

Issue: Qualification/grievant claims misapplication of state policy, retaliation, discrimination, hostile work environment; Ruling Date: November 30, 2004; Ruling #2004-886; Agency: Department of Motor Vehicles; Outcome: qualified on issues of policy misapplication and retaliation; discrimination issue and hostile work environment issue not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Motor Vehicles
Ruling No. 2004-886
November 30, 2004

The grievant has requested a ruling on whether his March 15, 2004 grievance with the Department of Motor Vehicles (DMV or the agency) qualifies for a hearing. The grievant claims that the agency has misapplied state and agency policy, subjected him to a hostile work environment, and retaliated and discriminated against him. For the following reasons, this grievance qualifies, in part, for a hearing.

FACTS

The grievant is employed with DMV as a Customer Service Generalist Senior at Customer Service Center A ("CSC A"). He transferred to CSC A from another Customer Service Center in 2001. In December 2003, the grievant applied for promotion to Assistant Manager of CSC A. The grievant was subsequently interviewed for this position, but he was not selected.

The successful candidate was, like the grievant, employed at CSC A, but in a "generalist" rather than a "senior" position. The grievant alleges that the successful candidate was close personal friends with the hiring manager, and that the hiring manager had, in effect, groomed the successful candidate for the Assistant Manager position by giving her the responsibility for managing CSC A in the hiring manager's absence.

On March 15, 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 Assistant Manager position, although this individual was not the best-suited applicant for the position, in violation of state and agency policy. The grievant also alleges that the agency's decision not to select him for the position was in retaliation for his previous transfer to CSC A and his complaints to the hiring manager, and was the result of age discrimination. In addition to his claims regarding the selection decision, the grievant also charges that he was threatened by the hiring manager in retaliation for his complaints and was subjected to a hostile work environment and sex discrimination.

DISCUSSION

Non-Selection

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 showing that he or she suffered an adverse employment action, and 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

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 Assistant Manager position an individual who was less qualified than he and not the best-suited applicant for the position.

In support of his claim of pre-selection, the grievant asserts that the successful candidate and the hiring manager are close friends. He has also presented evidence that the hiring manager had previously appointed the successful candidate to manage CSC A during her periodic absences, allegedly in an effort to groom the successful candidate for promotion to the Assistant Manager position,⁵ and that the hiring manager was angry when the grievant was transferred to CSC A, in part because she felt that his transfer cheated the successful candidate and another employee "out of a chance for advancement."⁶

In addition, the grievant has presented evidence that immediately following the first day of interviews for the Assistant Manager position, and before second day of interviews had taken

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

² For purposes of this analysis, we consider denial of a promotion to be an adverse employment action.

³ See Department of Human Resource Management (DHRM) Policy No. 2.10, pages 1-4; see also DMV Employment Policies and Procedures (as in effect at time grievance arose).

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).

⁵ During the course of this Department's investigation, the agency confirmed that, as a general rule, a generalist, such as the successful candidate, would not be selected as acting manager, but rather that the responsibility would usually go to a "senior," such as the grievant.

⁶ The grievant also alleges that the successful candidate was coached on her interview responses, but he admits that he has no evidence to support this contention.

place, the hiring manager marked the interview worksheet for every applicant interviewed the first day as not having been selected for the position. The grievant was one of the candidates interviewed on the first day; the successful candidate interviewed on the second day. While the agency's investigation into the grievant's complaints of pre-selection indicated that the other two members of the hiring panel did not feel pressure from the hiring manager to select the successful candidate, the administrative assistant to the district manager, who observed the completed worksheets after the first day of interviews, considered the hiring manager's actions to be so contrary to agency practice that she reported the hiring manager's conduct to the district manager.

This evidence, viewed in its totality, creates a sufficient factual question as to whether the hiring authority selected the successful candidate because she was the best-suited applicant, or, as the grievant contends, pre-selected her for other non-merit-based reasons. Accordingly, the grievant's claim regarding his non-selection for the Assistant Manager position is qualified for hearing.

Alternative Theories for Non-Selection

The grievant has advanced alternative theories related to his non-selection for the Assistant Manager position, including allegations of retaliation and age discrimination. Specifically, the grievant alleges that he complained to the agency that the successful candidate was selected as acting manager because she is older than the grievant, and that following his complaints, he was denied promotion to the Assistant Manager position and threatened by the hiring manager. He also alleges that he was retaliated against because of his transfer to CSC A.

