Issue: Qualification – Management Actions (recruitment/selection); Ruling Date: February 19, 2008; Ruling #2008-1926; Agency: Department of Environmental Quality; Outcome: Qualification denied.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Environmental Quality
Ruling No. 2008-1926
February 19, 2008

The grievant has requested a ruling on whether his November 6, 2007 grievance with the Department of Environmental Quality (the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant recently applied for a senior management position with the agency. Though he was chosen to be a part of the interview pool, the agency did not select him as the successful candidate. Thereafter, on November 6, 2007, the grievant initiated this grievance to challenge the selection process. The grievant alleges retaliation, misapplication of policy, and discrimination ("EEO violation"). He raises two specific issues with the selection: 1) the agency failed to evaluate correctly the grievant's work history and prior management experience; and 2) a criterion used to evaluate candidates was "what kind of team the new person and his supervisor would make and how that combination would be perceived by the staff as a team,"[1] which the grievant does not feel was communicated to the applicants.

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 claims retaliation, misapplication of policy, and discrimination.

Misapplication or Unfair Application 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

[1] For simplicity, this criterion will be referred to as "teamwork" for the remainder of this ruling.
[2] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

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] Because the senior management position would have been a promotion for the grievant, failing to select the grievant for the job would clearly be an adverse employment action.

Moreover, even though the grievance procedure accords much deference to management's exercise of judgment, including management's assessment of applicants during a selection process, agency discretion is not without limitation. Rather, this Department has repeatedly held that even where an agency has significant discretion to make decisions, qualification is warranted where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[7] Arbitrary or capricious is defined as a decision made "[i]n disregard of the facts or without a reasoned basis."[8]

The grievant raises issues with how the agency assessed his prior work and management experience. For instance, he states that the members of the panel failed to record certain information about his work history in their notes during the interview. While the grievant is factually correct that the interview notes do not appear to include certain details about the grievant's past jobs, there is no indication that the agency failed to consider any portion or all of the grievant's past work history. Indeed, much of his work history is noted in the interview notes. Furthermore, the grievant received two "checks" and a "check-plus" from the members of the panel for one of the interview questions that dealt with experience, and an overall "check" for "Training and Experience." It appears that the panel considered that the grievant's work experience at least satisfied the job's requirements.

Further, even if it is assumed the agency might have failed to consider the grievant's work experience and given the grievant a slightly lower score in this area than he deserved, it does not appear that a higher score for his work history and experience would have changed the outcome of this selection. Based on the interview notes, the successful candidate scored very highly in other areas of the interview as well. Even if the grievant's work history could be assumed to be more significant than the successful candidate's, the grievant still was not as well-qualified, in the agency's view, because of other areas of evaluation.

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[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, e.g.,* EDR Ruling No. 2007-1651.

[8] *See Grievance Procedure Manual* § 9.

Work history and experience were not the only types of knowledge, skills, or abilities for which the successful candidate for the position was selected. For instance, the job announcement required "considerable skill in teamwork;[9] personnel and resource management; oral and written communications, including the ability to address the public and manage a large diverse group of employees." Indeed, this job was a position of leadership requiring more than just demonstrated technical ability, but a candidate with the ability to manage. Though the grievant's work experience might meet the required qualifications for technical experience, the successful candidate better demonstrated other required skills and abilities in the interview in the agency's determination.[10] This further highlights the fact that the "management experience" of applicants could be assessed not only on past work history, but also by answers to a number of the interview questions. The grievant's responses to such interview questions did not, in the agency's view, demonstrate the management abilities sought by the panel when compared to those responses by the successful candidate.

The agency's assessment of the candidates' abilities is due much deference. This Department cannot find that the agency's evaluation of the candidates was in any way arbitrary or capricious. Rather, it appears the agency based its determinations on a reasoned assessment of the candidates' demonstrated knowledge, skills, and abilities. There is insufficient indication that the agency failed to evaluate properly the grievant's work and management experience. Moreover, it does not appear that the ultimate selection determination was affected by an assessment of the grievant's past work history, but rather an evaluation of the candidates' relative performance in the interviews. Because there is no indication that the agency has misapplied or unfairly applied policy in selecting the best suited candidate, this claim does not qualify for a hearing.

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;[11] (2) the employee suffered a materially adverse action;[12] 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

[9] The grievant argues that the agency utilized the "teamwork" criterion in assessing applicants for the position without advising the applicants it would do so. Additionally, the grievant claims that the questions asked during the interview did not address any information by which the panel could evaluate an applicant's abilities regarding "teamwork." However, the job announcement specifically states that the position required "considerable skill in teamwork." As such, the grievant has no basis to claim that the agency did not inform applicants that this was a criterion on which they would be evaluated. Further, at least two of the nine interview questions could have served as vehicles for a candidate to address his or her abilities in teamwork, depending on the answer given.

