

Issues: Qualification – Discrimination (age) and Management Actions  
(recruitment/selection); Ruling Date: October 23, 2007; Ruling #2008-1736;  
Agency: Department of Environmental Quality; Outcome: Not Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Environmental Quality  
Ruling No. 2008-1736  
October 23, 2007

The grievant has requested a ruling on whether her May 2, 2007 grievance with the Department of Environmental Quality (DEQ or the agency) qualifies for a hearing. The grievant claims that the agency has misapplied and/or unfairly applied policy and that she has been discriminated against on the basis of age. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant is employed as an Administrative and Office Specialist III with DEQ. On March 22, 2007, the grievant interviewed for the position of Compliance Auditor Jr. within DEQ. On April 5, 2007, the grievant was notified that she was not selected for the position. The grievant challenged her nonselection by initiating a grievance on May 2, 2007.

During the management resolution step, the second step respondent made a comment regarding the grievant's past work experience which prompted the grievant to fill out a second Grievance Form A on June 13, 2007. In this second grievance, the grievant claims that her nonselection was discriminatory on the basis of age.<sup>1</sup>

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 a hearing" unless there is sufficient evidence of

---

<sup>1</sup> It appears that the grievant and the agency treated the June 13, 2007 grievance as an attachment to the April 5, 2007 grievance and did not separately process the June 13<sup>th</sup> grievance. That is, the June 13<sup>th</sup> grievance did not proceed through all management resolution steps. The third step respondent and the agency head did however briefly address the grievant's age discrimination claim.

discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.<sup>2</sup> In this case, the grievant alleges that policy was misapplied during the selection process and that she has been discriminated against on the basis of age.

### *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.”<sup>3</sup> Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.<sup>4</sup> 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.”<sup>5</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>6</sup> Here, the grievant would appear to satisfy the threshold adverse employment action requirement because she is challenging her denial of a promotion.

In this case, the grievant claims that the agency misapplied policy because (1) she was the most qualified for the position yet was not selected; and (2) there were only two members on the interview panel and the panel was not “diverse.” The grievant’s claims are discussed in turn below.

### Selection Decision

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.<sup>7</sup>

---

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

<sup>3</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>4</sup> 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.

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

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

<sup>7</sup> 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.”

The grievant's evidence fails to raise a sufficient question that the agency's assessment of her qualifications was arbitrary or capricious, or that the selection was plainly inconsistent with other similar decisions by the agency. For example, 50% of a Compliance Auditor Jr.'s job is devoted to receiving, tracking and reviewing Discharge Monitoring Reports (DMRs), including entering all DMR data into the database. According to the agency, the selected applicant in this case, prior to her promotion to Compliance Auditor Jr., was responsible for entering DMR data in the database and assisting the compliance auditor with DMR validation and correction. Further, the selected applicant has taught the DMR data entry procedures to several staff and oversaw their DMR data entry assignments.<sup>8</sup> In addition, an April 3, 2007 memorandum sent to the human resources officer regarding who the panel recommended for the Compliance Auditor Jr. job states that "[the selected applicant] demonstrated, through her training and experience and interview responses, excellent knowledge, skills, and abilities in computer proficiency spreadsheet experience, database management, compliance auditing procedures, and communication and interpersonal skills." Further, according to documents provided to this Department, although the grievant and the selected applicant were rated similarly for training and experience, the interview panel rated the selected applicant higher on the interview than the grievant.<sup>9</sup>

Additionally, the grievant has presented an extensive amount of information as to why she was the most qualified applicant for the Compliance Auditor Jr. position; however, state and agency hiring policies are 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.<sup>10</sup> Accordingly, while it may be true that the grievant could have ably performed the functions of the Compliance Auditor Jr. position, the grievant has not provided evidence that the agency's 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.

#### Interview Panel

---

<sup>8</sup> Although the grievant does have experience in, and review of, DMR data entry, the agency claims that the vast majority of DMR data entry work was currently being done by the selected applicant.

