

Issue: Qualification/ grievant claims agency misapplied selection/hiring policies/retaliation for protected activities/age discrimination; Ruling #2004-548; Ruling Date: April 15, 2004; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: not qualified. Appealed in Twenty-Fifth Judicial Circuit of Virginia.



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/ No. 2004-548
April 15, 2004

The grievant has requested a ruling on whether his September 19, 2003 grievance with the Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS) qualifies for a hearing. The grievant claims that the agency misapplied selection/hiring policies and that it retaliated and discriminated against him. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant has been employed by DMHMRSAS for approximately thirty years and is currently a Lieutenant (Security Officer Supervisor) in the security department. On July 22, 2003, the grievant interviewed for the Security Manager position before a four-person panel, but was not the successful candidate. This is the third time that the grievant has been interviewed but not selected for the Security Manager position.

The grievant claims that DMHMRSAS violated state and agency hiring policy throughout the selection process. Specifically, he claims that (1) the interview was given more weight than experience, (2) two interview panel members were not part of the security department, (3) the job qualifications for the Security Manager position had changed since the last time the job was advertised, and (4) the selected candidate was not as qualified as the grievant. The grievant further claims that his non-selection was the result of age discrimination and retaliation.

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.¹ 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

¹ See Va. Code § 2.2-3004(B).

personnel policies and the hiring of employees within an agency “shall not proceed to a hearing.”² 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.³ In this case, the grievant claims that the agency misapplied policy and retaliated and discriminated against him.

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 the agency’s hiring policy, Hospital Instruction Number 3020.⁴ The grievant’s specific claims are discussed in turn below.

Interview Panel

The grievant claims that the individuals on the interview panel did not possess knowledge of the security department.⁵ The agency claims that individuals from Nursing and Administration were included on the panel because the Security Manager would “have significant dealings with both during [his] tenure.”⁶

DHRM Policy 2.10 states that “panel members *should* (1) represent a diverse population, (2) become familiar with the basic responsibilities of the position for which they will interview applicants, (3) normally be in the same or a higher Role than the position being filled (unless they are participating as human resource professionals . . .), (4) receive appropriate training, instruction, or guidance on lawful selection before participation in the interview and selection process, and (5) hold confidential all information related to the interviewed applicants and the selection or recommendation.”⁷ DMHMRSAS policy does not specify any additional requirements for interview panel members.⁸

DHRM policy indicates that panel members *should* possess these criteria. The use of the word “should” indicates that these guidelines are discretionary rather than mandatory. However, even if this policy provision were mandatory, it does not appear

² Va. Code § 2.2-3004(C).

³ *Grievance Procedure Manual* § 4.1(c), page 11.

⁴ See DHRM Policy 2.10 and Hospital Instruction Number 3020.

⁵ The panel members in question are a Registered Nurse and the Chief Financial Officer (CFO). The grievant also expressed concern that the CFO’s presence on the panel signaled a wish to hire a less expensive applicant.

⁶ Third Step Response, dated November 17, 2004.

⁷ DHRM Policy 2.10, pages 9-10 of 21 (emphasis added).

⁸ See generally Hospital Instruction Number 3020.

that DMHMRSAS would have misapplied the policy. The panel members were in higher Roles than the position being filled⁹ and, based on their comments on the interview summary sheets, appear to be familiar with the *basic* knowledge, skills, and abilities of the position, including the supervision of the security department, knowledge of public safety, and strong communication skills. While the grievant contends that the panel members did not possess *specific* knowledge about the operations of the security department, policy only recommends a basic understanding of the position.¹⁰

