

Issue: Qualification/Recruitment-Selection/Retaliation/Whistle-blowing; Ruling Date:
November 10, 2005; Ruling #2006-1103; Agency: Department of Motor Vehicles;
Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Motor Vehicles
Ruling No. 2006-1103
November 10, 2005

The grievant has requested a ruling on whether her May 11, 2005 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 policy¹ and retaliated against her. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Drivers License Specialist with DMV. In March 2005 the grievant applied for the position of Customer Service Center (CSC) Assistant Manager with DMV. Prior to interviews for the position, a member of the interview panel (Panel Member #1) allegedly told another DMV employee, Employee C, that she would be favored for the position, and allegedly offered Employee C a copy of the interview questions. In addition, Panel Member #1 allegedly advised Employee C that another panel member (Panel Member #2) would also be in favor of hiring Employee C. At that time, Panel Member #2 was the manager of the CSC where the successful applicant for the CSC Assistant Manager position would be working.

¹ Although not specifically denoted as such, the grievant's claim of favoritism can be appropriately viewed as a claim that the successful applicant was pre-selected for the CSC Assistant Manager position. Pre-selection for a position is prohibited by law and policy. *See* Va. Code § 2.2-2901 and DHRM Policy 2.10. As such, for purposes of this ruling, the grievant's favoritism claim will be viewed as a misapplication or unfair application of policy claim. Additionally, the grievant asserts that a removed interview panel member improperly influenced the selection decision. This assertion can likewise be read as a misapplication or unfair application of policy claim.

Employee C subsequently contacted the grievant and told her what had happened. The grievant thereafter notified the DMV Personnel Manager of Panel Member #1's alleged improper behavior. As a result of the grievant's assertions, the Hiring Manager removed both Panel Member #1 and Panel Member #2 from the three-member panel, appointed two new panel members, developed new interview questions, and placed the interview questions in a sealed envelope with instructions not to open until the interviews were ready to begin.² These changes resulted in all three panel members being from offices other than that in which the successful applicant would ultimately work. Employee C did not apply for the position. The grievant applied and interviewed for the CSC Assistant Manager position, but was not the successful applicant. Employee SA was the successful applicant.

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, a challenged non-selection does 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.³ In this case, the grievant alleges that her non-selection was a misapplication of policy and retaliatory.

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 the grievant suffered an adverse employment action due to management's violation of a mandatory policy provision or due to an action by management that in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. In this case, the grievant alleges that the agency misapplied policy by (1) pre-selecting Employee SA for the CSC Assistant Manager position; and (2) allowing Panel Member #2 to improperly influence the replacement panel's selection process. The grievant's claims will be discussed in turn below.

Pre-Selection

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

² Throughout the remainder of this ruling, references to Panel Member #1 and Panel Member #2 mean the two panel members that were removed from the original panel as a result of the grievant's allegations of improper behavior and not those that served as replacement panel members.

³ Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1.

position.⁴ Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.⁵ As such, 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 support of her pre-selection claim the grievant states the following: (1) she was told by yet another DMV employee, Employee B, that prior to the selection decision, Panel Member #2 had commented that he would be glad when Employee SA, the successful applicant, arrived at his office to work as the new CSC Assistant Manager; and (2) prior to the selection decision, Employee SA had worked with Panel Member #3, the interview panel chairperson, and was therefore, favored and preselected by Panel Member #3.

Panel Member #2's alleged pre-selection of Employee SA: If proven, Panel Member #2's alleged comment -- that he would be glad when Employee SA arrived at his office to work -- could imply that Employee SA's selection was a foregone conclusion, and thus support a claim of pre-selection. Panel Member #2 denies making such a comment. Moreover, during the investigation for this ruling, Employee B claimed that Panel Member #2 stated only "I hope Employee SA applies because she would be good in our office" and "I would love to have Employee SA come to work at this office because I have heard that she is very smart and fast."

