

Issue: Qualification/grievant claims of missapplication of state and agency hiring policy;  
Ruling Date: January 13, 2004; Ruling #2003-410; Agency: Department of Motor  
Vehicles; Outcome: not qualified



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Motor Vehicles/ No. 2003-410  
January 13, 2004

The grievant has requested a ruling on whether her May 19, 2003 grievance with the Department of Motor Vehicles (DMV) qualifies for a hearing. The grievant claims that the agency misapplied state and agency hiring policy and discriminated against her on the basis of age. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is the Assistant Manager of a DMV office. On March 12, 2003, the grievant applied for the position of Manager Senior in the office where she works. The grievant interviewed for the position on April 2, 2003 before a three-person panel, but was not the successful candidate.

The grievant claims that DMV violated state and agency hiring policy throughout the interview and selection process. Specifically, she claims that (1) the seven questions asked of the candidates in the interviews did not address the experience, education, and training necessary for the position, (2) the hiring manager drafted the interview questions without the assistance of a Human Resources consultant, (3) the interview panel used different criteria in rating applicants, (4) DMV failed to contact her references, (5) selection was based on interview responses only, and (6) question #5 in the interview was unfair. The grievant further claims age discrimination, based on the fact that the successful candidate for the Manager Senior position was significantly younger and had less experience as an assistant manager.

Additionally, the grievant raises a question of compliance. She states that the individual who affirmed the decision of the interview panel improperly served as the second-step respondent in this grievance.

DISCUSSION

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.<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup> In this case, the grievant claims that DMV misapplied policy and discriminated 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 applicable policies in this case are the Department of Human Resource Management (DHRM) Policy 2.10, *Hiring* and DMV’s Employment Policy.<sup>4</sup> The grievant’s specific claims are discussed in turn below.

### Interview Questions

The grievant claims that the seven interview questions did not expressly address the applicants’ “experience, education, or training.”<sup>5</sup> The questions asked of each applicant during the interview were:

1. In your current position as Assistant Manager, what have you done to help boost employee morale, especially during these trying times?
2. Relate to the panel your understanding of the Standards of Conduct and what purpose they serve.
3. What is the one weakness in your abilities that you would most like to improve?
4. What particular skills do you possess that would make you the best qualified applicant for this position?
5. End of the day processes have been somewhat modified during the past few months. What role have you played in this process and what improvements do you recommend?
6. Since the events of 9/11 DMV has changed significantly in regards to customer service. What have you done to conform to the new procedures and still provide good customer service?

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<sup>1</sup> See Va. Code § 2.2-3004(B).

<sup>2</sup> Va. Code § 2.2-3004(C).

<sup>3</sup> *Grievance Procedure Manual* § 4.1(c), page 10.

<sup>4</sup> See DHRM Policy 2.10 and DMV Employment Policies and Procedures.

<sup>5</sup> See Letter from Grievant to Third-Step Response, page 2, dated July 14, 2003.

7. What do you expect from the District Management staff in terms of support and what do you feel is your responsibility to the District Manager?

During this Department's investigation, the grievant stated that Questions 3 and 4 failed to address "education, experience, or training."<sup>6</sup> Specifically, she stated that Question #3 does not relate to being a manager and Question #4 was too broad and not specific to an applicant's experience and training.

Both DHRM Policy 2.10 and DMV's hiring policy state that interview questions "should seek information related to the applicant's knowledge, skills, and ability to perform the job" and that questions "that are not job related or that violate EEO standards are not permissible."<sup>7</sup> In this case, there is insufficient evidence to support the claim that the questions were not related to the duties of the position. Indeed, it appears that the seven interview questions, including Questions 3 and 4, sought information about the candidates' ability to function as a manager.<sup>8</sup> Question #4 in particular allowed the applicants to explain how their experience, education, and training made them the strongest candidate for the position. The grievant claims that because her application and resume explained her experience, education, and training, she did not emphasize her qualifications during her interview. It does not appear, however, that the questions asked during the interview prevented the grievant from fully explaining her qualifications.

