

Issue: Qualification – Management Actions: Recruitment/Selection; Ruling
Date: July 25, 2007; Ruling #2007-1721; Agency: Department of State Police;
Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of State Police
Ruling No. 2007-1721
July 25, 2007

The grievant has requested a ruling on whether his May 3, 2007 grievance with the Department of State Police (the agency) qualifies for a hearing. The grievant claims that the agency has misapplied state and agency policy during a selection process. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant, a sergeant with the agency, applied for a sergeant position at the agency's academy in March 2007. The grievant had previously applied for a sergeant position at the academy in October 2006. At that time, he received a "highly recommended" rating from the interview panel. However, during the March 2007 selection, which is the subject of this grievance, the grievant was not recommended at all for the position by the interview panel. The panel in the latter selection was nearly identical to the panel in October 2006.

There were only two applicants for the sergeant position in March 2007, the grievant and another Sergeant with the agency. The agency determined that neither applicant was recommended for the position. The agency then re-advertised for the position. Thereafter, the grievant initiated this grievance, alleging that policy had been misapplied or unfairly applied because the interview panel failed to recommend him when a similar panel had done so six months previously.

According to the agency, however, the October 2006 and March 2007 selections were different. Though both were for sergeant positions at the academy, the agency was hiring to replace employees with different duties. In October 2006, the sergeant vacancy was for a defensive tactics instructor. The grievant's experience as a former Trooper with the agency and ex-Marine might have been more suitable to such a position

according to the agency.¹ In addition, agency documents state that the grievant may have been rated “highly recommended” for the October 2006 vacancy because of his potential for that job, rather than because he actually satisfied the knowledge, skills, and abilities of the position.

The March 2007 vacancy was created by the departure of a Sergeant who was responsible for all DCJS mandates, instructor certifications, testing, and all information technology related responsibilities. According to the agency, this position required someone that could handle very tedious and technical issues. In short, a large volume of administrative duties would be required of the successful applicant. Based on the agency’s assessment during the March 2007 interview process, the grievant did not demonstrate those particular skills. As such, he was not recommended for the position by the interview panel.

The grievant also alleges that pre-selection may have occurred. The grievant had learned that the agency allegedly contacted another agency employee and suggested to that individual that he apply for the position. However, according to agency documents, members of the agency interview panel at the academy did not seek out another agency employee for the vacant position. This other agency employee had actually asked a member of the interview panel about the vacancy after the grievant’s interview had taken place and after the panel had determined that the grievant would not be recommended for the position.

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.² In this case, the grievant alleges that the determination that he was not recommended for the March 2007 sergeant position was a 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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”³ Thus, typically, a threshold question is whether

¹ The agency also admitted that the interview panel during the October 2006 selection process might have rated the grievant higher than he deserved at that time.

² Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

³ See *Grievance Procedure Manual* § 4.1(b).

the grievant has suffered an adverse employment action.⁴ 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.”⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁶

March 2007 Selection

Even if it is assumed that the grievant has suffered an adverse employment action, there is no evidence that there has been a misapplication or unfair application of policy. The grievance procedure accords much deference to management’s exercise of judgment, including management’s assessment of applicants during a selection process. Thus, a grievance that challenges an agency’s action like the selection in this case does not qualify for a hearing unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.⁷ That is not the case here.

At first glance, because the grievant was not recommended for a sergeant position in March 2007, after having been rated “highly recommended” by a similar interview panel just six months earlier for another sergeant position, questions might be raised as to the propriety of the selection process. However, the differences in the vacancies dispel any such questions. Specifically, the grievant received a highly recommended rating for the October 2006 sergeant position that was to replace a defensive tactics instructor. The March 2007 sergeant position was different, requiring additional experience in information technology and a large volume of administrative duties. According to the agency, the grievant did not demonstrate to the interview panel that he possessed the knowledge, skills, and abilities to fill the March 2007 vacancy. The fact that an employee was recommended for one sergeant position does not mean that policy was misapplied or unfairly applied when the same employee was not recommended for another sergeant position with different duties.

Accordingly, this grievance fails to raise a sufficient question that the agency’s decision was plainly inconsistent, arbitrary or capricious. Indeed, the agency’s stated rationale was that the grievant, in the agency’s assessment, did not demonstrate the

⁴ 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 somewhat lessened “materially adverse” standard for the “adverse employment action” standard in retaliation grievances. See EDR Ruling No. 2007-1538.

⁵ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ *Von Gunten v. Maryland Department of the Environment*, 243 F.3d 858, 866 (4th Cir 2001)(citing *Munday v. Waste Management of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997)).

⁷ See *Grievance Procedure Manual* § 9. Arbitrary or capricious is defined as a decision made “[i]n disregard of the facts or without a reasoned basis.”

required knowledge, skills, and abilities at the time of the March 2007 interview. The grievant has presented no evidence that the agency disregarded the facts in making its determination not to recommend the grievant for the position.

Pre-Selection

The grievant has also raised the issue of 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 position.⁸ Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.⁹ 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.

There is insufficient evidence in this case to raise a question as to whether pre-selection occurred. The grievant has not presented evidence to show that the agency simply went through the motions of the selection process. On the contrary, the agency appears to have acted based on a reasoned analysis of the applicants' abilities. Ultimately, the agency determined that neither the grievant nor the lone other applicant were recommended for the position. Consequently, the agency re-advertised the position, as is permissible under DHRM Policy 2.10.¹⁰ Moreover, agency documents indicate that the other employee allegedly sought by the agency did not contact anyone at the academy about the vacant sergeant position until *after* the grievant's interview process. Thus, even if the agency had desired to offer the sergeant position to this other employee, the interview panel was not aware of the other employee's interest until after determining that the grievant would not be recommended. For that reason, the agency's assessment of the grievant's suitability could not have been tainted by pre-selection of the other employee.

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

⁸ See Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.

⁹ 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).

¹⁰ "If initial recruitment does not result in an adequate applicant pool, agencies may reopen recruitment as necessary." DHRM Policy 2.10, *Hiring*.

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appointment of a hearing officer unless the grievant notifies the agency that he does not wish to proceed.

Claudia Farr
Director