

Issues: Qualification – Discrimination (Age and National Origin), Retaliation (Grievance Activity and Other Protected Right), and Management Actions (Recruitment/Selection); Ruling Date: July 16, 2008; Ruling #2008-1823; Agency: Department of Conservation and Recreation; Outcome: Not Qualified.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Conservation and Recreation  
Ruling No. 2008-1823  
July 16, 2008

The grievant has requested a ruling on whether his July 19, 2007 grievance with the Department of Conservation and Recreation (DCR or the agency) qualifies for a hearing. The grievant claims that DCR has misapplied state and agency policy during a selection process, that he has been discriminated against on the basis of national origin, color, accent and age, and that he has been the victim of retaliation for filing past grievances, lawsuits, and EEOC charges. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant is employed as an Accountant Senior with DCR. He applied for a position of General Accounting Manager #00008. Twenty-nine individuals applied for the position. To determine which applicants would be offered interviews, the applications were independently screened by the Human Resources (HR) Director, a HR Generalist, and the Finance Director. None of the screeners recommended that the grievant be granted an interview.

On June 20, 2007, the grievant was informed that he was not going to be interviewed for the position. He was informed that based on the paper screening, the referred candidates “possessed recent and significantly more experience managing complex accounting operations; demonstrated a history of progressive responsibility in financial management including supervision and training; and had experience overseeing a professional staff that involved effective handling of personnel matters.” While the agency conceded that the grievant met several of the required knowledge, skills, and abilities, it noted that he “did not have the depth in the aforementioned qualifications deemed critical to responsibilities assigned to the Manager position nor was [his] experience as recent as the best qualified candidates.” Specifically, when the grievant asked which criteria he did not meet for an interview, he was told that his application did not demonstrate: “[c]omprehensive *progressive* experience managing complex accounting operations for private or government entity and demonstrated history of

*progressive* responsibility in financial management and supervision.”<sup>1</sup> The grievant asserts that the agency added the requirement that management experience and responsibility be “progressive” in order to screen him out.

### 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>2</sup> In this case, the grievant alleges that policy was misapplied during the selection for the General Accounting Manager position, that he has been discriminated against on the basis of national origin, color, accent and age, and that he has been retaliated against. Each of these issues will be discussed below.

#### *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 he is challenging his denial of a promotion.

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<sup>1</sup> July 3, 2007 response to Freedom of Information Request from Human Resources Director (emphasis added).

<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 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)).

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>

The grievant has not presented evidence to raise a sufficient question that the agency's assessment of his qualifications was arbitrary or capricious, or that the selection was plainly inconsistent with other similar decisions by the agency. For example, the "progressive" experience requirement has been used by the agency in conjunction with a number of other past recruitments. Furthermore, the "progressive" experience requirement removed a number of other employees from contention for the General Accounting Manager position. Most importantly, the grievant has not provided any evidence to support his claim that the "progressive" requirement was added to remove him from contention for the General Accounting Manager position. 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.

#### *Discrimination*

For a claim of discrimination in the hiring or selection context to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, an employee must present evidence raising a sufficient question as to whether he: (1) was a member of a protected class;<sup>8</sup> (2) applied for an open position; (3) was qualified for the position; and (4) was denied promotion under circumstances that create an inference of unlawful discrimination. 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 evidence that raises a sufficient question as to whether the agency's stated reason was merely a pretext or excuse for discrimination.<sup>9</sup>

The grievant identifies himself as East Indian and is over the age of 40. Thus, he is a member of at least a couple of protected classes.<sup>10</sup> However, while the grievant and agency disagree on whether the grievant is minimally qualified for the General Accounting Manager position, the grievant has not provided evidence that the agency failed to select him for the position because of his membership in a protected class. Primarily, he asserts that because he has applied for jobs on a number of occasions and

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<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."

<sup>8</sup> See DHRM Policy 2.05, *Equal Employment Opportunity*.

<sup>9</sup> See e.g. *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 268 (4<sup>th</sup> Cir. 2005).

<sup>10</sup> See e.g. 29 U.S.C. § 621 et seq. (ADEA). It is unlawful for an employer to discriminate against an employee on the basis of age. 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.

has not been promoted, it must be because of his race and/or age. An allegation of discrimination, without more, is not appropriate for adjudication by a hearing officer.<sup>11</sup>

### *Retaliation*

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;<sup>12</sup> (2) the employee suffered a materially adverse action;<sup>13</sup> and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.<sup>14</sup> Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.<sup>15</sup>

Initiating and participating in a grievance is clearly protected activity.<sup>16</sup> So is filing an EEOC complaint.<sup>17</sup> However, even if it is assumed that the grievant has experienced a materially adverse action by not being granted an interview, the grievant has presented no evidence that a causal link exists between the grievant's prior protected acts and the alleged adverse action at issue in this case. The grievant has not presented any evidence that the agency's assessment of his application was motivated by improper factors. Rather, it appears that the determinations were based on an assessment of the grievant's application in relation to the agency's stated requirements for the position. The grievant has not presented evidence that raises a sufficient question that the agency's stated rationale for not interviewing him was pretextual. Because the grievant has not raised a sufficient question as to the elements of a claim of retaliation, the grievant's claim does not qualify for hearing.

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<sup>11</sup> The grievant notes that he received a lower rating than others in the category of oral and written communication. He attributes the lower score to his East Indian dialect. The agency has responded that its rating was based only on the application. The grievant's application contained numerous grammatical and typographical errors which would seem to warrant a lowered communication score.

<sup>12</sup> See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

<sup>13</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 66-68 (2006); see, e.g., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

<sup>14</sup> See, e.g., *EEOC v. Navy Fed Credit Union*, 424 F.3d 397, 405 (4<sup>th</sup> Cir. 2005).

<sup>15</sup> See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

<sup>16</sup> See Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

<sup>17</sup> Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a). Its anti-retaliation provision forbids "discriminat[ion] against" an employee or job applicant who, inter alia, has "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation. 42 U.S.C. § 2000e-3(a).

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 she does not wish to proceed.

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Claudia Farr  
Director