

Issue: Qualification/grievant claims agency discriminated against her on the bases of race and misapplied state hiring policy; Ruling Date: March 16, 2004; Ruling #2003-511; 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
Ruling Number 2003-511
March 16, 2004

The grievant has requested a qualification ruling on whether her September 9, 2003 grievance with the Department of Motor Vehicles (DMV or the agency) qualifies for a hearing. The grievant claims that the agency discriminated against her on the basis of race and misapplied state hiring policy. For the following reasons, this Department concludes that this grievance does not qualify for a hearing.¹

FACTS

The grievant is employed as a Program Support Technician with DMV. The grievant applied for the position of Human Resource DP User Liaison (IT Specialist II) with DMV. The grievant interviewed for the position on July 30, 2003, before a three-person panel, but was not the successful candidate.

The grievant claims that she should have been the successful candidate based on her seven years experience in vehicle titling and registration and that the agency's failure to hire her for the Human Resource DP User Liaison (IT Specialist II) position is discriminatory based upon her race, African-American, and a misapplication of policy. In support of her race discrimination claim, the grievant asserts: (1) the interview panel consisted of three Caucasian females; (2) the person hired has no experience in the required areas; (3) all interviewees were African-American, except the individual hired, who is Caucasian; and (4) DMV hires very few African-Americans for upper-level positions.

¹ During this Department's investigation, the grievant raised concerns regarding the agency's alleged failure to respond to her grievance within the mandated 5-workdays. However, she never requested a compliance ruling and it appears that the grievant never notified the agency head of the alleged noncompliance as required under the grievance procedure. Moreover, the agency has now responded at all stages of the management resolution steps, thus rendering a noncompliance argument moot. Finally, by advancing her grievance, the grievant essentially waived her right to further contest the agency's purported non-compliance with the 5-day rule at the second step.

The agency confirms that the interview panel consisted of three Caucasian females and that the person hired is a Caucasian female. The agency further asserts that seven individuals were interviewed for the Human Resource DP User Liaison (IT Specialist II) position and that of those seven, two were Caucasian and five were African-American. Additionally, DMV claims that the hiring decision was based upon the successful candidate's "knowledge of the motor vehicle code as it pertains to many aspects of DMV's business functions," experience in leading projects while working on other projects at the same time, extensive research and documentation experience, and her "assignment to diverse administrations around DMV headquarters as well as in the field." In contrast, the agency claims that the grievant "did not understand some of the [interview] questions even after clarification," does not have "hands on processing of Title and Registration transactions using the mainframe system," and "[c]onveyed little knowledge of CSC transaction processing."

During the management resolution steps, the agency, recognizing that the recruitment and selection process could have been conducted better, decided to create a second Human Resource DP User Liaison position.² The interviewees for the first Human Resource DP User Liaison position, including the grievant, were interviewed for the second position as well. The second interview eliminated at least one of the original interview questions and the selection panel was changed to be "reasonably diverse" according to the Agency.³ The grievant was not hired for the second Human Resource DP User Liaison position. The person hired is African-American.

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 The grievant alleges that race discrimination and misapplication of the state's hiring policy⁵ tainted the selection process.

Race Discrimination

² DMV states that its decision to create a second Human Resource DP User Liaison position was done only to address some areas of the recruitment and selection process that needed improvement and does not mean that the hiring decision for the first Human Resource DP User Liaison position was in violation of policy and/or discriminatory.

³ The second panel was comprised of two Caucasians and an African-American.

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

⁵ See DHRM Policy 2.10; *Hiring*.

For a claim of race 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 she was not selected for the position *because of* her race.⁶ A grievant may accomplish this by coming forward with evidence that (i) she belongs to a protected class, (ii) she applied and was qualified for a job for which the employer was seeking applicants, (iii) despite her qualifications, she was rejected and (iv) after her rejection, the position remained open and the employer continued to seek applicants from persons of her qualifications.⁷ If, however, the agency comes forward with a legitimate, non-discriminatory reason for its actions, the grievance should not qualify for hearing, unless there is sufficient evidence that the agency's stated reason is merely a pretext or excuse for improper discrimination.⁸

As an African-American, the grievant is a member of a protected class. As stated above, there is a question as to whether the grievant was fully qualified for the position. However, even assuming that the grievant met the minimum qualifications for the position, the agency has stated a non-discriminatory reason for awarding the position to another individual (i.e. the successful candidate's broad knowledge and experience) and the grievant has not shown that the stated reason is pretextual. Therefore, this issue does not qualify for a hearing.

