

Issue: Qualification – Management Actions: Recruitment/Selection; Ruling Date: August 20, 2007; Ruling #2007-1599; Agency: Department of Corrections; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2007-1599
August 20, 2007

The grievant has requested a ruling on whether his January 17, 2007 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant claims that he should have been granted a second interview for the position of Buildings and Grounds Superintendent A. For the reasons set forth below, this grievance is not qualified for hearing.

FACTS

The grievant, a Buildings and Grounds Supervisor B, applied for a vacant Buildings and Grounds Superintendent A position. The grievant was selected for the first round of interviews but not for the second. Two of the three first-round panel members recommended the grievant for the position of Buildings and Grounds Superintendent A but a third did not.

When the grievant asked the agency's human resource office about the selection process and requested supporting documentation, the agency provided the grievant with a copy of the evaluation forms used to rate the grievant. One of these forms bore a fax number on the second page that was not present on the first page of the form. When the grievant inquired about the fax number, he was informed that one of the three panel members had failed to mark on each of the interview evaluation forms whether he recommended the applicants for the position. Accordingly, the panel member was asked to complete each of the forms by indicating whether he would recommend the applicants for the Superintendent A position. When he completed the evaluation forms, the panel member did not recommend the grievant for the position. The grievant was not afforded a second interview.

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as hiring, promotion, transfer, assignment, and retention of employees within the agency “shall not proceed to hearing” unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. In this case, the grievant essentially claims that the agency unfairly applied policy by improperly screening him out of the selection process. The grievant asserts that he is certain that he has a level of experience and education that exceeds that of at least some of those who were selected for second interviews.¹ Accordingly, he asserts that he has no choice but to assume that there was a conspiracy to eliminate him before the process began.

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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”² Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.³ An adverse employment action is defined as a “tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”⁴ Here, the grievant would appear to satisfy the threshold adverse employment action requirement because he is challenging his denial of a promotion.

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

¹ The grievant notes in his Grievance Form A that he has a degree in information systems technology and a bachelor degree in business administration. He also states that as a supervisor at the correctional center, he has demonstrated, with the support of his evaluations, that he has the ability to perform the Superintendent A position. [tab 2]

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

³ While evidence suggesting that the grievant suffered an “adverse employment action” is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an “adverse employment action.” For example, consistent with recent developments in Title VII law, this Department substitutes a lessened “materially adverse” standard for the “adverse employment action” standard in retaliation grievances. See EDR Ruling No. 2007-1538.

⁴ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

position.⁵ Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.⁶ 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.

Here, a review of the selection reveals no evidence that the agency's selection of the best suited candidate was predetermined. While one of the panel members apparently failed to make initial recommendations on the evaluation forms regarding the applicants, he corrected that error approximately six days later. Certainly, this recording should have been made contemporaneously with completing the rest of the evaluation form. However, the failure to do so does not create any question of fact requiring further development at a grievance hearing. Any policy violation by failing to contemporaneously indicate a recommendation status for each of the three candidates was promptly corrected by agency and there is no additional relief that that hearing officer could order with respect to this oversight.⁷ Most importantly, there is no evidence that anyone attempted to influence the outcome of the panel. As part of the investigation surrounding this ruling request, this Department contacted each of the panel members and all indicated that no one attempted to sway their determinations in any way. Accordingly, because this Department has not been presented with sufficient evidence to warrant sending this grievance to hearing, this grievance is not qualified.

⁵ See Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.

⁶ Va. Code § 2.2-2901 (stating, in part, that "[i]n 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).

⁷ In the case of a misapplication or unfair application of policy, a hearing officer is limited to asking the agency to redo the process at the point at which it became tainted. *Rules for Conducting a Grievance Hearing*, VI (C)(1). Within six days of the error, the agency returned the selection process to the point at which it became tainted and corrected the oversight.

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, 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.

Claudia Farr
Director