

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date:  
November 9, 2007; Ruling #2008-1788; Agency: Department of Corrections:  
Outcome: Not Qualified.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling No. 2008-1788  
November 9, 2007

The grievant has requested a ruling on whether his April 3, 2007 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant claims that the agency has misapplied and/or unfairly applied policy during a selection process. For the following reasons, this grievance does not qualify for hearing.

FACTS

On February 15, 2007, the grievant interviewed for Position #01357, Corrections Sergeant, within DOC. The purpose of Position #01357 is to: “[a]ssist in directing the work of Corrections Officers on assigned shifts, oversee the transition program, [a]ssist in coordinating work schedules and duty rosters, oversees detainees work gang and inspects facility to maintain security, safety and sanitation.” The knowledge, skills and abilities (KSA’s) required to successfully perform the work of the Sergeant position include the following:

[c]onsiderable knowledge of policies, guidelines and laws governing correctional facilities and programs; working knowledge of self-defense, first aid, radio communications, evidence seizure and control, and principles of supervision. Working skill to use firearms, radio equipment, physical control devices, and electric and electronic controls and locking systems. Demonstrated ability to plan, schedule, organize work for others and to work with minimal supervision; to interpret written material, rules, regulations and laws; to review and evaluate records and reports, analyze and resolve problems and communicate and supervise effectively.

The grievant was not selected for the Sergeant position and as such, on April 3, 2007, he initiated a grievance challenging his nonselection. In his grievance, the grievant asserts that his nonselection is a misapplication of policy and that pre-selection has occurred.

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.<sup>1</sup> In this case, the grievant alleges that policy was misapplied during the selection for the Corrections Sergeant 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. In addition, 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>2</sup>

Finally, 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>

### *Selection of the Best Suited Candidate*

Even if it is assumed that the grievant’s nonselection is an adverse employment action, there is no evidence that the agency misapplied or unfairly applied policy. Specifically, the grievant has not presented evidence raising a sufficient question as to whether the agency’s assessment of his qualifications was arbitrary or capricious, or as to whether the selection was plainly inconsistent with other similar decisions by the agency. The selected applicant has been

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<sup>1</sup> Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

<sup>2</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.”

<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 lessened “materially adverse” standard for the “adverse employment action” standard in retaliation grievances. See, e.g. 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)).

a Corrections Officer for approximately 13 years. Prior to her promotion to Sergeant, the selected candidate was a transportation officer and was responsible for maintaining security and control over offenders. In addition, the selected applicant served as a Field Training Officer (FTO) and as such, was responsible for supervising Corrections Officer trainees in the proper application of policies and procedures. Based on the foregoing, it appears that the selected applicant had the necessary skills and training to adequately perform the duties of Position #01357. In addition, according to the agency, the selected applicant has a “broader experience base” and performed better during the interview phase than the grievant.<sup>7</sup>

Additionally, 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>8</sup> Accordingly, while it may be true that the grievant could have ably performed the functions of the Corrections Sergeant 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.

#### *Pre-Selection*

The grievant has also raised the issue of pre-selection. It is the Commonwealth’s policy that hiring and promotions be competitive and based on merit and fitness.<sup>9</sup> 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.

In support of his claim that pre-selection has occurred, the grievant states the following: (1) the selected candidate is not overseeing the transition program<sup>10</sup> as required for the Sergeant position, which proves that she was pre-selected because she is not qualified to perform the job; (2) unlike the other candidates, the selected applicant was given a tour of the facility following her interview; and (3) prior to her interview, the selected applicant was telling people that she had “gotten the job.”<sup>11</sup> The grievant’s claims will be addressed below.

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<sup>7</sup> On the Applicant Evaluation Form the grievant’s communications skills were rated “average,” while the selected applicant’s communication skills were deemed “very good.” In addition, in the Overall Recommendation section of the Applicant Evaluation Form, it states that the grievant “[d]id not address the questions given,” while the selected applicant was deemed to have “[p]rovided very good responses to questions in detailed fashion.”

<sup>8</sup> See DHRM Policy No. 2.10.

<sup>9</sup> Va. Code § 2.2-2901(A) (stating, in part, that “[i]n accordance with the provisions 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).

<sup>10</sup> According to the agency, the facility at issue here operates an alternative style six-month program that includes a military component, treatment and educational programs as well as work and community service programs. The “transition” phase consists of mostly the military protocol and getting acclimated to the overall program expectations during the first two weeks of the six-month program.

<sup>11</sup> According to the grievant, the wife of one of the grievant’s co-workers worked with the selected candidate at another DOC facility prior to the selected candidate’s promotion to Sergeant. The wife allegedly overheard the grievant stating that she had been selected for the Sergeant position prior to her interview for the position.

As noted above, oversight of the transition program is just one required responsibility of the Sergeant position. Moreover, according to the agency, the selected applicant is currently being trained by a Lieutenant on the transition component of her duties and works together with this Lieutenant on overseeing the program. Further, while the agency admits that not everyone was given a tour of the facility, the agency claims that the selected applicant was not the only applicant given such a tour. The agency asserts that those applicants requesting a tour were provided such and that in addition to the selected applicant, there was one other person that was given a tour of the facility.<sup>12</sup> While providing tours of the facility for some applicants and not others could appear to be somewhat problematic, this Department cannot conclude that such action demonstrated pre-selection in this case given that the selected candidate was not the only applicant to receive such a tour. Finally, with regard to the grievant's assertion that the selected applicant was telling people that she had been selected for the position prior to ever having an interview, this Department concludes that while such a statement could in some circumstances, if true, indicate that pre-selection has taken place, the grievant has failed to raise a sufficient question in this case that such a statement may have been made by the selected applicant.<sup>13</sup>

Accordingly, this Department concludes that there is insufficient evidence in this case to raise a question that pre-selection may have tainted the process.

#### 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.

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Claudia Farr  
Director

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<sup>12</sup> The selected applicant worked at another DOC facility and presumably was unfamiliar with the facility where the Sergeant position was located. The grievant, on the other hand, would not have needed a tour, as he currently worked at the facility where the Sergeant position was located.

<sup>13</sup> During this Department's investigation of this grievance, the investigating consultant attempted to verify the grievant's allegation regarding the selected candidate's comments on her selection for the Sergeant position prior to her interview. However, the person who allegedly heard the selected candidate's comment was, according to the grievant, unwilling to speak with the investigating EDR Consultant.