

Issue: Qualification/grievant claims that the agency misapplied its transfer and promotion policies; Ruling Date: September 22, 2004; Ruling #2004-663; Agency: Virginia State Police; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia State Police
Ruling Number 2004-663
October 13, 2004

The grievant has requested a ruling on whether his January 26, 2004 grievance with the Virginia State Police (VSP or the agency) qualifies for a hearing. The grievant claims that the agency misapplied its transfer and promotion policies. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by VSP as a Special Agent. In the fall of 2002, the grievant took the examination for promotion to the positions of Assistant Special Agent in Charge (ASAC) and First Sergeant. The agency subsequently notified the grievant that he was fourth on the promotion list for available ASAC and First Sergeant positions. Under unwritten agency policy and practice, when an existing position becomes vacant, the agency first honors any pending transfer request for the position. If no transfer request exists, the position is filled by the first name on the promotion list.

As part of the promotion list process, the grievant was asked to identify his desired assignments. Because the grievant knew that only one of the three individuals ahead of him on the list had applied to work in Field Office A of the Bureau of Criminal Investigation (BCI), and that three ASACs in that office were likely soon to retire or be promoted, he requested assignment to an ASAC position in Field Office A. He did not indicate that he would be willing to accept any other vacant positions.

In the Spring of 2003, an ASAC position in the Drug Enforcement Division (DED) in Field Office A became vacant. This position was filled by the candidate ahead of the grievant on the promotion list who had also requested assignment to Field Office A. Shortly thereafter, another ASAC challenged this promotion, on the grounds that he had a transfer request on file for the position. To resolve the conflict created by this situation, the agency created an additional ASAC position in Field Office A.

Between Spring 2003 and December 2003, the two remaining candidates ahead of the grievant on the promotion list accepted positions in other parts of the state, leaving the grievant as the first promotional candidate on the list for any available ASAC position in Field Office A. In December 2003, an ASAC in the General Investigations Division

(GID) was promoted, creating an ASAC vacancy in Field Office A. The agency did not offer this position to the grievant. Instead, the agency offered this position to ASAC L, who had been on temporary assignment to Field Office A in a criminal intelligence position, and who had a transfer request on file for the position.

ASAC L had initially requested transfer in 1996 to the DED (then DSD), GID, or internal affairs positions assigned to Field Office A. At the time he made his transfer request, ASAC L was assigned to another field office. In May 2001, the agency transferred ASAC L to Field Office A on a temporary basis, to accommodate ASAC L's family circumstances. When ASAC L was transferred to Field Office A, he did not take a position assigned to that office: rather, the department simply allowed ASAC L to work out of Field Office A while maintaining his prior position. In 2002, ASAC L received a temporary assignment to the Criminal Intelligence Division. In this position, ASAC L was responsible for supervising BCI field intelligence agents throughout the state. The criminal intelligence position was assigned to Field Office A on a temporary basis to accommodate ASAC L's personal circumstances, but the agency's long-term plan was ultimately to re-assign this position to the Richmond area.

Although ASAC L had his transfer request on file at the time the DED position became vacant in Spring 2003, he was not offered the position. He did not challenge the failure to transfer him to the DED position at the time it occurred, but shortly afterwards, he called the agency's human resources office to inquire whether they had his 1996 letter of transfer. He was informed by the agency that because he was already assigned to Field Office A, his letter had been nullified. ASAC L disagreed, arguing that under agency policy, his transfer request would only have been nullified if he had in fact received one of the three permanent assignments he requested—which he had not. Although ASAC L was never formally notified by the agency that it had reinstated his 1996 letter of transfer, when the GID position became available in December 2003, the agency honored his earlier request and offered him the position.

When ASAC L was first offered the GID position, he told the agency that he would prefer to stay in his current criminal intelligence position, if it were possible for him to do so. The agency responded by advising ASAC L that his position was being moved to the Richmond area, and that he could either keep the criminal intelligence position and move, or accept the vacant GID position and stay in Field Office A. After being offered this choice, ASAC L accepted the GID position. Approximately six weeks after the agency offered ASAC L the GID position, the grievant initiated the present grievance.

The grievant alleges that the agency misapplied or unfairly applied its policies on transfers and promotions by honoring ASAC L's letter of transfer, when he was already working in Field Office A. The grievant further alleges that the agency misapplied or unfairly applied its policies by offering ASAC L two opportunities to accept the GID position. Finally, the grievant charges that the only reason the criminal intelligence position previously held by ASAC L was transferred was to create an opening for a

superior's former son-in-law, who was first on the promotion list for any ASAC openings in the Richmond area.

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 may have been misapplied or unfairly applied.¹ In this case, the grievant claims that management misapplied or unfairly applied 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.² The applicable policies in this case are General Order No. 73, the agency's written policy on the promotional process; General Order No. 16, the agency's written policy on assignments and transfers; and the agency's unwritten policy and practice of giving transfers precedence over promotions.

