

Issues: Qualification – Management Actions (Recruitment/Selection) and
Discrimination (Race); Ruling Date: March 14, 2008; Ruling #2008-1877;
Agency: Virginia Department of Transportation; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling No. 2008-1877
March 14, 2008

The grievant has requested a ruling on whether his August 20, 2007 grievance with the Department of Transportation (VDOT or the agency) qualifies for a hearing. The grievant claims that VDOT has misapplied state and agency policy during a selection process, that pre-selection has occurred, and that he has been discriminated against on the basis of race. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Transportation Operator II with VDOT. On July 10, 2007, the grievant was interviewed for a promotion to the position of Transportation Operations Manager I ("Contract Monitor").¹ The grievant was notified by letter dated July 24, 2007 that he was not selected for the Contract Monitor position. As such, on August 20, 2007, the grievant filed a grievance challenging his nonselection for the position of Contract Monitor. The August 20th grievance proceeded through the management resolution steps without resolution and on November 19, 2007, the agency head denied the grievant's request for qualification. The grievant now asks this Department to qualify his August 20th grievance for a 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 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

¹ According to the Employee Work Profile (EWP) for the Contract Monitor position, the purpose of the position is: "[i]ndependently coordinates, schedules and monitors the work performed by contract forces for various Roadside Development field operations ensuring that all work is performed in compliance with contract provisions, in a safe manner, completed on schedule and providing satisfactory outcome."

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

the selection for the Contract Monitor position, that pre-selection has occurred, and that he has been discriminated against on the basis of race. 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.”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 Here, the grievant would appear to satisfy the threshold adverse employment action requirement because he is challenging his denial of a promotion.

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 his qualifications was arbitrary or capricious, or that the selection was plainly inconsistent with other similar decisions by the agency. For example, the Interview Summary sheet for the selected applicant, Mr. M., indicates that Mr. M. had more supervisory, technical, computer, and contract monitoring experience than the

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)).

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.”

grievant⁸ and performed better during the interview. Additionally, the selected applicant was the only applicant to have already received his Category 8 license, which is required for the Contract Monitor position.⁹ The grievant has presented insufficient evidence that the agency 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.¹⁰ Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.¹¹ 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.

⁸ More specifically, the Interview Summary sheet for the selected applicant states:

Applicant has Roadside Management experience and supervisory skills with VDOT and the private sector (Asplundh). Applicant demonstrated knowledge of chemical and various spraying operations with calibration techniques as well as knowledge of nutrient management plan requirements. Demonstrated a technical knowledge and understanding of roadside management activities that no other applicant conveyed in the interviews. Demonstrated familiarity with VDOT tree trimming and brush removal policy as well as knowledge of ANSI-A-300 and ISA standard relating to tree trimming safety and tree pruning. Technical knowledge of hydro seeding and truck. Has experience monitoring contracts and demonstrated correct procedure for contract monitoring/compliance. Demonstrated good communication and documentation skills as well as management skills. Basic knowledge of personal computer with limited VDOT computer applications. Applicant has obtained Category 6 and 8 licenses and studying for Arborist exam. This is the only candidate who already possesses a Category 8 license, which was advertised as ability to obtain.

The Interview Summary sheet for the grievant states:

Applicant has worked in Roadside Development for about 15 years. Applicant has working knowledge of tree trimming, spraying and hydro seeding. Limited computer skills; however, worked with PIMS system in stockroom until 1991. Attended contract monitoring class but per response in interview has never had an occasion to pull up and review any contact [sic] documents but has monitored contract work. Limited supervisory skills. Applicant has obtained Category 6 license.

⁹ The position announcement for the Contract Monitor position stated that the person selected must be able to obtain a Category 8 license.

¹⁰ See Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.

¹¹ 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).

This Department concludes that the grievant has failed to raise a sufficient question that pre-selection may have tainted the process. More specifically, in support of his pre-selection charge, the grievant states the following: (1) the Contract Monitor position was advertised for internal candidates only and not the general public as was past practice; (2) prior to the interview process, the Hiring Manager's Assistant, Mr. B.L., allowed Mr. M. to review contracts on the computer in Mr. B.L.'s office and as such, Mr. M. was able to provide a more satisfactory answer during the interview to the question that inquired as to the applicant's experience with reviewing contract documents; and (3) the selected candidate told Mr. B.L. that he is the only qualified person for the job and that there is no need to go through the interview process.

