

Issue: Qualification/Recruitment and Selection, Race Discrimination; Ruling Date: July 30, 2004; Ruling #2003-433; Agency: Department of Corrections; Outcome: Not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
EDR Ruling No. 2003-433
July 30, 2004

The grievant has requested a ruling on whether his August 22, 2003 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant claims the agency misapplied and/or unfairly applied policy during the selection process and engaged in discrimination. For the following reasons, his grievance does not qualify for a hearing.

FACTS

The grievant was employed by DOC as a Food Operations Manager B.¹ Because of a lengthy commute to work, on July 15, 2003, he requested a lateral transfer to another DOC facility located closer to his home, where he had previously worked. Management denied his request, deciding to fill the position through competitive recruitment. Management claims the grievant was notified by letter of the decision, and was advised that his application remained on file and would be competitively screened with the other applications. Subsequently, the grievant was selected to interview for the position, and management asserts that he was notified both by telephone and by letter of the date and time of his interview.²

The grievant maintains management failed to advise him that his transfer request had been denied. Additionally, he denies that the agency notified him of his scheduled interview, claiming he spoke with no one by telephone, and no messages were left on his voice mail. Furthermore, he notes that the interview notification letter did not arrive prior to his interview date. The grievant asserts he was unaware of the selection process until July 30th when he was contacted by the facility's Human Resource Office and asked why he had not been present for his scheduled interview that day. He explained to the caller

¹ After the initiation of his grievance, the grievant decided to leave state service.

² One of two employees would have made the telephone call to the grievant, but neither of those employees is currently employed by the facility. Additionally, no notes regarding the alleged telephone notification could be located by the agency.

that he had not been informed of the interview. Approximately fifteen minutes later, the grievant received another call from the facility notifying him that the panel would interview him immediately via telephone. During the investigation for this ruling, the grievant stated that he consented to the interview because he felt he had no other option, as the panel was already convened.

The grievant later initiated a grievance, asserting that management treated him unfairly and violated hiring practices and procedures. He also claims that management may have discriminated against him based upon his race because, if hired, he would have been the only Caucasian in the Food Services Group at the facility.³ In support of this assertion, the grievant states he contacted one of the panel members the day after the interview and was informed that the position was being offered to another candidate because the grievant's personality did not match the supervisor's. At this point in the conversation, the grievant alleges the panel member laughed, which led the grievant to believe that his personality was not the true reason for his nonselection, but that his race was. Also, the grievant asserts the panel member advised him to file a grievance.⁴

In response, DOC denies that the agency misapplied and/or unfairly applied the hiring policies. While the agency acknowledges the grievant may have received his interview letter after his interview, management asserts that a voice mail message on his telephone was sufficient notification.⁵ Furthermore, management notes that the grievant agreed to the telephone interview. DOC also denies the claims of racial discrimination and maintains that the successful candidate was selected because he gave an excellent interview and was the best suited candidate for the position.

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.⁶ In this case, the grievant has alleged that the agency misapplied or unfairly applied policy and engaged in discrimination. These allegations are discussed in turn below.

³ At the time of the selection process, six of eight employees in the Food Services Department were Asian and two were African American. The supervisor and the successful candidate are both Asian.

⁴ During the investigation for this ruling, the investigating consultant attempted to contact this panel member on several occasions, but the calls were not returned.

⁵ The Human Resource Officer stated that interview notification letters are often mailed to the applicants close to the date of the scheduled interview because the applicants are also notified by telephone. Significantly, a copy of the interview notification letter to the selected candidate was dated July 28, for a July 30 interview, just as grievant's letter had been.

⁶ Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1, pages 10-11.

Misapplication and/or unfair application of policy

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. In this case, the grievant alleges the agency violated policy because he was (i) not properly notified of his interview, (ii) interviewed via telephone and (iii) interviewed at work on short notice.

In this case, however, management's actions did not violate any mandatory policy provisions. While applicants selected for interviews obviously must be notified in order to interview, no state or agency policies address how the candidates should be notified or how far in advance of the interview the notification should occur.⁷ Similarly, current state selection policy permits telephone interviews, but does not specify their arrangement.⁸ Therefore, as no mandatory policy provisions were violated, the only question remaining is whether the agency's actions were so unfair as to amount to a disregard of the intent of the selection policy.

