Issues: Compliance – Grievance Procedure (Resolution Steps) and Qualification – Management Actions (Recruitment/Selection); Ruling Date: May 16, 2008; Ruling #2008-1956, 2008-1959; Agency: Department of Motor Vehicles; Outcome: Agency in Compliance, Not Qualified.

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

# COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Motor Vehicles
Ruling No. 2008-1956 and 2008-1959
May 16, 2008

The grievant seeks qualification of his September 25, 2007 grievance[1] with the Department of Motor Vehicles (DMV or the agency). In his grievance, the grievant claims that the agency has misapplied state and agency hiring policies. In addition, the grievant asserts that the agency has failed to comply with the grievance process. For the reasons set forth below, this Department concludes that the September 25th grievance does not qualify for a hearing and that the agency has complied with the grievance process.

## FACTS

The grievant is employed as a Law Enforcement Officer III with DMV. The grievant applied for a promotion to the position of Special Agent-in-Charge (SAC) within DMV. On August 13, 2007, the grievant learned that he was not selected to be interviewed for the SAC position.[2] As a result, the grievant initiated a grievance on September 25, 2007. The grievant's September 25, 2007 grievance challenges the agency's failure to select him for an interview for the SAC position and claims that the agency has misapplied agency policies and procedures during the recruitment and interview phases of the selection process for the SAC position.

[1] The grievance was originally submitted to the agency on September 25, 2007. The agency subsequently administratively closed the grievance for alleged noncompliance and returned the grievance to the grievant. This Department issued a compliance ruling in the matter on November 2, 2007 and found the grievant to be compliant with the grievance process. The grievant, on November 19, 2007, submitted another grievance to the agency identical to the one initiated in September. Because the date of initiation is of no import in this decision, for purposes of this ruling the grievance will be referred to as the September 25, 2007 grievance.

[2] According to the grievant, interviews for the SAC position were held on August 14th and 15th.

## DISCUSSION

*Compliance*

The grievance procedure requires both parties to address procedural noncompliance through a specific process.[3] That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.[4] (If the agency is purportedly out of compliance, the grievant must notify the agency head of the alleged noncompliance.) Importantly, all claims of party noncompliance must be raised immediately. For example, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance.[5]

In this case, the grievant alleges numerous grievance procedure violations by the agency at the first and second management resolution steps. The grievant acknowledges however that he "never contested [these] violations, in [an] effort to speed the process up to a hearing." By advancing his grievance without formally contesting the agency's alleged actions through the noncompliance process set forth above (notifying the agency head of the non-compliance and allowing 5-workdays to correct), the grievant has effectively waived his right to contest the agency's alleged noncompliance at the first and second management resolution steps.

However, there is one outstanding noncompliance issue that will be addressed in this ruling. The grievant alleges that the agency has failed to comply with the grievance process because the agency head's qualification determination was changed. More specifically, it is undisputed that on January 28, 2008, the agency head checked the box on the Form A to qualify the grievant's September 25, 2007 grievance for a hearing. However, before the grievance was presented to the grievant on February 2, 2008, the agency head's qualification decision was changed such that the grievance was not qualified for a hearing.[6] The grievant notified the agency head on February 5, 2008 of the alleged noncompliance. In response, the agency head stated: "I reviewed [your] grievance and have determined that it does not qualify for a hearing. The reasons for that non-qualification decision were written on the form. The form was initially checked incorrectly, however what you were sent is the correct determination." The grievant now seeks a compliance ruling on this issue.

This Department has repeatedly recognized that the Grievance Form A is an official grievance document used by the parties to communicate throughout the grievance

[3] *Grievance Procedure Manual,* § 6.
[4] *Grievance Procedure Manual,* § 6.3.
[5] *Grievance Procedure Manual,* § 6.3.
[6] According to the grievant, the agency head's qualification determination was changed by using white correction fluid and was altered by someone other than the agency head.

process and as such, is of paramount importance during the grievance procedure. Because the grievant, the agencies, and this Department rely on the Form A to ascertain the intent of the parties, it is incumbent on the parties to clearly and accurately express their intentions on the Grievance Form A. However, unlike some previous cases reviewed by this Department where the agency or grievant attempted to change their response on the Form A after clearly indicating their decision and advancing it,[7] in this case, the qualification decision was changed prior to the agency advancing the From A to the grievant. Moreover, the agency head recognized that he incorrectly checked the "Yes" box and that the qualification decision that was ultimately presented to the grievant was correct. Accordingly, under the facts of this case, this Department cannot conclude that the agency has failed to comply with the grievance process.