According to the agency, the reason the applicant pool for the Contract Monitor position was limited to internal candidates only was "[i]n order to afford the crew members impacted by the disbanding of the Roadside crew¹² every opportunity for consideration for the promotional opportunity."¹³ Further, in response to the grievant's claim that Mr. B.L., one of the hiring managers in this case, allowed Mr. M. to review contracts on his computer prior to the interview process and thus, Mr. M. was able to answer affirmatively that he had contract review experience during the interview, the agency asserts that copies of all applicable contract documents are kept in the trucks used by the contract monitors and that the grievant, who periodically performed contract monitoring work while at VDOT, could have accessed and reviewed these contracts at any time. Moreover, the agency appears to imply that had the grievant requested to look at the contract documents on Mr. B.L.'s computer, like the selected applicant did, he likewise would have been afforded the opportunity to do so. Further, during the interview, the selected applicant described his experience with reviewing a contract document while on the job, which appears to have had nothing to do with his review of contracts in Mr. B.L.'s office. Finally, with regard to the grievant's allegation that the selected applicant told Mr. B.L. that he was the most qualified person for the Contract Monitor position, this Department concludes that even if such a statement was actually made by the selected candidate, the grievant has not shown that the statement had any impact on Mr. B.L. or the hiring decision in this case.¹⁴

Significantly, prior to the selection process for the Contract Monitor position, the agency became aware that the potential applicants were concerned that pre-selection may be an issue. In an effort to "ensure that the panel was fair and impartial," Mr. H, a manager of roadside functions from outside the district, and Ms. B, a member of the Civil Rights staff, were asked to serve as panel members for the Contract Monitor position. At

¹² According to the agency, the state force crew in Roadside Management had been advised that it was being disbanded and the operators on the crew were being offered placements on area headquarters maintenance crews.

¹³ To the extent the grievant is arguing that limiting the applicant pool to VDOT employees only is a misapplication of policy, this Department concludes that there was no misapplication of policy in this regard. According to DHRM Policy 2.10, agencies are permitted to select the recruitment option that best fits their needs, which may include recruiting internally.

¹⁴ Mr. B.L. was not on the interview panel in this case, but did have a role in the selection process. More specifically, Mr. B.L. and Mr. R.L. were the hiring managers for the Contract Monitor position.

the conclusion of the interviews, the panel members recommended Mr. M. for the position. According to documents provided by the agency during this Department's investigation, both Mr. H and Ms. B say that their recommendation was not influenced by the hiring managers and the decision was made independently by the interview panel. The panel members' recommendation was accepted by the hiring managers, Mr. B.L. and Mr. R.L., and an offer was made to Mr. M.

Based on the foregoing, this Department concludes that the grievant has not presented evidence to indicate any type of pre-selection or that the agency simply went through the motions of the selection process. On the contrary, as stated above, the agency appears to have acted based on an analysis of the abilities of the grievant and the successful candidate, and took significant steps to ensure that pre-selection was not a factor in this case. Therefore, the issue of pre-selection does not qualify for hearing.

Race Discrimination

For a claim of race 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;¹⁵ (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 race discrimination.¹⁶

The grievant is an African-American and because he was interviewed, he would appear to be at least minimally qualified for the Contract Monitor position. The agency however has, as outlined in more detail above, stated a non-discriminatory reason for awarding the Contract Monitor position to another individual (i.e., the selected applicant had more qualifications, experience and better responses during the interview). The grievant has not provided sufficient evidence that the agency failed to select him for the position because of his membership in a protected class.¹⁷ An allegation of discrimination, without more, is not appropriate for adjudication by a hearing officer.

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

¹⁵ See DHRM Policy 2.05, *Equal Employment Opportunity*.

¹⁶ See e.g. *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 268 (4th Cir. 2005).

¹⁷ Although not binding on this Department, it should be noted that as a result of this grievance, the agency's civil rights office also investigated the grievant's complaint of race discrimination in the selection for the Contract Monitor position. The investigative report recommended a "no cause finding" regarding the grievant's allegation of race discrimination.

March 14, 2008
Ruling #2008-1877
Page 7

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 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