

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling
Date: January 29, 2008; Ruling #2008-1901; 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. 2008-1901
January 29, 2008

The grievant has requested a ruling on whether his October 26, 2007 grievance with the Department of Transportation (the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant was an unsuccessful candidate for a position at one of the agency's facilities. Although he had submitted a timely application for the position, it was overlooked during screening. On Friday, October 12, 2007, the grievant's application was discovered, but an offer had already been made to the successful candidate. It was determined that the grievant's application would have been sufficient to pass the initial screening and qualify the grievant for an interview. The agency asked the grievant if he still wanted an interview. The grievant stated that he did. The agency immediately put the successful candidate's offer on hold, and that same day (Friday, October 12, 2007), the agency arranged an interview for the grievant with the original interview panel. The short notice occurred because the agency did not want to leave either the successful candidate or the grievant "in limbo" for an extended period. Moreover, the agency was unable to schedule the interview early the following week because the grievant informed the agency that he was on vacation that week. As such, the grievant had a short amount of time to prepare for the interview. The agency offered to have the grievant's interview via video teleconference, so he would not have to drive to the district office where the interview panel assembled. The grievant agreed to conduct the interview via video teleconference on October 12, 2007. The grievant was given a copy of the interview questions and paperwork to fill out before the interview. The agency states that all candidates were given the same documents immediately prior to the interview. Following the interview, the agency notified the grievant that same day that he did not get the position. The grievant initiated this grievance to challenge the manner in which his

application was handled and how the interview was conducted. He argues that he was not given sufficient time to prepare for the interview.¹

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.² In this case, the grievant essentially claims that the agency misapplied policy during the selection process.

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

The grievant asserts that his interview was not conducted fairly. Department of Human Resource Management (DHRM) Policy 2.10 provides that “[a]ll scheduled interviews must be completed before a final selection decision and job offer are made.”⁷ Therefore, it would appear that the agency misapplied policy by making a job offer without interviewing the grievant.⁸ Moreover, DHRM Policy 2.10 would appear to

¹ It is also important to note that the grievant states he is not challenging the fact that he did not get the job. He simply believes the interview process itself was not fair. However, the grievant also requests as a form of relief a pay increase.

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

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 DHRM Policy 2.10, *Hiring*.

⁸ However, at the same time, the grievant never had a “scheduled interview” prior to the job being offered.

indicate that all candidates for a position must be treated equitably and interviewed consistently.⁹

Although the agency may have misapplied policy in handling the grievant's application, the agency also quickly sought to remedy the problem. The job offer was put on hold and the grievant was given an opportunity to interview for the position. It does not appear the grievant was put at any disadvantage in comparison to the other candidates. The grievant received the interview questions and forms in the same manner as other candidates and was interviewed by the same panel. The only difference appears to be that the grievant had less time between being notified about the interview and the actual interview. However, it is unclear what effect this had on the interview itself, or the selection process as a whole. The grievant has not identified any specific disadvantage the short timeframe caused him.¹⁰

While the grievant's concerns about the interview process are understandable, it does not appear that the grievant's interview performance caused him to be an unsuccessful candidate. According to the agency, the successful candidate had more experience in a particular area that was valued in the selection. Because the agency appears to have corrected its initial error completely, treated the grievant consistently with other candidates in the interview process, and the ultimate decision does not appear to have been affected by the earlier problem, there is no basis for this grievance to be qualified for a hearing.

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, the grievant 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.

Claudia Farr
Director

⁹ See DHRM Policy 2.10 (stating that an "agency must screen positions according to the qualifications established for the position and must apply these criteria consistently to all applicants," and the same "set of interview questions must be developed and asked of each applicant").

¹⁰ The grievant did assert that he did not have a list of his certifications ready to give to the panel because of the short notice. However, the grievant also had ample time to include these certifications on his application in the appropriate section.