This Department's rulings on matters of procedural compliance are final and nonappealable.[8]

*Qualification*

The grievance procedure recognizes management's exclusive right to manage the operations of state government, including the hiring or promotion of employees within an agency.[9] Inherent in this right is the authority to weigh the relative qualifications of job applicants and determine the "best-suited" person for a particular position based on the knowledge, skills, and abilities required. Grievances relating solely to the contents of personnel policies and the hiring of employees within an agency "shall not proceed to a hearing."[10] Accordingly, a grievance challenging the selection process does not qualify for a hearing unless there is evidence raising a sufficient question as to whether discrimination, retaliation, discipline, or a misapplication of policy tainted the selection process.[11] In this case, the grievant claims that the agency misapplied or unfairly applied state and agency hiring policies.

For an allegation of misapplication 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

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[7] *See e.g.*, EDR Ruling #2004-611(The agency head mistakenly qualified the grievance for a hearing and attempted to rescind the qualification determination after the Form A had been advanced to this Department and a hearing officer appointed to hear the matter. This Department determined that, despite his error in qualifying the grievance for a hearing, the agency head's qualification determination must stand.); EDR Ruling #2004-696 (The grievant mistakenly checked the box that she wished to conclude her grievance after the second management resolution step. Relying upon the Form A, the agency administratively closed the grievance. The grievant later tried to resurrect her grievance claiming that she had checked the wrong box on the Form A. This Department determined that the grievant's intent was clear on the Form A, that the agency acted in accordance with the grievant's clear intent, and as such, the grievant could not change the Form A after the fact.)

[8] Va. Code § 2.2-1001 (5).

[9] *See* Va. Code § 2.2-3004(B).

[10] Va. Code § 2.2-3004(C).

[11] *Grievance Procedure Manual* § 4.1(c).

amount to a disregard of the intent of the applicable policy. Additionally, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[12] Thus, typically, the threshold question is whether or not the grievant has suffered an adverse employment action.[13] 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."[14]

Here, the grievant makes numerous challenges to the agency's actions in the recruitment and interview phases of the selection process for the SAC position. Many of these challenges have to do with the agency's actions in relation to the actual processes employed during and after the interviews for the SAC position. For instance, the grievant challenges the composition of the interview panel, the interview questions, and the ranking of applicants once interviewed as well as the ultimate selection. Even if this Department were to assume that the agency did misapply policy in its selection of who would comprise the interview panel, the questions asked by the panel, and/or the panel's ranking of applicants once interviewed, this Department cannot qualify these issues for hearing because the grievant was not interviewed for the SAC position and as such, the agency's actions in thus regard did not adversely affect the grievant.

However, the grievant's failure to be interviewed for a promotional opportunity would clearly constitute an adverse employment action and as such, this Department will address the issue of whether the agency misapplied policy in failing to select the grievant for an interview for the SAC position. The grievant appears to make two arguments with regard to the agency's failure to select him for an interview for the SAC position: (1) the grievant alleges that the agency can only interview and promote current Special Agents to the position of SAC and as such, the agency violated policy when it advertised the position to the general public and selected three applicants from the general public for an interview for the SAC position; (2) because he is currently a Special Agent and the current policy does not specifically permit the agency to "screen" applicants, the agency was required by policy to interview him for the SAC position.

The applicable policy in this case is the agency's promotion policy, DMV Law Enforcement Services (LES) Policy Manual, Policy Number 1-12, *Career Development.* The relevant provisions of LES Policy 1-12 are contained in Section III, subsection (B) and state:

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[12] *See Grievance Procedure Manual* § 4.1(b).
[13] 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.
[14] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

1. When a vacancy exists for the position of Special Agent in Charge or Assistant Special Agent in Charge, the Director or designee shall post an advertisement of the position for a minimum of two weeks. During that time, Special Agents may complete a state application for consideration for the advertised position.

2. The Director or designee shall arrange an oral board to interview applicants for promotion. The Director or designee **may** arrange a board to consider applicants for a new assignment. The promotions board shall consist of the Director or designee, Special Agent in Charge, an HRO representative, and a representative from a nearby agency, if practicable.

    a. The board shall review the applicant's performance, training and disciplinary records.

    b. The board shall agree on interview questions and render them consistent and standard for all applicants. The interview questions shall examine general job knowledge, dependability, quantity and quality of work, cooperation, *esprit d'corps*, public relations, leadership, report writing ability, and additional skills acquired while a member of the Department…..

    e. Unsuccessful applicants who wish to grieve the selection process must follow the provisions of Directive 1-10.

