

Issue: Qualification/grievant claims management misapplied hiring policy, discrimination; Ruling Date: June 9, 2004; Ruling #2004-692; Agency: Virginia State University; Outcome: not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia State University
Ruling Number 2004-692
June 9, 2004

The grievant has requested a ruling on whether his February 4, 2004, grievance with Virginia State University (VSU) qualifies for a hearing. The grievant claims that management misapplied the hiring policy and discriminated against him in the selection process for the position of Police Sergeant. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Police Corporal at VSU. In August 2003, the grievant applied for the position of Police Sergeant on campus. The grievant was interviewed for the position on December 18, 2003 before a three-person panel.¹ He was not recommended for a second interview and was not the successful applicant.

He asserts that the agency misapplied the hiring policy and discriminated against him in the selection process. Specially, he claims that management preselected the successful applicant by (1) not listing prior supervisory experience as a mandatory qualification in order to favor the less experienced successful applicant and (2) allowing the successful applicant to compete in the selection process despite being the subject of a disciplinary proceeding. The grievant further claims that he has been the victim of racial discrimination.

DISCUSSION

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

¹ The three-person panel was comprised of police officials from external organizations not affiliated with VSU.

may have been misapplied or unfairly applied.² In this case, the grievant claims that management misapplied or unfairly applied policy 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 disregard of the intent of the applicable policy. The applicable policy in this case is Department of Human Resource Management (DHRM) Policy 2.10, *Hiring*. The grievant's specific claims are discussed below.

Preselection

It is the Commonwealth's policy that hiring and promotions be competitive and based on merit: knowledge, skills, and abilities. Thus, pre-selection (merely going through the motions of the selection process when the outcome has been predetermined), regardless of merit and suitability, violates that policy.

In support of his claim of pre-selection, the grievant contends that management (1) failed to list prior supervisory experience as a mandatory qualification in order to favor the less experienced successful applicant and (2) allowed the successful applicant to compete in the selection process despite being the subject of a disciplinary proceeding.

Prior Supervisory Experience as a Mandatory Qualification

Under DHRM policy, it is not mandatory that job announcements include a requirement or preference for related experience.³ This criterion may only be listed as a preferred qualification, as was done in the job announcement for the Police Sergeant position.⁴ There are no facts to support that the agency misapplied policy or applied it unfairly by not establishing prior supervisory experience as a mandatory qualification for the position.

Successful Applicant the Subject of a Disciplinary Proceeding

On November 19, 2003, the individual ultimately selected responded to a police call and upon arriving at the scene, discovered a suspicious looking substance. Instead of processing the substance as potential evidence, he discarded it. Subsequently, a departmental investigation was conducted into the incident, which was not completed until January 21, 2004, with the issuance of a counseling memorandum. The grievant

² Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1, pages 10-11.

³ See DHRM policy 2.10, *Job Announcement Requirements*, pages 5-6.

⁴ In reviewing the screening results for the position, it was noted that all applicants were credited with prior supervisory experience based upon an assessment of their work history.

contends that the applicant should not have been allowed to compete in the selection process while the investigation of the incident was ongoing.

Under DHRM policy, there is no provision to deny an employee the opportunity to apply for a position and compete fully in the selection process while an investigation is pending. If the applicant becomes the final candidate for position, the agency may check references and conduct background checks to help determine final suitability for selection.⁵ In this instance, management determined that the alleged procedural violation was not criminal in nature and therefore would not impact the applicant's qualification for continued employment or suitability for selection.⁶

The agency's stated reason for its action is that the selected applicant demonstrated the greatest potential for the position based upon his broad background in law enforcement and his performance during the interview process. In contrast, the grievant was not recommended for a second interview by a three-person panel comprised of experienced police officials from other jurisdictions.

Race Discrimination

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. Rather, an employee must present evidence raising a sufficient question as to whether he: (1) was a member of a protected class;⁷ (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. 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 race discrimination.

The grievant is an African-American and minimally qualified for the Police Sergeant position. The agency, however, has stated a non-discriminatory reason for awarding the Police Sergeant position to another individual: the grievant's failure to advance to the second round of interviews due to the panel's assessment that he lacked sufficient knowledge and communications skills to adequately respond to the interview questions, and the successful applicant's strong performance during the interview process. The grievant has not provided sufficient evidence that the agency failed to select him for the position because of his membership in a protected class. An allegation of discrimination, without more, is not appropriate for adjudication by a hearing officer.

⁵ See DHRM policy 2.10, *Reference Checks*, page 10 and *Background Checks*, page 11.

⁶ A mandatory requirement of the position was that an applicant never have been convicted of a felony, domestic violence or a crime involving moral turpitude.

⁷ See DHRM Policy 2.05, *Equal Employment Opportunity*.

CONCLUSION

For the reasons discussed above, this grievance does not qualify 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 this 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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