

Issue: Qualification – Management Actions: Recruitment/Selection; Ruling Date: July 18, 2007; Ruling #2007-1728; Agency: Department of Social Services; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling No. 2007-1728
July 18, 2007

The grievant has requested a ruling on whether his April 9, 2007 grievance with the Department of Social Services (the agency) qualifies for a hearing. The grievant claims that the candidate the agency eventually hired during a selection in which the grievant competed was less qualified than he was for the position. For the following reasons, this grievance does not qualify for hearing.

FACTS

In March 2006, the grievant interviewed for a licensing program administrator position with the agency. A year later, in March 2007, he was notified that the agency had chosen another applicant to fill the position.¹ The grievant notes that he has over twenty-five years of experience in licensing programs, whereas, based on his assessment, the successful applicant had only approximately eight years of such experience. Therefore, the grievant initiated this grievance on April 9, 2007 to challenge the agency's selection. Having failed to reach resolution during the management steps, the grievant now seeks qualification of his grievance for hearing.²

DISCUSSION

¹ The agency originally offered the position to a candidate around April 2006. However, that candidate declined to accept the position because of the offered salary. The agency then chose to re-advertise the position after adjusting the advertised salary. According to the agency, applicants from the original pool were incorporated into the second set of applicants, and all interview panels and hiring authorities remained the same.

² The grievant also initially included a claim that the selection was based on gender. However, the grievant has waived that argument and is pursuing only the claim that the agency hired a less qualified applicant.

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.³ In this case, the grievant essentially claims that by hiring a candidate whom he alleges is less qualified than him, the agency misapplied 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.”⁴ Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.⁵ 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.”⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁷

Even if it is assumed for purposes of this ruling only that the grievant suffered an adverse employment action, there is no evidence that there has been a misapplication or unfair application of policy in this case. 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 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 agency exercised its judgment in an arbitrary or capricious manner, in other words, “[i]n disregard of the facts or without a reasoned basis.”⁹

³ Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

⁴ *See Grievance Procedure Manual* § 4.1(b).

⁵ 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.

⁶ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁷ *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)).

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

⁹ *See Grievance Procedure Manual* § 9.

The grievant's sole argument is that he has more experience in licensing programs than the successful applicant. While this may be true based on the alleged years of service, licensing program experience was not the only skill or ability assessed by the agency in determining whom to hire. Because the grievant relies solely on the fact that he has more years of experience in licensing programs, he has failed to raise a sufficient question that the agency's decision was without a reasoned basis or in disregard of the facts. Indeed, a review of the selection documents reveals no other evidence that the agency's selection of the best suited candidate was arbitrary or capricious. The documents show that the successful applicant was rated higher than the grievant following final interviews by the hiring authority. In sum, the grievant has failed to raise a sufficient question that the agency misapplied or unfairly applied policy to 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, 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