

Issue: Qualification – Management Actions: Recruitment/Selection; Ruling Date: August 30, 2007; Ruling #2008-1760; Agency: Virginia Commonwealth University; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Commonwealth University
Ruling No. 2008-1760
August 30, 2007

The grievant has requested a ruling on whether her April 17, 2007 grievance with Virginia Commonwealth University (the university) qualifies for a hearing. The grievant claims that the university has misapplied state and agency policy during a selection process, that pre-selection has occurred, and that her opportunities for advancement have been blocked. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant was an unsuccessful candidate for a manager position with the university. She has initiated this grievance alleging that she was the most qualified candidate for the job. The grievant states that she has performed the tasks required of this manager position, both through her own duties and filling in for her supervisor, and held the same position in the past. She also states that the job description of the manager position is nearly identical to her most recent past position.¹ The grievant additionally alleges that the successful candidate requested training from her regarding the position's duties in an e-mail. The university states that the reasons that the grievant was not selected for the position were her communication skills and her score on an Excel skills test administered during the selection process.

The grievant also alleges that pre-selection has tainted the university's decisions. She points to incidents in which a co-worker was notified about a different job posting and asked to apply. In addition, the grievant has included university documents reflecting the reorganization plans for her department and maintains that these indicate

¹ The department in which the grievant works at the university has recently undergone significant reorganization. The manager position for which the grievant competed was newly created in another area. Some of the grievant's duties were reorganized in that area under the new manager position. As such, the grievant currently holds a position much different than before the reorganization.

that other co-workers were pre-selected for other positions, and that she was, in effect, pre-selected not to get the position for which she applied.

The grievant's final allegation is that her opportunities for advancement have been blocked. She states that during the selection process for the manager position, the university administered a test of the candidates' Excel skills. The grievant believes that this test was given to block her advancement at the university from positions such as the one for which she applied. She alleges that the university has never utilized a test in a selection process until this manager 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 a 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 policy was misapplied during the selection for the manager position.

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 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

Selection of the Best Suited Candidate

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

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

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 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)).

Even if it is assumed that the grievant's nonselection is an adverse employment action, there is no evidence that the university misapplied or unfairly applied 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

The grievant has not presented evidence 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, although it appears the grievant has performed some of the tasks of the position in the past, the manager position is new and included additional duties the grievant had not performed. A comparison of employee work profiles shows that the manager position has more and higher level duties than the grievant's. The university also stated that the grievant's abilities from her past jobs were taken into account.

The university's stated bases for choosing another candidate over the grievant were the grievant's communication skills and her score on the Excel test. Although the grievant performed eight of the nine tasks on the test in the required time, the successful candidate completed all nine accurately and timely. The university states that Excel skills are an extremely important part of the manager position. Thus, it appears reasonable to require a top score for this skill. In addition, the announcement for the position indicates that "[e]xcellent oral and written skills" are a requirement. In the university's assessment, the grievant's communication skills did not meet this standard. As such, it was determined that the grievant was not the best suited candidate for the job.⁸ The grievant has presented no evidence that the university disregarded the facts in making this determination. 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.

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.⁹ Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit

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."

⁸ In addition, the e-mail sent by the successful candidate to the grievant does not appear to be a request for training. Rather, it appears that the new manager was reasonably seeking to begin the process of transferring a portion of the grievant's duties to the new area.

⁹ See Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.

and fitness.¹⁰ 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 that pre-selection may have tainted the process. The grievant alleges that documents reflecting changes in and notes made on organization charts indicate that the university, at a minimum, had pre-selected her out of the manager position. However, based on information from the university, these documents reflect only the reorganization of the department, and had nothing to do with filling the new manager position. Indeed, nothing on the documents indicates who would be in the new manager position, nor do they appear to indicate pre-selection of other university employees into other positions. The documents do indicate where the grievant and other employees might be placed in the department following the reorganization, but that seems a necessary step. The grievant has not presented evidence to show that these documents indicate any type of pre-selection or that the university simply went through the motions of the selection process.¹¹ On the contrary, as stated above, the university appears to have acted based on an analysis of the grievant's abilities. As such, it is this Department's determination that the grievant has not raised a sufficient question for the issue of pre-selection to qualify for hearing.

Opportunities for Advancement

The grievant also claims that her opportunities for advancement have been blocked, specifically with regard to the selection for the manager position. She alleges that the inclusion of a test that required candidates to perform tasks in Excel was meant to block her advancement. The grievant states that the university has never utilized such a test in a selection process. Even if the grievant's allegation is true, there is no evidence that such a test serves to block employees' opportunities for advancement. Indeed, as stated by the university, skills in Excel are an important part of the manager's job. As such, it appears reasonable to test the skills of candidates in this manner to receive measurable and comparable results. Nothing in state policy appears to prohibit the university's action and there is no evidence that policy has otherwise been misapplied or unfairly applied in this regard.¹² Therefore, the grievant's claims that her opportunities for advancement were blocked during this selection process, like the rest of the grievant's claims, do not qualify for hearing.

¹⁰ Va. Code § 2.2-2901(A) (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).

¹¹ The grievant has also stated that other university employees were asked to apply for new positions during the reorganization effort. While this might be evidence to infer that pre-selection could have occurred in such other circumstances, there is no evidence that any such efforts were made during the selection for the manager position for which the grievant applied.

¹² See DHRM Policy 2.10, *Hiring*.

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, she 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 university will request the appointment of a hearing officer unless the grievant notifies the university that she does not wish to proceed.

Claudia Farr
Director