

Issue: Qualification/Management actions – recruitment/selection; Ruling Date: May 2, 2005; Ruling #2005-973; 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 Number 2005-973
May 2, 2005

The grievant has requested a ruling on whether her February 6, 2004 grievance with the Department of Transportation (VDOT or the agency) qualifies for a hearing. The grievant claims that the agency misapplied and/or unfairly applied state and agency policy. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed with VDOT as a Permits Inspector Sr. On or about December 3, 2004, she applied for promotion to the position of Construction Project Manager. She was subsequently informed on February 3, 2005 that although the hiring panel had selected her for the position, the agency had been advised by the Attorney General's office that her selection would violate the Ethics in Public Contracting provisions of the Virginia Public Procurement Act, Va. Code §§ 2.2-4368-4369. As Construction Project Manager, the grievant would have been responsible for supervising employees of Firm H, a subcontractor providing services to the agency. The grievant's husband is employed by Firm H, although he would not have been supervised by the grievant.

On February 6, 2004, the grievant initiated a grievance challenging the agency's decision not to promote her to the Construction Project Manager position. In her grievance, the grievant asserts that the agency's action was an "unfair application and/or misapplication of the procedures provided by the Secretary of the Commonwealth's Office to disclose potential conflicts of interests." As relief, she seeks to be placed into the Construction Project Manager position, with back pay and benefits.

By letter dated February 17, 2004, the first-step respondent denied the grievant's request for relief. He advised the grievant that the agency had contacted its counsel, but that agency counsel "was not able to give a definite answer whether a conflict of interest existed or whether a potential violation of the Ethics in Public Contracting [law] might occur. . . ." The grievant was also advised that rather than seeking relief through the grievance procedure, she should instead request an advisory opinion from the Attorney General under Virginia's Conflicts of Interest Act, Va. Code §2.2-3100 *et seq.*

On February 20, 2004, the grievant advanced her grievance to the second management resolution step. The second-step respondent denied the grievant's request for relief, on the grounds that the employment of the grievant's husband by Firm H would create an impermissible conflict of interest. The grievant was again advised to seek "a definitive answer to the conflict of interest question" from the Attorney General's office.

The grievant subsequently advanced her grievance to the third management resolution step. By memorandum dated March 31, 2004, the third-step respondent informed the grievant that he was unable to offer her the relief requested in her grievance because a ruling by the Attorney General's office was needed to "validate that no conflict of interest exists," but he offered to stay the filling of the Construction Project Manager position pending a request by the grievant to the Attorney General's office for such a ruling. The grievant was advised that if she decided to decline this offer, the agency would again begin the hiring process.

The grievant states that she first submitted a request for an opinion by the Attorney General's office in February 2004. In May 2004, the Attorney General's office advised the grievant that it was unable to render an advisory opinion to a state employee regarding the Ethics in Public Contracting law, but could render such an opinion under Conflicts of Interest Act, if the grievant provided the office with additional factual information. The grievant claims that she submitted additional information but never received a response.

The agency continued to hold the Construction Project Manager position open while the grievant waited for a response from the Attorney General's office. On December 10, 2004, the grievant e-mailed the third-step respondent to advise him of her intent to advance her grievance to the agency head for qualification. On December 16, 2004, the third-step respondent received a letter from the agency's counsel in the Attorney General's office. This letter, which apparently memorializes advice previously given to the agency, concludes that the promotion of the grievant into the Construction Project Manager position would likely result in a violation of the Ethics in Public Contracting law.¹ The next day, the third-step respondent responded to the grievant's December 10, 2004 e-mail. In his response, he advised the grievant that it was the agency's position that her promotion "might violate either or both" the Conflicts of Interest Acts or the Ethics in Contracting law.

After the grievant elected to proceed with the grievance process, the agency re-advertised the Construction Project Manager position. The agency states that the grievant did not apply the first time this position was re-advertised. The second time the position

¹ In the course of our investigation, the agency advised this Department that it had in its possession a letter from the Attorney General's office "which answers the question of conflict." We requested a copy of this letter from the agency so that we could consider its contents in our investigation and ruling. We advised the agency, however, that they should first consult with the author of the letter regarding any potential waiver of the attorney-client privilege. After consultation with counsel, the agency elected to provide the letter to this Department.

was re-advertised the grievant applied and was selected for an interview. Prior to any selection decision being made by the agency, the grievant withdrew from consideration.

The grievant asserts that the agency misapplied state policy by denying her the Construction Project Manager position. She argues that her promotion to this position would not violate either the Conflicts of Interest Act or the Ethics in Public Contracting law. Moreover, she claims, even if her promotion would result in an impermissible conflict, the agency was not free to deny her the position but rather was required to promote her to the position and then simply disqualify her from participating in any prohibited transaction. Finally, she challenges the agency's insistence that she, rather than the agency, obtain a ruling from the Attorney General's office, and she alleges that the agency's actions toward her are inconsistent with its conduct toward another employee.

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.²

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 a disregard of the intent of the applicable policy. The applicable policies in this case are the Department of Human Resource Management (DHRM) Policy 2.10, *Hiring* and the agency's hiring policy, VDOT Policy No. 2.10.

State hiring policy is designed not only to determine who may be *qualified* for the position, but also to ascertain which candidate is *best-suited* for the position. In determining who is the best-suited candidate, an agency has wide discretion. Accordingly, in making a selection decision, an agency may consider a number of factors, including whether selection of a particular candidate would result in an appearance of impropriety or a violation of law.

The evidence in this case indicates that the agency initially informed the grievant that she was the selected candidate, but that the agency could not offer her the position because doing so would result in a violation of the Ethics in Public Contracting law. Although the grievant makes much of the agency's use of the term "selected," the agency's explanation for denying the grievant the position may fairly be read as a

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

statement that *but for* the conflict with Firm H, the grievant would have been considered by the agency to be the best-suited for the position. This was a determination the agency was free in its discretion to make. We note that although the agency relies here on the advice of counsel that selecting the grievant for the Construction Project Manager position would result in a violation of law, a reasonable belief that the selection would result in at least an appearance of conflict would have been a sufficient basis on which the agency could have denied the grievant the position, even if the selection would not have resulted in a violation of either the Conflicts of Interest Act or the Ethics in Public Contracting law. Again, in determining which candidate is “best suited” for a position, the hiring agency has wide discretion.³

The grievant also argues that the agency’s disqualification of her from the Construction Project Manager position is inconsistent with its treatment of Ms. D, who allegedly worked as a project manager on a contract performed by her spouse’s employer. The agency has presented evidence distinguishing the two situations, however. Most notably, the agency states that Ms. D, unlike the grievant, was a consultant rather than an agency employee when she acted as a project manager. Moreover, the agency notes, because Ms. D was a consultant, she did not make “fiduciary decisions” on the project. Because the grievant has failed to show that the agency’s actions constituted a misapplication or unfair application of policy, her 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 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.

Claudia T. Farr
Director

Gretchen White
EDR Consultant

³ The grievant also argues that the agency acted inappropriately by requiring her to obtain a formal ruling from the Office of the Attorney General, rather than obtaining such an opinion itself. We have been advised by that office that it will issue opinions under the Conflicts of Interest Act only to the involved employee, not to the hiring agency.

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