

Issue: Qualification/misapplication of state and agency policy, retaliation for previous protected activity; Ruling Date: November 3, 2004; Ruling #2004-846; Agency: Department of Environmental Quality; outcome: qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Environmental Quality
Ruling No. 2004-846
November 3, 2004

The grievant has requested a ruling on whether his May 26, 2004 grievance with the Department of Environmental Quality (DEQ or the agency) qualifies for a hearing. The grievant claims that the agency has misapplied state and agency policy and retaliated against him for previous protected activity. For the following reasons, this grievance qualifies for a hearing.

FACTS

The grievant is employed with DEQ as an Environmental Engineer Consultant. In March 2004, he applied for promotion to Site Assessment Manager. The grievant was subsequently interviewed for this position, but he was not selected. On May 26, 2004, the grievant initiated a grievance challenging the agency's selection decision. The grievant alleges that the agency pre-selected the successful candidate for the Site Assessment Manager position, although this individual was not the best-suited applicant for the position, in violation of applicable policy. The grievant also alleges that the agency's decision not to select him for the position was in retaliation for his initiation of two previous grievances in 1993 and 2002.

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.¹

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

Misapplication 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.² State hiring policy is designed to ascertain which candidate is best suited for the position, not just to determine who might be qualified to perform the duties of the position.³ It is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.⁴ The grievant alleges that the agency misapplied policy by pre-selecting as the successful candidate for the Site Assessment Manager position an individual who was less qualified than the grievant and not the best-suited applicant for the position.

In support of his claim of pre-selection, the grievant first charges that one of the three members of hiring panel—who is also the supervisor of the hiring supervisor/panel chair—has a “personal and/or family relationship” with the successful candidate. In her second-step response to the grievance, the supervisor in question admitted that she is friends with many of her subordinates, including the successful candidate, but denied that she has a “family relationship” with the successful candidate. Although the grievant has presented no specific evidence to support his allegations, during the course of this Department's investigation, a witness for the grievant stated that it was widely believed at the agency that the successful candidate received the position because of a close relationship with the supervisor.

The grievant also questions the qualifications of the successful candidate, in particular his educational background. The successful candidate indicated in his application and supporting documentation that he received a degree in Environmental Science from University X, which is located in another state. At the time that he received this degree, he was working full time for the agency in Richmond, Virginia. Based on this Department's investigation, it appears that when the successful candidate received his degree, University X was neither licensed by the appropriate state authority nor accredited by any recognized accrediting agency

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 consider denial of a promotion to be an adverse employment action.

³ Department of Human Resource Management (DHRM) Policy No. 2.10, pages 2-4 (defining selection as the result of the hiring process that identifies the applicant best suited for a specific position; and knowledge, skill, and ability as components of a position's qualification requirements).

⁴ Va. Code § 2.2-2901 (stating, 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”) (emphasis added).

or organization.⁵ In contrast, the grievant holds both bachelors' and masters' degrees in civil engineering from an accredited university.

The posting for the Site Assessment Manager position did not specify a required minimum level of education, but did specify, in part, that the position requires a "thorough knowledge of engineering principles, mathematics, basic sciences, site assessment and characterization principles, remediation treatment technologies and waste management practices," as well as an "[a]bility to manage and solve a variety of complex environmental problems." The agency has indicated that it considered the candidates interviewed for the Site Assessment Manager position, including the grievant and the successful candidate, to be technically comparable, and that the candidates' interviews were the deciding factor in the hiring decision.

In this case, however, the apparent extreme disparity in the educational background of the successful candidate and other applicants for the position, three of whom (including the grievant) appear to hold graduate degrees in related fields from accredited universities, combined with the grievant's other evidence of pre-selection and/or retaliation, creates a sufficient factual question as to whether the agency selected the successful candidate because he was the best-suited applicant, or, as the grievant contends, for other non-merit-based reasons.

In reaching this determination, we do not find or suggest that the individual chosen for the Site Assessment Manager position was not, in fact, the best-suited candidate for the position, nor do we wish to suggest that, in the future, this Department will sit in judgment on the relative merit of degrees from different accredited schools. Under the unique facts of this case, however, the evidence, when considered in its totality, suggests that further exploration by a hearing officer of the grievant's claims and the agency's stated reasons for its selection decision is appropriate. Accordingly, the issue of pre-selection qualifies for hearing.

Retaliation

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

⁵ University X is one of several unaccredited schools identified in 2004 testimony entitled "Diploma Mills: Federal Employees Have Obtained Degrees from Diploma Mills and Other Unaccredited Schools, Some at Government Expense," given by Robert J. Cramer of the United States General Accounting Office before the United States Senate Committee on Governmental Affairs, available at www.gao.gov/new.items/d04771t.pdf. The University is also identified on a list maintained by the State of Michigan of unaccredited colleges and universities. See www.michigan.gov/documents/Non-accreditedSchools_78090_7.pdf. Degrees from schools identified on this list will not be accepted by the Michigan Department of Civil Service as satisfying any educational requirements on job specifications.

activity;⁶ (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.

The grievant easily satisfies the first and the second of these requirements. The grievant's prior participation in the grievance process constitutes protected activity, while the agency's failure to select him for the Site Assessment Manager position constitutes an adverse employment action. At issue, then, is whether the grievant has satisfied the third requirement of a causal connection.

The grievant alleges that the agency retaliated against him in not selecting him for the Site Assessment Manager position because of his successful 1993 grievance and his unsuccessful 2002 grievance. In support of his claim, he notes that two of the hiring panel members appeared to testify against him at the Circuit Court appeal of this Department's decision not to qualify his 2002 grievance for hearing. In response to this allegation, the agency states that neither panel member was called to testify against the grievant, and neither was involved in the grievant's 1993 grievance. It is not disputed, however, that one of the two 2004 hiring panel members was also a member of the selection panel that made the decision challenged by the grievant in his 2002 grievance; that panel member also served as the second-step respondent for the 2002 grievance.

The grievant also charges that the decision by the agency's Human Resources Manager to sit on the 2004 hiring panel was directly related to her involvement in the earlier selection process and was in furtherance of the agency's alleged retaliatory motive. During the course of this Department's investigation, the Human Resources Manager denied any retaliatory motive, but that her presence on the panel was due to the grievant's involvement. She indicated that she sat on the panel because the grievant was not well-liked, and she wanted to ensure that he received a "fair shake" from the selection panel; later clarifying in a subsequent conversation that she wanted to ensure that the agency's actions were impartial, because the grievant had previously announced that if he did not receive the position, he would file a grievance.

Certainly, the reasons stated by the Human Resources Manager do not in themselves suggest a retaliatory motive. The question of motive, however, is best judged by a hearing officer, sitting as a fact-finder. In this case, the grievant's previous grievance activity, coupled with the undisputed fact that Human Resources Manager served as a panel member *because of the grievant's involvement*, raise a

⁶ See *Grievance Procedure Manual* §4.1(b)(4). 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 a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law."

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sufficient factual question as to the existence of a causal link between the decision not to select the grievant and his previous grievance activity. As such, the grievant's claim of retaliatory non-selection also qualifies for hearing.

CONCLUSION

For the reasons discussed above, this Department qualifies this grievance for hearing. This qualification ruling in no way determines that the agency's decision not to select the grievant for the Site Assessment Manager position was a misapplication of policy, retaliatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

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