is only one of the factors considered by management that ultimately determine who is best suited for a position. 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.²⁸ Furthermore, the grievant has provided no evidence that the interviews were conducted in an unfair manner. Thus, there is insufficient evidence that management improperly

²⁵ During this investigation, the grievant informed the investigating consultant that, among others, a Lieutenant who served on the grievant's selection panels at Facility #1 and #2 was promoted to Captain. Also, the Officer promoted to Lieutenant at Facility #4 is an African American. While the grievant asserts these individuals were only promoted in order to negate his claims of discrimination, the grievant has provided no evidence of such.

²⁶ Department of Human Resource Management (DHRM) Policy No. 2.10 (defining selection as the final act of determining the best-suited applicant for a specific position. DHRM Policy 2.10, Effective Date: 9/25/00; Rev. 3/01/01.

²⁷ 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).

²⁸ While the grievant specifically disagrees with management's promoting a Corrections Officer to Lieutenant at Facility #1, no policy prohibits such action by management. Indeed, management explained (and the grievant concurred) that field units usually do not have positions designated as Corrections Sergeant, so it is not unusual for an Officer to be promoted to Lieutenant at a field unit.

avored one candidate over another. Accordingly, this issue does not qualify for a hearing with respect to Facilities #1, 2 and 3.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department qualifies the issues of retaliation and pre-selection/misapplication or unfair application raised in the June 20, 2003 grievance for a hearing. This qualification ruling in no way determines that the agency's decision not to promote the grievant was retaliatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

However, the two grievances initiated on May 9, 2003 and the grievance initiated on May 26, 2003 are not qualified 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 these qualification determinations 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 these grievances, 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 grievances and notifies the agency of that desire.

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