The grievant asserts that the above-cited provisions of LES Policy 1-12 allow the agency to interview only current Special Agents for promotion to the position of SAC. More specifically, the grievant argues that the provision stating "Special Agents may complete a state application for consideration for the advertised position" means that **only** current Special Agents with DMV may complete an application for promotion to SAC. In support of his interpretation, the grievant points to the other above-cited provisions of LES Policy 1-12. In particular, the grievant asserts the board would only be able to assess the performance, training and disciplinary records of current DMV employees and as such, to comply with subsection (a) above, only internal applicants could be considered for SAC positions. Moreover, the grievant points to the fact that policy requires the board to craft interview questions that would elicit information regarding the applicant's "skills acquired while a member of the Department" to support his assertion that only internal candidates and/or current special agents can compete for promotion to the position of SAC. Finally, the grievant contends that only DMV employees would be able to grieve his or her nonselection via Directive 1-10 and as such, policy is clear that only internal candidates can compete for the position of SAC.

The agency however asserts that "[s]ince 2004 Special Agent in Charge vacancies have been advertised to the public and those applicants were considered along with agency Special Agents. The agency Law Enforcement Services Policy 1-12 section B, refers to procedures and polices that are to be utilized by a Special Agent Applicant but does not indicate or suggest that other applicants are not to be considered."

An agency's interpretation of its own policies is generally afforded great deference. This Department has previously held that where the plain language of an agency policy is capable of more than one interpretation, a hearing officer should give the agency's interpretation of its own policy substantial deference *unless* the agency's interpretation is clearly erroneous or inconsistent with the express language of the policy.[15] Further, we have held that even where an ambiguous policy is otherwise enforceable, a hearing officer may consider whether the grievant had fair notice of the agency's interpretation.[16] In this case, we conclude that the grievant has failed to raise a sufficient question as to whether the agency's interpretation is clearly erroneous or inconsistent with the policy's express language, or demonstrate that the agency failed to provide fair notice of its interpretation. More specifically, the agency's interpretation of LES Policy 1-12 appears consistent with the express provisions of that policy. That is, LES Policy 1-12 specifically applies to promotions of current DMV Special Agents and does not forbid external candidates for applying for SAC positions within DMV, nor does it specifically require or imply that all special agents that apply for the SAC position be interviewed.

With regard to the grievant's contention that the agency misapplied policy when it conducted a "screening" process not specifically permitted within LES Policy 1-12, this Department concludes that the agency has neither misapplied nor unfairly applied policy. Although "screening" applications is not specifically allowed in LES Policy 1-12, it is not specifically excluded either. More importantly, to require an agency to interview every applicant who may be minimally qualified for a position could be unduly burdensome and inefficient. Additionally, Department of Human Resource Management (DHRM) Policy 2.10, which applies to all current classified state employees, allows agencies to use screening criteria to select a subset of qualified applicants for interviews, provided those criteria are in accordance with the qualifications established for the position and applied consistently.[17]

Here, the agency required all applicants to answer a series of questions at the time of their online application including "screening questions" that were developed by LES. The online application system automatically scores each applicant based on the approved points assigned to each screening question. These scores are the percentage of eligible points received. The agency selected a minimum score of 70% for a further review of the applications and assessment of who would be granted an interview. Those applicants

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[15] *See, e.g.,*EDR Ruling No. 2001-064 and EDR Ruling No. 2004-932.
[16] *Id.*
[17] *See* DHRM Policy 2.10, Hiring.

whose automatic scores were less than 70%, such as the grievant who received a score of 35%, were eliminated from further review.

Based on the foregoing, there is insufficient evidence that the agency misapplied or unfairly applied policy in establishing screening criteria and selecting applicants for interviews based on those criteria. Accordingly, we cannot conclude that the agency misapplied policy in failing to grant the grievant an interview. In sum, while the grievant clearly disagrees with management's decision not to interview him for the position, and is understandably disappointed by this decision, he has not presented evidence raising a sufficient question as to whether misapplication or unfair application of policy tainted the selection process. Accordingly, this issue does not qualify for a hearing.

## APPEAL RIGHTS AND OTHER INFORMATION

Based on the foregoing, this Department concludes that the agency is in compliance with the grievance process. This Department's rulings on matters of procedural compliance are final and nonappealable.[18]

For information regarding the actions the grievant may take as a result of this Department's qualification determination, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification 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.

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Claudia Farr
Director

[18] Va. Code § 2.2-1001 (5).