<sup>9</sup> The agency rates an applicant's answers to each interview question with a check plus, a check, or a minus notation. A check plus means the applicant is fully prepared to perform the duties of the position; a check means the applicant is somewhat or minimally prepared to assume the duties of the position; and a minus notation means the applicant is not prepared to assume the duties of the position. See DEQ Policy Number 3-1 III (C)(3)(a)(1-3) and III(D)(5)(e). The grievant was given an overall check for her performance during the interview while the selected candidate was given an overall check plus.

<sup>10</sup> See DHRM Policy No. 2.10 and DEQ Policy Number 3-1 (I).

The grievant claims that there were only two people on the interview panel and that both of these individuals worked in the same section as the candidate that was selected and thus, was not “diverse.”<sup>11</sup>

Department of Human Resource Management (DHRM) Policy 2.10 defines a selection panel as “[t]he group of individuals (two or more) that interviews job applicants for selection or for referral to the hiring authority for selection.”<sup>12</sup> Likewise, DEQ Policy Number 3-1 states that “[t]he interview panel should consist of at least two members.”<sup>13</sup> In this case, there were two individuals on the interview panel, the minimum number required per state and agency policy.

In addition, under DHRM Policy 2.10 states that, “[w]hen a selection panel is used, panel members *should* represent a diverse population.”<sup>14</sup> Similarly, DEQ Policy 3-1 stated that “[p]anel should include a varied race/sex/disability composition whenever possible.”<sup>15</sup> The use of the word “should” indicates that these guidelines are discretionary rather than mandatory. Moreover, while the panel members in this case may have worked with the selected candidate, their presence on the interview panel was not prohibited under policy nor does it indicate that the panel did not represent a diverse population. That is, by stating that the panel members should represent a diverse *population* state policy seems to imply, and agency policy states directly, that the panel should represent different populations in terms of immutable characteristics such as race, sex and so on. The policy does not appear to require that panel members do not currently, nor have ever, worked with any of the potential candidates.<sup>16</sup> Further, although both panel members may have personally known the selected candidate and had the opportunity to previously assess her work performance and abilities, their presence on the interview panel did not violate any mandatory policy provision nor does it raise a sufficient question as to whether the selection was so unfair as to amount to a disregard of the intent of state and agency hiring policies.

Because there is no indication that policy was misapplied or unfairly applied during the selection process, the grievant’s claim does not qualify for hearing.

### *Age Discrimination*

The grievant also claims that she was not selected for the position because of age discrimination. For a claim of age discrimination in the hiring or selection context to

---

<sup>11</sup> There interview panel consisted of two members. One of the panel members, Mr. E., is the supervisor of the position at issue and the other panel member, Ms. K., is the Senior Compliance Auditor for the work unit. The selected candidate in this case was previously an administrative assistant and reported directly to Mr. E.

<sup>12</sup> DHRM Policy 2.10, “Recruitment Management System (RMS).”

<sup>13</sup> DEQ Policy Number 3-1 (III)(D)(a)(1).

<sup>14</sup> DHRM Policy 2.10, “The Selection Process.”

<sup>15</sup> DEQ Policy Number 3-1 (III)(D)(1)(d).

<sup>16</sup> Such a requirement would be virtually impossible to achieve given that state employees are frequently applying for promotions within their current departments.

qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. The grievant must present facts that raise a sufficient question as to whether she was not selected for the position *because of* her membership in a protected class.<sup>17</sup> An employee must be forty years of age or older and must present evidence raising a sufficient question as to whether: (1) she was a member of a protected class;<sup>18</sup> (2) she applied for an open position; (3) she was qualified for the position, and (4) she was denied promotion under circumstances that create an inference of unlawful discrimination.<sup>19</sup> Where the agency, however, presents a legitimate, non-discriminatory reason for the employment action taken, the grievance should not qualify for a hearing, unless there is sufficient evidence that the agency's stated reason was merely a pretext or excuse for age discrimination.

