

Issue: Qualification/Age discrimination/recruitment/selection; Ruling Date: February 17, 2006; Ruling #2006-1159; Agency: Department of Corrections; Outcome: Not qualified.



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2006-1159
February 17, 2006

The grievant has requested a ruling on whether his July 15, 2005 grievance with the Department of Corrections (DOC or the agency) qualifies for hearing. The grievant asserts that the management at the facility where he worked engaged in unfair hiring practices. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant was employed with the agency as a Case Management Counselor.¹ The agency had advertised a Counselor Senior Position for which the grievant applied and was interviewed. During the interview process, the agency discovered that although the position had been opened solely to agency employees, a non-DOC employee had been granted an interview. Upon discovering the error, the agency decided to recruit again for the position, this time opening it to the general public. Neither the grievant nor the person erroneously interviewed in the first round was ultimately the successful candidate.

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.² In this case, the grievant alleges that his non-selection was a misapplication of policy and possibly discriminatory.

¹ Since initiating the instant grievance, the grievant resigned his position with the agency.

² 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 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 through improper (1) announcement of the position, (2) initial screening of applicants, (3) interview questions, and (4) selection for the position.

I. Job Announcement/ Initial Screening

The agency admits that it erred when it interviewed a non-DOC employee after it elected to limit recruitment to agency-only personnel. The grievant argues that the agency should have simply removed the improperly interviewed candidate from the pool and then selected a candidate among the remaining candidates. However, the agency's re-advertisement of the position to the general public appears to have been a valid means through which it attempted to remedy its earlier mistake. The agency was free to exercise discretion in how it remedied its earlier mistake. While the agency certainly could have corrected the error in the fashion suggested by the grievant, nothing required it do so. Under these facts, this Department cannot conclude that the agency misapplied or unfairly applied the Commonwealth's selection policy.³

II. Interview Questions

The grievant asserts that the agency misapplied policy by asking a personal question during his interview. The grievant claims that he was asked: "In the past, you have spoken negatively about the administration and the direction the institution is taking. Now you are a part of the administrative team. How do you address your differences with previous peers who now see you as an administrator?" The grievant asserts that he believes this question related to his previous frank discussions with management about his concerns regarding staffing levels and his disagreement with management over the appropriate staffing levels. The agency asserts that the question was posed not just to him but other employees as well. The grievant concedes that other applicants confirmed that they were asked the same question.

³ The Department of Human Resources Management (DHRM) Hiring policy states that:

Agencies should select the recruitment option that best fits their needs before posting a vacancy. The decision should be based on factors such as the diversity of the agency's workforce and the availability of qualified applicants. *If initial recruitment does not result in an adequate applicant pool, agencies may reopen recruitment as necessary.* (Emphasis added).

DHRM policy requires that “[a] a set of interview questions must be developed and asked of each applicant.”⁴ DHRM policy further states that questions “should seek information related to the applicant’s knowledge, skills, and ability to perform the job.”⁵ In this case, the agency asserts that it posed its questions to each applicant. The grievant confirmed that when he asked other applicants if they were asked the same question several specifically recalled it whereas others did not. The grievant did not assert that any candidate specifically recalled not being asked the question. Furthermore, the question would appear to be job related. Thus, the fact that the question posed may have been more than hypothetical in the grievant’s case did not prevent management from asking it so long as it was posed to all candidates.

III. Selection

The grievant asserts that the agency should have selected a candidate from among the original pool, after excluding the non-agency employee. While the grievant does not assert that he was necessarily the best-suited candidate, he explained to this Department’s investigating consultant that in the fall of 2003 he was required to do the work of multiple consultants, a task that he ably completed. According to the grievant, his fall 2003 performance illustrates that he was amply qualified.

State hiring policy is designed to ascertain which candidate is best suited for the position, not just to determine who is qualified to perform the duties of the position.⁶ Accordingly, while it may be true that the grievant could have ably performed the functions of the Counselor Senior Position, the grievant has not provided evidence that the agency’s determination to reopen recruitment for the position or its ultimate selection of another candidate was based on any improper reason. Management has a great deal of discretion in determining who is the best suited candidate for a position and the grievant has not provided any evidence that the agency abused its discretion in selecting the ultimately successful candidate.

IV. Age Discrimination

Finally, the grievant asserts that he may not have been selected because of his age. Grievances that may be qualified for a hearing include actions related to discrimination on the basis of age.⁷ To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. In this case, the basis for the grievant’s supposition that the decision may have been impacted by age is that both the successful applicant and the individual who was improperly allowed to interview were both

⁴ DHRM Policy 2.10, *Interview Questions*.

⁵ *Id.*

⁶ See Department of Human Resource Management (DHRM) Policy No. 2.10, pages 1-4.

⁷ See Grievance Procedure Manual § 4.1(b).

significantly younger than he and apparently well under the age of forty. However, as noted above mere speculation without any supporting evidence is not sufficient grounds to warrant a hearing.⁸

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.

Claudia T. Farr
Director

William G. Anderson, Jr.
EDR Consultant, Sr.

⁸ See *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985) A party opposing summary judgment cannot create a genuine issue of fact through mere speculation or by the building of one inference upon another. *Causey v. Balog*, 162 F.3d 795, 802 (4th Cir. 1998) Conclusory statements, without specific evidentiary support, cannot support an actionable claim for harassment. This Department's investigating consultant spoke with each of the three panel members. Each asserted that no one had attempted to influence their selection decision and that age had nothing to do with their choice. Each of the panel members is over the age of forty.