Based on the foregoing, this Department concludes that the grievance fails to raise a sufficient question as to whether Panel Member #2 was involved in pre-selection of Employee SA.

Panel Member #3's alleged pre-selection of Employee SA: The agency has confirmed that Employee SA did in fact work under the general supervision of Panel Member #3 prior to being selected for the position of CSC Assistant Manager. However, neither state nor agency hiring policies prohibit the supervisor of an interviewee from serving on the interview panel.⁶ Therefore, although Panel Member #3 may have personally known Employee SA and had the opportunity to previously assess her work performance and abilities, his presence on the interview panel did not violate any mandatory policy provision nor does it raise a sufficient question as to whether the

⁴ See Department of Human Resource Management (DHRM) Policy No. 2.10, pages 1-4; see also DMV Employment Policies and Procedures (revised 05/01/04).

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 There appears to be one exception to this rule in DMV policy, however the exception is irrelevant in this particular case. Specifically, DMV policy prohibits family members or other relatives of an interviewee from serving on the interview panel. See DMV Employment Policies and Procedures (revised 05/01/04). See also DHRM Policy 2.10, Hiring, page 9-10 of 21 (effective 9/25/00, revised 9/10/05) (stating requirements to be a panel member).

selection was so unfair as to amount to a disregard of the intent of state and agency hiring policies.

Further, it appears that the final selection decision was determined by averaging the three panel member assessments of the individual applicants, and as such, Panel Member #3 did not make the selection decision alone. The grievant has provided no evidence (nor has this Department discovered evidence) suggesting that Panel Member #3 influenced the other panel members in the scores they assessed each applicant.

Panel Member #2 Improperly Influenced the Replacement Panel's Selection Process:

Under DMV's hiring policy, interview "[p]anel members must make a recommendation regarding their choice of applicant(s) to the individual making the final hiring decision."⁷ Likewise, under DHRM Policy 2.10, it is a selection panel's duty to interview job applicants for selection or for referral to the hiring authority for selection.⁸

In support of her claim that Panel Member #2, despite his removal from the original panel, improperly influenced the replacement panel's selection process, the grievant asserts that (1) during the interviews she saw Panel Member #3 give removed Panel Member #2 paperwork from the interviews; and (2) she observed Panel Member #2 and Panel Member #3 discussing the interviews. During this Department's investigation, the grievant admitted that she did not actually see what Panel Member #3 handed to Panel Member #2, but claims to have heard Panel Member #3 say to Panel Member #2, "here are the notes." According to Panel Member #2, the only thing he received from Panel Member #3 during the interview process was the list of interview questions to provide to the next candidate upon arrival.⁹ Moreover, Panel Member #2 claims that the only thing Panel Member #3 said to him during the selection process involved Panel Member #2's removal from the original interview panel. Likewise, according to the second step-respondent, "[r]esults from the interview were not discussed with [Panel Member #2] until the three panel members had reached a selection decision." In light of the above, the grievance fails to raise a sufficient question as to whether Panel Member #2 improperly influenced the replacement panel's selection process or decision in this case.

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;¹⁰ (2)

⁷ DMV Employment Policies and Procedures (revised 05/01/04).

⁸ See DHRM Policy 2.10, Hiring, page 4 of 21 (effective 9/25/00, revised 9/10/05).

⁹ According to the grievant, upon arrival for the interview, she, and presumably all interviewees, was provided a copy of the interview questions for review.

¹⁰ 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

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. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.¹¹ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹²

We will assume for purposes of this ruling only that informing the Personnel Manager of the alleged improprieties of an interview panel member could be a protected activity. Further, the grievant's non-selection for the CSC Assistant Manager position constitutes an adverse employment action. At issue then is whether there is sufficient evidence of a causal connection between the grievant's protected activity and her non-selection.