The grievant's claim of age discrimination is not qualified, as the grievant is under 40 years of age and therefore not a member of the protected class.⁷ We also decline to qualify the grievant's claim that he was retaliated against because of his previous transfer, as such a transfer does not constitute protected activity under the grievance procedure.⁸ However, the grievant's claim that he was denied the Assistant Manager position in retaliation for having made *complaints* of age discrimination is appropriate for adjudication by a hearing officer, to help assure a full exploration of what could be interrelated facts and issues.⁹ We note that to prevail

⁷Although DHRM Policy 2.05 prohibits discrimination on the basis of "age," the policy does not specifically define this term. This Department has been advised by a DHRM policy analyst that DHRM interprets the policy to protect only those individuals "over 40" years of age. This interpretation is consistent with the coverage of the federal Age Discrimination in Employment Act, which applies only to individuals 40 years of age and older. *See* 29 U.S.C. § 621 *et seq.*

⁸*Grievance Procedure Manual*, § 4.1 (b)(4) (defining protected activity to include "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 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.")

⁹As previously noted, in addition to alleging retaliation in the selection process, the grievant also alleges that he was threatened in retaliation for his complaints of discrimination. Although the specific nature of the threatened action is unclear, it appears that the manager suggested that it would not "be pretty" if an employee complained about what happened at CSC A outside that office, although she later told employees that if they if they wanted to go "over [her] head" about her treatment of the successful candidate, they "had her blessing" but had to "do it on [their] own time." These threats, standing alone, do not in themselves constitute adverse employment actions for which a

on this claim, the grievant must demonstrate that he in fact made such complaints and that the complaints were reasonable and made in good faith.¹⁰

Sex Discrimination

In addition to his claims regarding his non-selection for the Assistant Manager position, the grievant also challenges what he contends is an atmosphere of sex discrimination at the agency. In support of his claim, the grievant points to the following conduct: the use of the term “she” in the *Grievance Procedure Manual*; the composition of the hiring panel, which, according to the grievant, was comprised of two women and an African-American male; the agency’s inclusion of statements on its hiring materials encouraging women and minorities to apply for open positions and identifying the agency’s status as an equal opportunity employer; and a typographical error on a letter sent to the grievant, which addressed him as “Ms.”

Although grievances that may qualify for a hearing include those alleging discrimination on the basis of sex,¹¹ to qualify his grievance for a hearing, the grievant must present facts that raise a sufficient question as to whether an adverse employment action resulted from prohibited discrimination based on the grievant’s protected status. The grievant has not met this burden. As an initial matter, the grievant’s claim of gender discrimination fails because he does not allege that the alleged discrimination resulted in any adverse employment action against him—the grievant has not claimed that his non-selection for the Assistant Manager position was based on his gender. Moreover, even if the grievant were able to demonstrate the existence of an adverse employment action related to his gender, the conduct cited by the grievant is insufficient to demonstrate that he was treated differently because of his gender. For these reasons, the grievant’s claim of sex discrimination is not qualified for hearing.

Hostile Work Environment

The grievant also alleges that the hiring manager’s decision to leave the successful candidate in charge of CSC A in her absence created a hostile work environment, in that it led to unnecessary tension and friction in the office. For a claim of hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on his protected status or prior protected activity; (3) sufficiently severe or pervasive so as to alter his conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.¹² Here, the grievant has not presented evidence to show that any

hearing officer could provide a remedy. However, to the extent the grievant alleges that these threats are part of a course of retaliatory conduct culminating in his non-selection, he may present evidence regarding these threats at the hearing on the issue of non-selection.

¹⁰See, e.g., *Seebald v. Praxair, Inc.*, 2004 U.S. Dist. LEXIS 2643, at ** 28-29 (E.D. Pa. Jan. 21, 2004). We note that the mere fact that the grievant is under 40 does not require a finding that his complaints of age discrimination were unreasonable or made in bad faith. As the applicable DHRM policy does not specifically define “age” as including only those individuals over 40, the grievant may reasonably have believed that discrimination on the basis of his relative youth was prohibited.

¹¹ See *Grievance Procedure Manual*, § 4.1 (b)(2).

¹² See generally *White v. BFI Waste Services, LLC*, 375 F.3d 288, 296-97 (4th Cir. 2004).

difficulties caused by the hiring manager's decision to leave the successful candidate in charge during the hiring manager's absence was based on the grievant's protected status or prior protected activity or were sufficiently severe or pervasive as to alter his conditions of employment.¹³ Accordingly, the grievant's claims of a hostile work environment do not qualify for hearing.

CONCLUSION

For the reasons discussed above, this Department qualifies for hearing the grievant's claims of policy misapplication and retaliation (for having complained of age discrimination) relating to his non-selection for the Assistant Manager position. This qualification ruling in no way determines that the agency's decision not to select the grievant was a misapplication of policy, retaliatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

For additional 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 to the circuit court the denial of qualification of his claims of age and sex discrimination and hostile work environment, he 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 notifies the agency that he does not wish to proceed.

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¹³ See generally *Chaloupka v. M. Financial Holdings, Inc.*, 2001 U.S. Dist. LEXIS 8287 (D. Ore. June 5, 2001); *Stevens v. Henderson*, 2000 U.S. Dist. LEXIS 22498 (S.D. Ohio Sept. 19, 2000).