#### Hiring Manager Drafted Questions

The grievant asserts that DMV violated its hiring policy when the hiring manager drafted the interview questions without the assistance of a Human Resources consultant. The agency claims that the DMV "guidelines do not require [hiring manager] and [HR consultant] to confer on questions."<sup>9</sup>

DHRM Policy 2.10 does not specify who should develop interview questions. DMV policy states, however, that "the Hiring Manager and HR Consultant confer on a set of interview questions that must be asked of each applicant."<sup>10</sup> It appears from the language of this policy provision that the conference between the hiring manager and HR consultant is a standard practice or requirement. Accordingly, there is a sufficient question as to whether the agency misapplied policy when it allowed the hiring manager

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<sup>6</sup> The grievant further stated during this Department's investigation that Questions 1, 2, 6, and 7 and her responses to those questions reflected her ability to serve as Manager.

<sup>7</sup> DHRM Policy 2.10, page 10 of 21 and DMV Employment Policies and Procedures, "Interview Questions."

<sup>8</sup> According to the Employee Work Profile (EWP) for the position, the position is "responsible for human resources management of staff" and that "[a]ll duties are performed in a customer service oriented manner." Core responsibilities include supervision of staff, customer service, and safeguarding agency assets. The interview questions appear to address the applicants' ability to supervise employees, provide adequate customer service, and safeguard agency assets (Question 5).

<sup>9</sup> Third Step Response, dated August 4, 2003.

<sup>10</sup> DMV Employment Policies and Procedures, "Interview Questions."

to develop a set of interview questions without the assistance of a HR Consultant. However, in some cases, qualification is inappropriate even if an agency may have misapplied policy. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event would prevent a hearing officer from being able to grant any meaningful relief. In addition, as is the case here, if there is no causal link between the alleged misapplication of policy (i.e., not conferring with HR on the interview questions) and the management action grieved (i.e., the grievant's nonselection), qualification is inappropriate.

Here, the grievant has not demonstrated that the agency's failure to confer with an HR Consultant on the interview questions prejudiced her in any way. As noted above, the interview questions were related to the Manager position; the mere fact that they were drafted by the hiring manager had no bearing on the panel's decision to offer the position to another candidate. Moreover, the same seven questions were asked of *all* interviewees, so it does not appear that the grievant was treated unfairly in her interview.

#### Interview Question #5

The grievant claims that Interview Question #5 was unfair because her office was closed due to budget cuts from October 2002 through January 2003 at the time when "end of the day" procedures were changed. Because she was on layoff status when the changes were made, she claims she had no knowledge of the modifications and did not know how to respond to the question. She asserts that her office did not use the new end of the day procedures when it reopened because it was not aware of the changes. DMV claims that it notified her of the new procedures just prior to her office's reopening.

The only requirement in state and agency policy for interview questions is that they be job-related and that they "should seek information related to the applicant's knowledge, skills, and ability to perform the job."<sup>11</sup> There is no requirement under policy that the applicants must *possess* the knowledge, skills, and ability to perform the job – the purpose of the interview process is to determine which applicants have those desired qualifications. Here, the grievant claims that she did not know the answer to the question, therefore it was unfair. However, it does not appear that DMV misapplied policy in this instance because policy does not require that agencies only ask questions that applicants are capable of answering fully and accurately. In any event, it appears that the grievant was not unfairly prejudiced by the question because her overall evaluation by the panel members states that "application and interview responses revealed good abilities in the area[] of . . . the end of the day process."<sup>12</sup>

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<sup>11</sup> DHRM Policy 2.10 page 10 of 21; DMV Employment Policies and Procedures, "Interview Questions."

<sup>12</sup> See Grievant's Interview Worksheet, page 3, dated April 2, 2003.

### Criteria Used by Panel

According to the grievant, two of the panel members relied only on interview question responses in scoring applicants, while the third panel member considered both interview responses and the applications. She claims that because the panel used inconsistent criteria in rating candidates during the interview process, the agency misapplied policy.