In support of her claim of retaliation the grievant states the following: (1) prior to his removal from the panel, Panel Member #2 had previously acknowledged the grievant's ability to "walk into" a CSC Assistant Manager position given her knowledge and experience and wished her luck when she told him that she had applied for the position; (2) shortly after Panel Member #2's removal from the panel, she (the grievant) was working at the CSC managed by Panel Member #2 and Panel Member #2 appeared to be upset with her; (3) when she arrived for her interview, Panel Member #3 asked her "how are things at [the facility where Panel Member #1 had allegedly offered Employee C the interview questions]" and she (the grievant) "felt tension" during the interview; (4) shortly after Panel Member #1 and Panel Member #2 were removed from the interview panel, grievant's computer disk disappeared and later resurfaced with a note on it stating that the disk had been found in Panel Member #1's computer; (5) since the filing of her May 11, 2005 grievance, she applied for a CSC Manager position and did not get an interview, despite the fact that she had received interviews for the manager position in the past;¹³ and (6) over the past three years the grievant applied for ten different management

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."

¹¹ See *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 656 (4th Cir. 1998).

¹² See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10, 101 S. Ct. 1089 (Title VII discrimination case).

¹³ Although this incident occurred after the May 11th grievance was filed and appears to be unrelated to the grievant's claim that her non-selection for the CSC Assistant Manager position was retaliatory, it may nonetheless be used to support such a claim. In other words, if the grievant could demonstrate that her non-selection for an interview for the CSC Manager position was motivated by retaliatory intent, such a showing could lend support to her allegation that her non-selection for the CSC Assistant Manager position was also motivated by retaliatory intent.

positions, including a CSC Assistant Manager position in July 2003, but was not selected for any of them.

These arguments fail to raise a sufficient question of retaliatory intent. Assuming that Panel Member #2 did display some sort of displeasure with the grievant, for this discontent to be considered sufficient evidence of a causal connection between the grievant's reports of misconduct and her non-selection, it would have to be shown that Panel Member #2 in some way had significant influence over the selection decision. As discussed above, the facts and circumstances of this case fail to present a sufficient question that Panel Member #2 had in any way influenced the selection for the CSC Assistant Manager position. Likewise, even if Panel Member #2 had previously commented on the grievant's ability to perform the duties of a CSC Assistant Manager with ease, it does not mean that her subsequent non-selection for the position was motivated by retaliatory intent. Similarly, if we were to assume that the grievant's computer disk did in fact resurface in Panel Member #1's computer, thereby implying that Panel Member #1 intentionally took the grievant's computer disk for some improper purpose without her permission, the grievant has failed to demonstrate how Panel Member #1's actions demonstrate a causal connection between the grievant's complaints to the Personnel Manager and her non-selection. This is especially true in light of the fact that Panel Member #1 was removed from the interview panel and appears to have had nothing to do with the selection of Employee SA.

Moreover, the grievant worked at the facility referenced by Panel Member #3's question at the interview. There is insufficient evidence that Panel Member #3's question was connected in any way to the allegations of Panel Member #1's improper behavior or was anything more than a general office pleasantry. The fact that the grievant "felt tension" during her interview cannot be viewed as evidence of any retaliatory intent on the part of Panel Member #3.

As to the grievant's non-selection for the CSC Manager position following the filing of this grievance, the agency confirmed that the grievant had been interviewed for the CSC Manager position in August 2004, but was denied an interview for the same position in 2005, due to legitimate business reasons: (1) there were at least four applicants that demonstrated far superior qualifications and as such, these applicants were interviewed first; and (2) the CSC Manager position Employee Work Profile (EWP) was changed in February 2005 resulting in very different job responsibilities from when the grievant previously interviewed for the same position. Finally, grievant's non-selection on numerous occasions in the past occurred prior to her protected activity (i.e., prior to her report of Panel Member #1's alleged improprieties), and thus do not support her retaliation claim.

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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, she 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 she does not wish to proceed.

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