It appears likely that the grievant did not receive prior notice of his scheduled interview. The grievant asserts the agency did not contact him by telephone, and the agency is unable to produce any documentation or witnesses to establish that he was called. Also, the date and postmark of the notification letter support the grievant's claim that the letter arrived the day of his interview, after the interview had already occurred. However, while the grievant apparently did not receive timely notification of his scheduled interview, the chairperson remedied management's oversight by offering the grievant the opportunity to interview via telephone, which the grievant accepted.⁹ Although the grievant states that he only agreed to be interviewed because the panel had already convened, he acknowledges he did not ask the panel to reschedule the interview. Nor did he advise the panel or management that it was inconvenient for him to interview at that time. Therefore, as the panel chairperson offered the grievant a telephone interview, which he accepted, we cannot conclude that management's notification error

⁷ DOC policy requires the Employee Relations Unit to provide written notification to applicants who are *not* referred for an interview, but fails to address notification of those applicants who are selected. *See* DOC Procedures Manual, 5-7.11(C), page 11 of 20 pages, dated September 26, 1997.

⁸ *See* Department of Human Resource Management (DHRM) Policy No. 2.10, Hiring, page 9 of 21, effective date, September 25, 2000, revised October 10, 2003. "Although telephone interviews are not prohibited, it is strongly recommended that the candidate meet with the hiring authority before a job offer is made." The policy in effect at the time this grievance was initiated was silent as to whether phone interviews were permissible. Given the lack of any language prohibiting such interviews and the subsequent express granting of telephone interviews in the current version of this policy, it seems reasonable to presume that the grievant's phone interview did not constitute an unfair application or misapplication of policy.

⁹ According to management, the panel chairperson makes the determination whether or not the circumstances warrant a telephonic interview.

was so unfair as to violate the intent of the selection policies. Accordingly, this issue does not qualify for a hearing.

Discrimination

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.¹⁰ 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.¹¹

As a Caucasian, the grievant is a member of a protected class. Additionally, it is undisputed that he is qualified for the position and was not the successful candidate. The grievant asserts management failed to notify him of his interview and then selected another applicant because the manager is Asian, and he preferred an Asian in the position. Therefore, the agency must put forth a legitimate, non-discriminatory reason for not selecting the grievant.

The agency states that if the grievant was not provided timely notification of his interview, it was an oversight rather than intentional discrimination. Additionally, management maintains that the successful candidate was selected because the hiring panel determined he possessed the requisite knowledge, skills and abilities for the job and gave an excellent interview.¹² Furthermore, a review of the applications indicate that the successful candidate was well qualified for the position, and the panel's recommendation sheet to the Warden lists the successful candidate in the first position. In addition, two panel members indicated during phone interviews that the successful candidate had performed well during the interview.

Thus, to qualify for a hearing, the grievant must present evidence that management's reason was merely a pretext – an excuse – for discrimination. In support of his claim, the grievant states that had he been selected, he would have been the only Caucasian working with a large number of Asians and that both the supervisor and the successful candidate are Asian. Additionally, he inferred from his conversation with a

¹⁰ 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)).

¹¹ 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).

¹² During the investigation for this ruling, two of the three panel members supported this position. The third panel member, whom the grievant asserts he contacted the day after the interview, did not return the telephone calls of the investigating consultant.

panel member that he was not selected because he is Caucasian and not Asian, like the supervisor.

For the following reasons, the grievant's claim of pretext is not persuasive. Significantly, the Asian supervisor was not a panel member. The panel was comprised of the Assistant Warden (who served as the Chairperson), the Regional Food Service Director for the Eastern Region and the Food Service Director for another DOC facility. According to two panel members and the supervisor, the supervisor provided no input regarding the selection of the successful candidate -- the panel members ranked the candidates and recommended the successful candidate to the Warden, whom the Warden later approved. The grievant has provided no evidence to establish that the supervisor improperly influenced the selection process. Nor has this Department's investigation produced evidence of such. Furthermore, two of the three panel members, including the Chairperson, are not Asian. Moreover, while the grievant notes the majority of employees in the Food Service Department are Asian, the grievant was previously hired by that facility at a time when there had also been a majority of Asians in the Department, and he worked there approximately two years. He chose to leave of his own accord to accept a position at another DOC facility. Therefore, based upon the evidence presented, the grievant has failed to raise a sufficient question as to whether management's stated reason for his non-selection is pretextual. Accordingly, this issue 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 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.

Claudia T. Farr
Director

Susan L. Curtis
EDR Consultant