Misapplication of DHRM Policy 2.10

The grievant claims that the selection panel, consisting of three Caucasian females, was not diverse and that the interview questions did not relate to the position, and as such, the agency misapplied DHRM Policy 2.10. For an allegation of misapplication of policy to qualify for 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.

Under DHRM Policy 2.10, "[w]hen a selection panel is used, panel members *should* represent a diverse population."⁹ Therefore, while policy encourages diversity among selection panel members, such practice is not mandated. Accordingly, this issue does not qualify for hearing. Further, Policy 2.10 states that "[interview] [q]uestions should seek information related to the applicant's knowledge, skills and ability to perform the job" and "[q]uestions that are not job related or that violate EEO standards are not permissible."¹⁰ It appears that out of fourteen interview questions, one was

⁶ *Hutchinson v. INOVA Health System, Inc.*, 1998 U.S. Dist. LEXIS 7723, at pages 3-4 (E.D. Va. 1998) (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)).

⁷ *EEOC v. Sears Roebuck and Co.*, 243 F.d 846,851 (4th Cir. 2001).

⁸ *See Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000).

⁹ DHRM Policy 2.10 page 9 of 21 (emphasis added).

¹⁰ DHRM Policy 2.10 page 10 of 21.

unrelated to the position.¹¹ Accordingly, there is a question as to whether the agency misapplied policy when it asked the unrelated interview question.

In some cases, however, 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., asking the unrelated interview question) and the management action grieved (i.e., the grievant's nonselection), qualification is inappropriate.¹² Further, while management's final interview question may have violated the letter of Policy 2.10, it did not violate the spirit of the policy,¹³ which is to determine who is the "best-suited" candidate for a given position.¹⁴ Moreover, the same fourteen questions were asked of *all* interviewees, so it does not appear that the grievant was treated unfairly in her interview or that she was not selected for the position as a result of the lone unrelated interview question. As such, this issue does not qualify for hearing.¹⁵

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

¹¹ Interview question #14 asked, "If you were a cucumber in a salad and somebody was about to eat you, what would you do?" During this Department's investigation, the agency admitted that they were unsure whether question #14 related to the job and such uncertainty was one reason a second interview was conducted.

¹² See also EDR Qualification Ruling #2003-410 (January 14, 2004).

¹³ See *Shenandoah Publishing House, Inc. v. Winchester City Council et al*, 37 Va. Cir. 149 (1995) dismissing a Freedom of Information case in which a violation was "minor and unintended," and holding that "the letter, but not the spirit or substance" of the law was violated. 37 Va. Cir. at 154. See also *Repp v. Anadarko Municipal Hospital*, 43 F.3d 519 (10th Cir. 1994) which held that it "does not mean that any slight deviation by a hospital from its standard screening policy violates EMTALA [the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. §§ 1395dd]. Mere de minimis variations from the hospital's standard procedures do not amount to a violation of hospital policy. To hold otherwise would impose liabilities on hospitals for purely formalistic deviations when the policy had been effectively followed." 43 F.3d at 523.

¹⁴ DHRM Policy No. 2.10 defines selection as the final act of determining the best-suited applicant for a specific position. Furthermore, Virginia Code § 2.2-2901 states, 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." Here, there is no evidence that the agency made its decision based on anything other than merit and fitness.

¹⁵ It should be noted that this ruling does not stand for the premise that an agency can violate policy with impunity. To the contrary, only in exceptional circumstances will undisputed misapplications of policy not result in qualification. Here the deviation from policy was slight and the facts, taken as a whole, do not warrant qualification of this grievance for hearing.

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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