

Issue: Qualification/grievant claims misapplication of state and agency selection policies, retaliation for previous protected activity and discrimination; Ruling Date: November 2, 2004; Ruling #2004-893; Agency: Virginia Department of Transportation; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling No. 2004-893
November 2, 2004

The grievant has requested a ruling on whether his December 11, 2003 grievance with the Department of Transportation (VDOT or the agency) qualifies for a hearing. The grievant claims that the agency has misapplied state and agency selection policies, retaliated against him for previous protected activity, and discriminated against him.

FACTS

The grievant is employed with VDOT as a Transportation Operator II. In October 2003, he applied for promotion to Transportation Operations Manager I. The agency interviewed the grievant for this position, but he was not selected. The agency notified the grievant of its decision by letter dated November 25, 2003. On December 11, 2003, the grievant initiated a grievance challenging the agency's selection decision. The grievant alleges that the agency misapplied state and agency selection policies by engaging in favoritism and failing to consider his experience, retaliated against him for his prior initiation of grievances in 1993 and 2002, and discriminated against him because he was assigned to Headquarters H and had not adequately carried his supervisor's favor.¹ The grievance has progressed through the agency resolution steps and the grievant now seeks qualification of his grievance for hearing.

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

¹ In the course of the grievance process, the grievant raised additional complaints about the agency's failure to provide him with computer training and the agency's requirement that he complete an authorization for a background check (including credit reports) as part of his application. However, once a grievance has been initiated, additional claims may not be added. *Grievance Procedure Manual* § 2.4. Because these two additional complaints were not in the grievant's original written grievance, they cannot be considered for qualification by this Department.

whether policy may have been misapplied.² In this case, the grievant alleges that the agency misapplied state and agency selection policies, retaliated against him for previous protected activity, and discriminated against him.

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.³ 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.⁴ It is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.⁵

The grievant alleges that the agency misapplied policy by selecting for the Transportation Operations Manager position a candidate who is married to a VDOT employee. More specifically, the grievant claims that the selection of this candidate creates an impermissible conflict of interest and was the result of improper pre-selection in the hiring process.

State law prohibits supervision by an employee of a member of his or her immediate family.⁶ In this case, however, there is no evidence that a reporting relationship exists between the Transportation Operations Manager I position and the position held by the successful candidate's spouse. In the absence of such evidence, we conclude that no prohibited conflict of interest was created.

Moreover, there is no evidence to support the grievant's claim of pre-selection. Because it is the Commonwealth's policy that hiring and promotion be competitive and based on merit, an agency may not pre-select the successful candidate for a position without regard to the candidate's merit or suitability and then merely go through the motions of the selection process. In this case, the grievant alleges that the agency pre-selected the successful candidate for the Transportation Operations Manager I, primarily because the successful candidate's spouse is also employed by the agency. Apart from

² Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1.

³ 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.

⁴ Department of Human Resource Management (DHRM) Policy No. 2.10, page 4 (defining selection as the result of the hiring process that identifies the applicant best suited for a specific position).

⁵ 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).

⁶ Va. Code §§ 2.2-3101, 2.2-3106.

the grievant's bare allegations, however, the grievant has presented no evidence that would allow a fact finder reasonably to conclude that the agency engaged in pre-selection.

The grievant also alleges that the agency misapplied policy by failing to consider his experience. Experience, however, is only one of the factors considered by management in determining who is best suited by a position. The grievant's assertions merely reflect that his own perception of his qualifications and suitability for the position differ from that of management. Because policy gives management the discretion to determine who is best suited for the job, the grievant's perceptions of his qualifications and suitability cannot support a claim that management misapplied or unfairly applied policy.

Finally, the grievant has provided no evidence, other than his own conclusory assertions, that the agency's decision making process was unfair. For all these reasons, the grievant's claims that the agency misapplied selection policy do not qualify 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 activity;⁷ (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.

In this case, the grievant has satisfied the first and the second of these requirements. The grievant's prior participation in the grievance process in 1993 and 2002 constitutes protected activity, while the agency's failure to select him for the Transportation Operations Manager I position could be viewed as an adverse employment action. There is no evidence, however, that a causal link exists between his protected activity and his non-selection, other than the bald fact that both protected activity and non-selection occurred. As the grievant has failed to make this showing, his claim of retaliation does not qualify for a hearing.

⁷ 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."

Discrimination

Under the grievance procedure, a claim of discrimination arising from membership in a protected class (in other words, on the basis of race, color, religion, political affiliation, age, disability, natural origin, or sex) may qualify for a hearing.⁸ The grievant's complaint of discrimination, however, is not based on any membership in a protected class, but rather on his belief that he has been discriminated against because of the headquarters to which he was assigned and for not pandering to his supervisors. 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 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.

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⁸ *Grievance Procedure Manual* § 4.1(b).