Change in Job Announcement Requirements

At the Third Management Resolution Step, the grievant expressed concern that the qualifications for the Security Manager position had changed since the last time the position was advertised, specifically, that the Virginia Crime Information Network (VCIN) requirement had been dropped. According to DHRM Policy, “[t]he following elements *must* be included [in job announcements]: a summary of job duties; any educational qualifications required by law; any bona fide occupations requirements (BFOQs); any occupational certification or licensing *required by law*; notification that a fingerprint-based criminal history check will be required of the finalist candidate for the position . . . notification that the selected candidate must complete a Statement of Personal Economic Interests as a condition of employment, if applicable; [and] hours of work if less than 40 per week, with a note that health benefits are available.”¹¹ Similarly, agency policy states that vacancy postings must include the “date of vacancy, qualification standards, salary range and grade, procedure to apply, deadline for application, . . . location, shift, and position number.”¹² Any other elements included in the job announcement are at the discretion of the agency.¹³

In this case, the grievant has presented no evidence that VCIN certification is required by law for the Security Manager position. Thus, it does not appear that DMHMRSAS misapplied policy by omitting VCIN certification as a prerequisite for the Security Manager position in its job announcement. Accordingly, this issue does not qualify for a hearing.

Weight of Interview and Selection of a Less-Qualified Applicant

The grievant states that the interview panel did not adequately consider his credentials and dedication to the agency and that his knowledge, skills, and abilities (KSAs) exceed those of the selected applicant.¹⁴ Specifically, the grievant claims that he

⁹ The Security Manager position is in Pay Band 4. During this Department’s investigation, the agency reported that three of the interview panel members, including the employees from Nursing and Administration, are in Pay Band 6. The fourth panel member, from the Personnel Office, is in Pay Band 5.

¹⁰ See DHRM Policy 2.10, pages 9-10 of 21.

¹¹ DHRM Policy 2.10, pages 5-6 of 21 (second emphasis added).

¹² Hospital Instruction No. 3020, page 1.

¹³ See DHRM Policy 2.10, page 6 of 21.

¹⁴ Under DHRM Policy 2.10, Knowledge, Skills, and Ability (KSA) is defined as “a component of a position’s qualification requirements.”

has worked in the security department for nearly thirty years while the selected candidate, who was subordinate to the grievant prior to his selection for Security Manager, has only four years with the department.¹⁵ The agency claims that successful candidate “demonstrated the necessary KSAs and was best suited for the job.”¹⁶ The agency further stated that the successful candidate gave an excellent interview while the grievant failed to articulate his qualifications during his interview. It appears that the agency, wholly within its discretion, placed significant weight on interview performance.¹⁷ 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 chosen for interviews, were minimally qualified for the position.¹⁸ As noted above, the grievant was provided the opportunity to emphasize his qualifications during his interview and has provided no evidence that the interviews were conducted in an unfair manner.

State hiring policy is designed not only to determine who may be *qualified* for the position, but also to ascertain which candidate is *best-suited* for the position. While the grievant asserts that his knowledge, skills, and abilities exceed those of the selected applicant, direct work 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.

Retaliation

The grievant claims that his non-selection was an act of retaliation by management. During this Department’s investigation, the grievant described an ongoing “vendetta” against him for his engagement in numerous protected activities. In one instance, the grievant claims that, approximately two years ago, he objected when the department issued security staff multi-purpose tools with a four-inch knife blade. He stated that investigators agreed with his safety concerns and recalled the tools, and since then, he has received the “cold shoulder” from management. The grievant also claims

¹⁵ The grievant, however, noted during this Department’s investigation, and the interview summary sheets reflect, that the successful candidate had eight years of experience in the military before joining the agency.

¹⁶ Agency Head Qualification Decision, dated December 17, 2003.

¹⁷ The agency stated that the “interview questions and answers are of vital importance in trying to distinguish between qualified applicants for any position, including this one.” Third Step Response, dated November 17, 2003.