[10] It is also noteworthy that the successful candidate was currently holding an identical senior management position with the agency in another region.

[11] *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).

[12] Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414-15 (2006); *see, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[13] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[14]

The grievant's retaliation claim fails to qualify for hearing because he has not presented sufficient evidence of a causal link between the alleged protected activity and materially adverse action.[15] There is no other indication of potential retaliation other than the grievant has filed grievances in the past and now did not receive the job for which he applied.[16] However, as stated above, the agency's selection of the successful candidate appears to have been based upon a reasonable evaluation of the knowledge, skills, and abilities of the applicants. There is no indication that retaliation tainted the process. As such, the grievant's retaliation claim does not qualify for hearing.

Discrimination

The grievant also claims that he may not have been selected for the position because of age discrimination. For a claim of age discrimination in the hiring or selection context to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. The grievant must present facts that raise a sufficient question as to whether he was not selected for the position *because of* his membership in a protected class.[17] An employee must be forty years of age or older and must present evidence raising a sufficient question as to whether: (1) he was a member of a protected class;[18] (2) he applied for an open position; (3) he was qualified for the position, and (4) he was denied the position under circumstances that create an inference of unlawful discrimination.[19] Where the agency, however, presents a legitimate, non-discriminatory reason for the employment action taken, the grievance should not qualify for a

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[13] *See, e.g.*, EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

[14] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

[15] A materially adverse action is one that might dissuade a reasonable employee in the grievant's position from participating in protected conduct. In *Burlington Northern*, the Court noted that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." 126 S. Ct. at 2415. "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." *Id.* The Court determined that "plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

[16] The grievant also cites to past "retaliation" when he was "removed from a management/supervisory position" with the agency following a grievance hearing many years ago. The grievant argues that this act prevented him from having management experience with the agency and affected his ability to compete in this selection process. The grievant's argument relies on speculation. There is no indication that even if the grievant was in a supervisory/management position with the agency years ago that he would have been the best candidate in this selection. The acts are too remote in time to raise any inference of causation. The grievant is attempting, in part, to raise anew issues from past grievances. *See* EDR Ruling No. 2001-097 & 2001-107.

[17] *See* Huchinson v. INOVA Health System, Inc., 1998 U. S. Dist. LEXIS 7723, at *3 (E.D. Va. 1998) (citing St. Mary's Honor Center v. Hicks, 509 U. S. 502 (1993)).

[18] It is unlawful for an employer to discriminate against an employee on the basis of age. *See* 29 U.S.C. 621, et seq. (ADEA). 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* DHRM Policy 2.05.

[19] *See* Dugan v. Albemarle County School Bd., 293 F.3d 716, 720-721 (4th Cir. 2002); EEOC v. Sears Roebuck & Co., 243 F.3d 846, 851 (4th Cir. 2001). Proof of selection of a substantially younger worker is required; not selection by someone entirely outside of the ADEA's protected class. *Dugan*, 293 F.3d at 721.

hearing, unless there is sufficient evidence that the agency's stated reason was merely a pretext or excuse for age discrimination.

The grievant's only indication that the selection may have been tainted by age discrimination was the "feedback" he states he received from the selection committee. The grievant states that a member of the selection committee told him his "management experience was old." This statement is insufficient to raise a question of discriminatory intent on the part of the agency with respect to the grievant's non-selection in this case. First, the selection committee member could merely be pointing out that the grievant's alleged relevant experience was acquired some time ago and as such, may no longer be useful in similar jobs today regardless of the grievant's current age. Further, as noted above, the agency's selection of the successful candidate appears to have been based on reasonable evaluation of the applicants' knowledge, skills, and abilities, rather than the age of the applicants playing any role. Because there is no indication that the agency's non-discriminatory reason for the selection was pretextual, the grievant's claim of age discrimination does not qualify for a hearing.[20]

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.

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Claudia Farr
Director

[20] This result is the same even if the grievant's claim is analyzed under a disparate-impact theory. In order to state a disparate-impact discrimination claim under the ADEA "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is 'responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.'" Smith v. City of Jackson, 544 U.S. 228, 241 (2005) (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989)). Even if the grievant demonstrated such "statistical disparities" in this case, the agency can avoid liability if it can show that the employment practice was based on reasonable factors other than age. *Id.* at 241-43. As discussed above, the agency's selection decision in this case appears to have been based on reasonable factors other than age. Accordingly, the disparate-impact claim does not qualify for a hearing.