The grievant is 53 years old, is minimally qualified for the position of Compliance Auditor, Jr., but was not selected while a younger candidate was.<sup>20</sup> As noted above, however, the agency has stated a non-discriminatory reason for selecting another individual: the successful candidate had excellent qualifications and provided exceptional answers to the interview questions. As evidence of pretext, the grievant cites to the second step respondent's response which states: "[the grievant] places a large reliance on her experience with an Illinois state agency that she worked for about 20 years ago. Her employment in that position was in another state in a different media (solid waste not water quality) and due to the fact that it was 20 years ago, there is no comparison to what and how we accomplish our mission today." In addition, the grievant asserts that approximately four or five years ago, she complained to her immediate supervisor about "some sexually harassing conversations about gays" that occurred at a staff meeting. She claims that she was told at that time that she needed to understand that because she was "older" than the rest of the group, what may offend her was not necessarily offensive to the rest of the staff. As a result of this incident, the grievant claims that she was prohibited from attending staff meetings, transferred to another work unit and labeled a "problem employee."

The above cited statements and/or acts are insufficient to raise a question of discriminatory intent on the part of the agency with respect to the grievant's nonselection in this case. First, the second step respondent seems to merely be pointing out that the grievant's alleged relevant experience was acquired quite some time ago and as such, may no longer be useful in similar jobs today regardless of the grievant's current age. Further, none of these alleged statements and/or acts described above were made or taken

---

<sup>17</sup> See, *Huchinson v. INOVA Health System, Inc.*, 1998 U. S. Dist. LEXIS 7723 (E.D. Va. 1998) at 3, (citing *St. Mary's Honor Center v. Hicks*, 509 U. S. 502 (1993)).

<sup>18</sup> It is unlawful for an employer to discriminate against an employee on the basis of age. See 29 U.S.C. 621 et seq. (ADEA). The ADEA's protections extend only to those who are at least forty years old. Such discrimination is also a violation of state policy. See the Department of Human Resources management (DHRM) Policy 2.05.

<sup>19</sup> See *Dugan v. Albemarle County School Bd.*, 293 F.3d 716, 720-721 (4<sup>th</sup> Cir. 2002). Note: proof of selection of a substantially younger worker is required; not selection by someone entirely outside of the ADEA's protected class. *Dugan* at 721.

<sup>20</sup> The selected candidate is 43 years old.

by people who were directly involved in, or otherwise influenced,<sup>21</sup> the hiring decision at issue here.<sup>22</sup> Accordingly, the grievant's claim of age discrimination does not qualify for a hearing.<sup>23</sup>

#### 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, the grievant should notify the human resources office, in writing, within five workdays 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

---

<sup>21</sup> See e.g., McDonald v. Rumsfeld, 166 F.Supp. 2d. 459, 464-465 (E.D. Va. 2001) (“This Court will follow suit [of other circuit courts] and hold that it will look beyond who officially made the adverse employment decision to determine who actually made the decision or caused the decision to be made. Under circumstances indicating that the decisionmaker's determination may have been tainted by another supervisor or employee's discriminatory animus toward the plaintiff, it is appropriate to infer the causal connection if the evidence demonstrates that the supervisor or employee possessed leverage, or exerted influence, over the decisionmaker.”)

<sup>22</sup> Both panel members in this case confirmed during this Department's investigation that their hiring recommendation was not influenced by anyone. Moreover, according to the second step respondent, while he is responsible for routing the interview panel's selection decision and hiring package to the agency's human resources officer, he does not second guess the panel's decision. The second step respondent looks at the hiring package to ensure that state and agency policies have been followed as well as look for any signs of potentially troublesome trends, such as if one particular manager never seems to hire women.

<sup>23</sup> To the extent the grievant is claiming that she was not selected for the Compliance Auditor Jr. position in retaliation for her complaints to her immediate supervisor about the “sexually harassing conversations about gays”, this Department concludes that such a claim would likewise not qualify for a hearing. That is, even if the grievant could demonstrate the other necessary elements of a retaliation claim (i.e., she engaged in a protected activity and suffered a materially adverse), she has failed to provide sufficient evidence that because she made such complaints to management, she was denied selection for the Compliance Auditor, Jr. position. More specifically, the grievant's complaints were made years ago and involved people who were neither directly involved in nor influenced the selection decision in this case.