¹⁸ State policy gives 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. In this case, DMHMRSAS screened applications and selected ten candidates for interviews. The agency stated during the Second Resolution Step that “all persons chosen for interviews were qualified in terms of management experience.” Second Resolution Step, dated October 15, 2003. 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.

that, “a couple of years ago,” he gave a speeding ticket to one of the interview panel members.¹⁹

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;²⁰ (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.²¹ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency’s explanation was pretextual.²²

Reporting alleged safety violations²³ and pursuing law enforcement duties during the grievant’s work as a security officer (such as issuing traffic citations) could be protected activities. Furthermore, not being selected for a position could be viewed as an adverse employment action. The agency, however, has provided a nonretaliatory business reason for the grievant’s non-selection: the successful candidate demonstrated strong leadership abilities during his interview, while the grievant’s interview performance was not as strong.²⁴ The grievant has not presented sufficient evidence to support his claim that he was not selected because of his engagement in protected activities. Nor did this Department’s ruling investigation reveal any such evidence. The notes from the interviews provide no evidence that the applicants were considered unequally or evaluated unfairly. Moreover, the panel members’ comments for the grievant and the successful candidate were consistent. In sum, this grievance fails to

¹⁹ The grievant cited a number of other incidents that contributed to the “vendetta” against him: (1) in the past he has filed and won grievances, though he could not say when, (2) he is a member of a union, (3) in the 1980s he investigated a theft that was allegedly, later covered-up (4) he participated in an EPA investigation of the agency in 1979, and (5) he witnessed employees burning a citizen’s property in the mid-1970s.

²⁰ See Va. Code §2.2-3004(A). 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 an incident of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

²¹ 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 (4th Cir. 1998).

²² See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

²³ Under the Occupational Safety and Health Act of 1970 (OSHA), employers must establish “place[s] of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. 654(a)(1). OSHA also protects employees who report unsafe working conditions to their employers against retaliation. 29 U.S.C. 660(c)(1).

²⁴ Interviewer comments on the interview summary sheets indicate that the successful candidate demonstrated the ability to think critically, strength in management abilities, and a broader perspective of issues in the security department. On the other hand, the grievant failed to identify management principles and could not convey how his years of services prepared him for a leadership role as the Security Manager.

raise a sufficient question as to whether the grievant's non-selection was the result of retaliation.

Age Discrimination

The grievant also claims that he was not selected for the position because of age discrimination. During this Department's investigation, the grievant stated that he is 57 years old, while the successful candidate is in his early 30s. As evidence of age discrimination, the grievant stated that during the successful candidate's second interview, management asked him how long he planned on staying with DMHMRSAS.²⁵ The grievant stated that the reason for this question is because younger officers tend to leave the security department for positions in police departments.

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. 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.²⁶ An employee must be forty years of age or older and must present evidence raising a sufficient question as to whether: (1) he was a member of a protected class;²⁷ (2) he applied for an open position; (3) he was qualified for the position, and (4) he was denied promotion under circumstances that create an inference of unlawful discrimination.²⁸ 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 sufficient evidence that the agency's stated reason was merely a pretext or excuse for age discrimination.

The grievant is 57 years old, is minimally qualified for the position of Security Manager, but was not selected while a younger candidate was. As noted above, however, the agency has stated a non-discriminatory reason for selecting another individual: the successful candidate had excellent qualifications and provided exceptional answers to the interview questions. As evidence of pretext, the grievant cites to the agency's interview question about how long the candidate planned on staying with the agency. He also claims that the successful candidate is inexperienced and often relies on the grievant's knowledge and assistance.

The interview question concerning anticipated length of service is insufficient to raise a question of discriminatory intent on the part of the agency. Additionally, the fact

²⁵ The grievant did not receive a second interview for the position and was not asked the same question.

²⁶ See, *Huchinson v. INOVA Health System, Inc.*, 1998 U. S. Dist. LEXIS 7723 (E.D. Va. 1998) at 3, (citing *St. Mary's Honor Center v. Hicks*, 509 U. S. 502 (1993)).

²⁷ 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.

²⁸ See *Dugan v. Albemarle County School Bd.*, 293 F.3d 716, 720-721 (4th 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.

that the successful candidate sometimes seeks advice from the grievant does not establish that the grievant was not selected because of his age. In consideration of all the above, the grievant has not put forward sufficient evidence of pretext to qualify the issue of age discrimination for 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, the grievant should notify the human resources office, in writing, within five workdays 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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