There is no dispute that the grievant was the first candidate on the promotion list for the GID position, and therefore that he would have been offered the position but for ASAC L. The grievant argues that the agency misapplied or unfairly applied its policies in allowing ASAC L to transfer into the GID position, rather than awarding the position to the grievant.

As an initial matter, the grievant charges that ASAC L's transfer request should have been considered null and void under General Order No. 16, which provides that the granting of any portion of a transfer request will nullify that request. The grievant argues that ASAC L had already been assigned to Field Office A, as he had requested, and therefore his transfer request should not have been considered in filling the GID position.

It appears, however, that the agency acted in accordance with its policies in honoring ASAC L's 1996 transfer request. Under unwritten agency policy and practice, a temporary assignment does not nullify a pending transfer request.³ Because ASAC L had never been assigned on a permanent basis to Field Office A, his letter of transfer remained valid at the time the GID position became vacant, and the agency acted properly in offering ASAC L the vacant position.

¹ *Va. Code § 2.2-3004; Grievance Procedure Manual § 4.1.*

² We note that a mere misapplication of policy in itself is insufficient to qualify for a hearing. The General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions." *Va. Code § 2.2-3004(A)*. For purposes of this analysis, we assume, without deciding, that denial of a promotion would constitute an adverse employment action.

³ This policy and practice is not disputed by either party.

There is little question that the agency misapplied its policies when it previously failed to offer ASAC L the DED position which opened in the Spring of 2003, however. At the time the position was filled, ASAC L had an active letter of transfer specifically requesting transfer to the position. Under agency policy, which gives transfers preference over promotions, the agency should have offered ASAC L the position before utilizing the promotion list. ASAC L never grieved this misapplication of policy, however, and any challenge to the agency's action would be untimely. Moreover, the grievant lacks standing to challenge the agency's mistake, as he was not entitled to the position at issue and therefore was not directly harmed by the agency's error.⁴

The grievant argues that because the agency has previously created additional positions when it has made errors in filling positions, it was an unfair application of policy for the agency not to create a position for him. While the grievant has cited numerous examples of the agency creating additional positions to correct its own errors in applying selection policy, none of the examples cited is analogous to his situation. In each of the examples cited by the grievant, the individual receiving the additional position would otherwise be directly harmed by an error in the application of policy. In the grievant's case, the agency did not misapply policy in offering the position to ASAC L, rather than the grievant. While the grievant understandably believes that he was harmed by the agency's prior mistake in overlooking ASAC L for the position filled in Spring 2003, any impact on him was at most indirect. Under these circumstances, the agency's failure to create a position for the grievant cannot be considered to be an unfair application of policy.

The grievant further challenges the awarding of the GID position to ASAC L on the ground that the agency offered ASAC L the position a second time after he initially rejected the position. The grievant argues that under agency policy, once ASAC L turned down the position, the grievant should have been offered the position, without ASAC L being offered the opportunity a second time.

Our investigation, however, does not support the grievant's characterization of the agency's actions. ASAC L was not in fact offered the GID position twice. ASAC L was contacted by the agency and told that the GID position he had requested was available. ASAC L responded by saying that he would do whatever the agency needed him to do, but that his preference would be to stay in his temporary assignment, if possible. The agency then advised ASAC L, in a second telephone call, that it would not be possible for him to stay in the temporary assignment in Field Office A, and that he could either move with the criminal intelligence position to the Richmond area or accept the GID position in Field Office A. After learning this information, ASAC L accepted the GID position. The agency's actions in responding to ASAC L's inquiry and clarifying the options available to him were both reasonable and appropriate under the circumstances, and do not constitute a misapplication or unfair application of policy.

⁴ See *Grievance Procedure Manual* § 2.4 (an employee's grievance must pertain directly and personally to the employee's own employment).

Finally, the grievant takes issue with the agency's decision to move the criminal intelligence position held by ASAC L to the Richmond area, arguing that this decision was made to further the career of a superior's former son-in-law. There is no evidence to support this allegation, however.

The agency has presented evidence showing that the criminal investigation position was initially assigned to the Richmond area, but that it had allowed ASAC L to work in Field Office A as an accommodation to his personal and family circumstances. Over time, this arrangement became untenable for the agency. The primary duty of the criminal intelligence position held by ASAC A is to supervise the agency's field intelligence agents. In recent months, an increasing number of these agents have been assigned to the Washington, D.C., area. This increase, along with a need to have the state's counter-terrorism activities based in the Richmond area, led the agency to conclude that it could not continue to accommodate ASAC L by allowing him to work in his temporary assignment in Field Office A. The superior whose former son-in-law was next in line for promotion to any Richmond area ASAC positions did not take part in the decision to move the criminal intelligence position, as he had recused himself from the decisionmaking process to avoid any claims of conflict of interest.

In sum, we find that the grievant has failed to present facts raising 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. Accordingly, this grievance does not qualify 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 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.

Claudia T. Farr
Director

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October 12, 2004
Ruling #2004-663
Page 7

EDR Consultant