DHRM Policy 2.10 only requires that interviewers “document applicants’ responses to questions to assist with their evaluation of each candidate’s qualifications.”<sup>13</sup> Similarly, DMV’s hiring policy states that each panel member “takes notes of [interview] responses. The Hiring Manager/Supervisor compiles the panel’s notes on an Interview Worksheet and states reason for selection or non-selection for each candidate.”<sup>14</sup>

In this case, the panel used a “scoring” method, using the numbers 1-5 to rate each interview response, with 1 being the best possible score. The sum of the individual scores was the applicant’s total interview score. Policy does not expressly prohibit such a rating measurement. Nor does state or agency policy require a certain method of scoring interview responses or criteria that must be used. While it is certainly preferable for panel members to consider the same criteria when evaluating candidates, it does not appear that DMV misapplied policy, nor does it appear that its actions were so unfair as to amount to a disregard of the intent of state hiring policy, because the criteria, inconsistent or otherwise, was applied in the same manner to each applicant.<sup>15</sup>

### Failure to Contact References

The grievant further claims that DMV never contacted her job references. DHRM Policy 2.10 states that “[a]gencies should check references with the current and at least one former supervisor *of the applicant who is the final candidate for the position.*”<sup>16</sup> Similarly, DMV policy requires background checks “to ensure *the selected candidate is*

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<sup>13</sup> DHRM Policy 2.10, page 10 of 21.

<sup>14</sup> DMV Employment Policies and Procedures, “Interview Documentation.”

<sup>15</sup> It should be noted that *both* the application and interview questions allowed candidates to fully explain their qualifications, including their experience, education, and training. The grievant states that she fully explained her credentials on her application, but not in her interview. Her complaint is, basically, that had the panel relied more on her application, she would have been the successful candidate. However, the fact that the grievant was not thorough in her interview responses cannot be attributed to the panel and its scoring of interview responses as a misapplication or unfair application of state and agency policy. Because the policies do not speak specifically to *how* an applicant may be rated in his or her interview, the decision to use the scoring method was wholly within DMV’s discretion. Moreover, it appears that the panel members were very consistent in their interview scores. For example, the successful candidate’s scores were 11-12-11. The second highest candidate’s scores were 18-19-18, while the grievant received 20-20-21. The remaining applicants received 22-20-22 and 21-21-21. Therefore, the scoring method used by DMV in this case produced a consistent result.

<sup>16</sup> DHRM Policy 2.10, page 10 of 21 (emphasis added).

suitable for the position.”<sup>17</sup> Here, the grievant was not the selected candidate for the position. Accordingly, DMV did not misapply policy by failing to contact her references.

#### Selection Based on Interview Responses Only

Finally, the grievant states that the selection was based on interview responses only and did not take into account her employment history or training, which were explained on her employment application. She states that policy requires that selection be based on several factors, including the application, interview, and background checks.<sup>18</sup> The grievant stated during this Department’s investigation that a less-qualified candidate was selected simply because she performed better at her interview. It appears that the agency, wholly within its discretion, placed a great deal of weight on interview performance. Moreover, in screening applications prior to the interview process, the agency reviewed the applications and determined that the grievant, as well as the other applicants, were minimally qualified for the position.<sup>19</sup> Furthermore, as noted above, the grievant was provided the opportunity to emphasize her qualifications during her interview. The grievant has provided no evidence that the interviews were conducted in an unfair manner.

The grievant asserts that her knowledge, skills, and abilities exceed those of the selected applicant. However, training and experience are only some of the factors considered by management that ultimately determine who is best suited for a position.<sup>20</sup> The grievant’s assertions merely reflect that the grievant’s perception of her 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 her qualifications and suitability cannot support a claim that management misapplied or unfairly applied policy.

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<sup>17</sup> DMV Employment Policies and Procedures, “Background Checks” (emphasis added).

