Issue: Qualification – Management Actions: Recruitment/Selection; Ruling Date: September 19, 2007; Ruling #2008-1784; Agency: Department of Corrections; Outcome: Qualified for hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2008-1784
September 19, 2007

The grievant has requested a ruling on whether his March 6, 2007 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the following reasons, this grievance qualifies for hearing.

FACTS

The grievant was an unsuccessful candidate for a position at one of the agency's facilities. Although he was recommended following an interview, he was not one of the six candidates selected to fill the openings. On March 6, 2007, the grievant initiated a grievance to challenge this selection process. The grievant alleges that he has more experience than at least three of the successful candidates, one of whom did not graduate high school. The grievant argues that he should have been one of the "most qualified" candidates selected. Having failed to resolve the grievance during the management steps, the grievant now seeks qualification of his grievance for hearing.

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.[1] In this case, the grievant essentially claims that the agency misapplied policy during the selection process.

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

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] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[5] By not being selected for the position, it would appear that the grievant suffered an adverse employment action.

DHRM Policy 2.10 provides that an "agency must screen positions according to the qualifications established for the position and must apply these criteria consistently to all applicants."[6] In the job announcement, the first minimum qualification states: "Completion of high school or equivalent and training in related trades." In addition, the Employee Work Profile (EWP) for the position lists the same as education "required for entry into position." It is not disputed that one of the successful candidates did not graduate high school and does not possess a high school equivalency diploma.

The agency has stated during the management steps that "Department and state policies state that educational requirements should no [sic] be so absolutely stated or used as to preclude from consideration applicants who possess equivalent or sufficient applicable experience or training that would reasonably predict an applicant's ability to perform the job satisfactory." The agency suggests that the successful candidate without a high school diploma had the applicable training and experience for this job. While that could be true, the selection of that individual may still contravene the published minimum qualifications for the job, and in so doing, contravene DHRM Policy 2.10. The minimum

---

[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).

[5] 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)).

[6] DHRM Policy 2.10, *Hiring*. The policy further defines "screening" as "[t]he process of evaluating the qualifications of individuals in an applicant pool against established position qualifications to determine: which applicants in the pool meet minimum qualifications; and which of the qualified applicants an agency wishes to interview."

qualification mentions candidates having "training in related trades," but *in addition to* the applicant having completed high school or its equivalent. Therefore, the language of the announcement could be read to provide that training was not a substitute for a high school diploma. As such, it would appear that completion of high school or its equivalent (GED) was a requirement of the position.

Under this Department's plain reading of DHRM Policy 2.10 and the job announcement, the grievant has raised a sufficient question as to whether the agency misapplied policy by failing to screen out a candidate who allegedly did not meet the published minimum qualifications of the job and by ultimately hiring that individual instead of the grievant. Because the grievant was also recommended for the position following the interview, he may have been improperly denied selection for the position.

This qualification ruling in no way determines that the agency's actions in fact violated policy, only that further exploration of the facts by a hearing officer is appropriate. Moreover, the grievant raises other challenges to the selection process. For example, the grievant argues he was more qualified for the position than some of the successful candidates based on the extent of his employment experience and having worked at the facility previously. He also suggests that the hiring decisions may have been based upon favoritism. The hearing officer should review the selection process based on these and other grounds raised in the grievance in addition to the argument that one of the successful candidates did not meet the minimum qualifications of the position.

CONCLUSION

For the reasons set forth above, the grievant's March 6, 2007 grievance is qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.

_____

Claudia Farr
Director