

Issue: Qualification – Discrimination (other), Management Actions (recruitment/ selection), Retaliation (grievance activity participation); Ruling Date: October 25, 2007; Ruling #2008-1793; Agency: Department of Corrections; Outcome: Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2008-1793
October 25, 2007

The grievant has requested a ruling on whether his May 22, 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 and that he has been subjected to discrimination and retaliation. For the following reasons, this grievance qualifies for hearing.

FACTS

The grievant is employed as a Corrections Officer with DOC. On April 24, 2007, the grievant interviewed for Position #18039, Corrections Lieutenant, within DOC. The grievant was not selected for the position and as such, on May 22, 2007, the grievant initiated a grievance challenging his nonselection. In his grievance, the grievant asserts his nonselection is a misapplication of policy, discriminatory and retaliatory.

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.¹ In this case, the grievant claims that the agency has misapplied the hiring policy as well as discriminated and retaliated against him.

Misapplication and/or Unfair Application of Policy

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

The grievant claims that the agency misapplied policy when it failed to afford him veterans' preference in determining selection for the Corrections Lieutenant position.² 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.

Moreover, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."³ Thus, typically, the threshold question is whether or not 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 By not being selected for promotion to the position of Corrections Lieutenant, the grievant has suffered an adverse employment action and as such, has satisfied this threshold determination.

The policy at issue in this case is Department of Human Resource Management (DHRM) Policy 2.10, *Hiring*.⁷ DHRM Policy 2.10 provides that: "[c]onsistent with the requirements of the Va. Code §§ 2.2-2903⁸.....the veteran's military service shall be taken into consideration by the Commonwealth during the selection process, provided that such veteran⁹ meets all of the knowledge, skill, and ability requirements for the

² It appears that the grievant believes that policy mandated that he be the selected candidate for the position of Corrections Lieutenant because he is a veteran while the person selected is not. In addition, the grievant appears to contend that he was the most qualified candidate for the position yet was not selected.

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 Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ *E.g. Von Gunten v. Maryland*, 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)).

⁷ See also DOC Memorandum HR-2003-02 which states that for those positions in which a written test is not administered, "strong consideration shall be given to the knowledge, skills, abilities and experience obtained while the applicant was in the military when selecting individuals for employment."

⁸ Va. Code § 2903(B) states: "[i]n a manner consistent with federal and state law, if any veteran applies for employment with the Commonwealth that is not based on the passing of any examination, such veteran shall be given preference by the Commonwealth during the section process, provided that such veteran meets all the knowledge skill, and ability requirements for the available position."

⁹ DHRM Policy 2.10 defines "veteran" as "[a]ny person who has received an honorable discharge and has (i) provided more than 180 consecutive days of full-time, active-duty service in the armed forces of the United States or reserve components thereof, including the National Guard, or (ii) has a service-connected disability rating fixed by the United States Department of Veterans Affairs." DHRM Policy 2.10, "Definitions."

available position.”¹⁰ During this Department’s investigation, DHRM, the agency charged with promulgation and interpretation of state and agency policy, advised the investigating Consultant that while policy does not require an agency to hire the applying veteran just because he is a veteran, policy mandates that one’s veteran status be considered in some manner during the selection process (e.g., during the initial screening of applications to determine which applicants to interview) and the agency should be able to document any such consideration.

The grievant was honorably discharged from the U.S. Army after approximately five and a-half years of service and as such, meets the policy definition of a “veteran.” Additionally, the agency admits that the grievant met the minimum qualifications for the Corrections Lieutenant position. Accordingly, DOC was required by policy to take the grievant’s veteran status into consideration during the selection process for the position of Corrections Lieutenant. Based on the documents and information received by this Department, it is unclear whether the agency did so in a manner consistent with state and agency policy. More specifically, when asked at what stage of the selection process the grievant’s veteran status was considered in this case, the agency replied that the grievant’s veteran status was considered when he was initially hired with DOC and that it is the practice of both the Appointing Authority, Major K, and the Panel Member, Captain H, to consider veteran status as the “tie breaker” when there are two candidates that are otherwise equal.¹¹ Likewise, in his response to the grievance, the first step-respondent states that veteran status only comes into play when two candidates are equal and administration is trying to decide which candidate to hire. Similarly, during this Department’s investigation, a member of the agency’s human resources department stated that the Superintendent at the grievant’s facility always considers veteran status and if there are “equal” candidates, veteran status is the deciding factor.¹²

As stated above, however, it appears that under DHRM policy, each applicant’s veteran status *must* be considered during the selection process in some manner, and the agency should be able to document any such consideration. Here, several members of the agency, including the Appointing Authority and Panel Member for the Corrections Lieutenant position, have indicated that the agency generally only considers one’s veteran status in cases of a “tie” between candidates. Moreover, when asked, the agency failed to

¹⁰ DHRM Policy 2.10, “The Selection Process.”

¹¹ It should be noted however that the grievant’s military service is mentioned by both the Appointing Authority and the Panel Member on the Applicant Evaluation Forms. More specifically, the Appointing Authority and the Panel Member reference the grievant’s military service when commenting on the relevancy of the grievant’s experience, education and training for the Corrections Lieutenant position. It is unclear whether this constitutes adequate consideration and/or documentation of veteran’s status under state or agency policy.

¹² If an agency only considers veteran status in cases of a “tie” between applicants, one’s status as a veteran may never get considered during the selection process which would violate both policy and law. *See generally* Hudson v. Virginia Employment Commission, 69 Va. Cir. 318, 321-322 (2005) (the circuit court found that Va. Code §2.2-2903(B) was violated when the hiring authority admitted that one’s veteran status is taken into consideration only as a deciding factor if the candidates are otherwise equal and the court noted that this amounts to no consideration at all).

identify at what stage of the selection process the grievant's veteran status was taken into consideration for the Corrections Lieutenant position. Based on the foregoing, this Department concludes that the grievant has raised a sufficient question as to whether the agency properly considered his veteran status during the selection process for Position #18039, Corrections Lieutenant, as mandated by policy. Accordingly, the grievant's misapplication of policy claim qualifies for a hearing.

Alternative Theories for Non-Selection

The grievant has advanced alternative theories related to the agency's decision not to select him for the Corrections Lieutenant position, including allegations that the agency discriminated against him on the basis of his veteran status and retaliated against him for past grievance activity. Because the issue of misapplication and/or unfair application of policy qualifies for a hearing, this Department deems it appropriate to send all alternative theories advanced for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's May 22, 2007 grievance is qualified and shall advance to hearing. This qualification ruling in no way determines that the agency's actions were in violation of policy or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. By copy of this ruling, the grievant and the agency are advised that the agency has five workdays from receipt of this ruling to request the appointment of a hearing officer.¹³

Claudia T. Farr
Director

¹³ It should be noted that as relief, the grievant requests that he be awarded a sum of \$1,500,000 and promoted to Lieutenant with a yearly salary of \$43,800. The grievant should note that even if he prevails at hearing, a hearing officer has no authority to award monetary damages or to direct the agency to promote the grievant to Lieutenant. If discrimination, retaliation or policy violations are found, the hearing officer may order the agency to create an environment free from discrimination, retaliation and/or policy violations, and to take corrective actions necessary to cure the violation and/or minimize its reoccurrence. *See Rules for Conducting Grievance Hearings* § VI(C).