<sup>18</sup> DHRM Policy 2.10 defines “selection” as “the result of the hiring process that identifies the applicant best suited for a specific position.” DHRM Policy 2.10, page 4 of 21. The “Selection Process” includes (1) screening employment applications, (2) interviews, and (3) reference/background checks. *See* DHRM Policy 2.10, pages 9-11 of 21. Similarly, DMV policy states that selection “is based on several factors including qualification and suitability as demonstrated during the application, interview, presentation, work sample (if any) and background checks.” DMV Employment Policies and Procedures, “Selection Criteria.”

<sup>19</sup> Both state and agency policies give agencies the option of interviewing all applicants for a position or reducing the applicant pool by screening applications. *See* DHRM Policy 2.10, page 9 of 21 and DMV Employment Policies and Procedures, “Application Screening.” In this case, DMV screened applications and selected five candidates for interviews. If the screening process is used, “the agency must screen positions according to the qualifications established for the position and must apply these criteria consistently to all applicants.” DHRM Policy 2.10, page 9 of 21.

<sup>20</sup> Under DHRM Policy 2.10, Knowledge, Skills, and Ability (KSA) is defined as “a component of a position’s qualification requirements.”

### *Age Discrimination*

For a claim of age discrimination in the hiring or selection context to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, an employee must be forty years of age or older and must present evidence raising a sufficient question as to whether she: (1) was a member of a protected class;<sup>21</sup> (2) applied for an open position; (3) was qualified for the position, and (4) was denied promotion under circumstances that create an inference of unlawful discrimination.<sup>22</sup> Where the agency, however, presents a legitimate, non-discriminatory reason for the employment action taken, the grievance should not qualify for a hearing, unless there is evidence that raises a sufficient question as to whether the agency's stated reason was merely a pretext or excuse for age discrimination.

The grievant is 53 years old and is minimally qualified for the Manager position. The successful candidate is 28 years old. The agency has stated a non-discriminatory reason for awarding the Manager position to another individual: the successful candidate's performance during the interview process. The grievant has not provided sufficient evidence that the agency failed to select her for the position because of her membership in a protected class. Moreover, during this Department's investigation for this ruling, the grievant stated that she does not believe age was a factor in the selection process. An allegation of discrimination, without more, is not appropriate for adjudication by a hearing officer.

### *Compliance – Second Step Respondent*

During her third resolution step, the grievant noted her concern that her second-step respondent had been involved with the hiring process.<sup>23</sup> However, the grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>24</sup> That process assures that the parties first communicate with each other about the purported noncompliance, and resolve any compliance problems voluntarily without

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<sup>21</sup> It is unlawful for an employer to discriminate against an employee on the basis of age. *See* 29 U.S.C. 621 et seq. (ADEA). The ADEA's protections extend only to those who are at least forty years old. Such discrimination is also a violation of state policy. *See* the Department of Human Resources management (DHRM) Policy 2.05.

<sup>22</sup> *See* Dugan v. Albermarle County Sch. Bd., 293 F.3d 716, 720-721 (4<sup>th</sup> Cir. 2002). Note: proof of selection of a substantially younger worker is required; not selection by someone entirely outside of the ADEA's protected class. Dugan at 721.

<sup>23</sup> The second step respondent is generally a senior manager designated by the agency (even if his or her actions lead to the grievance). If the grievant alleges discrimination or retaliation by that individual, the grievant has the option to (1) request that the agency designate another individual to serve as the second-step respondent or (2) waive the face-to-face meeting at the second step and receive only a written response. *See Grievance Procedure Manual* § 3.2, page 9. However, the grievant did not exercise either of these options under the grievance procedure.

<sup>24</sup> *See Grievance Procedure Manual* § 6, pages 16-18.



this Department's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance. If the alleged non-compliance is not corrected, then and only then, may the opposing party request a compliance ruling from this Department. Further, a party may waive the right to challenge alleged noncompliance if she advances the grievance to the next step, even after becoming aware of the alleged procedural violation.

In this case, the grievant does not appear to have contacted the agency head nor has she requested a compliance ruling from this Department. Further, she waited until *after* advancing her grievance to the third-step respondent before raising the issue of alleged noncompliance at the second step, thus waiving her right to challenge the designated second-step respondent through a ruling request.

#### 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.

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Claudia T. Farr  
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