

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: June 5, 2008; Ruling #2008-2020; Agency: Department of Social Services; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling No. 2008-2020
June 5, 2008

The grievant has requested a ruling on whether her March 19, 2008 grievance with the Department of Social Services (the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant applied for a Program Manager position with the agency. However, after a candidate was hired, she determined that she had never been offered an interview. The grievant argues that her experience with one of the programs that the Program Manager position would oversee should have qualified her for an interview. The grievant also asserts that the agency pre-selected the successful candidate who was previously hired as a "P-14" to hold a deputy manager position with the agency. The grievant asserts that the successful candidate is a friend of a senior member of agency management. Having received no relief during the management steps, the grievant now requests qualification of her grievance for 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 hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.¹ In this case, the grievant essentially claims misapplication of policy in the form of pre-selection and for not having been interviewed for the Program Manager position.

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

¹ Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

actions.”² Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.³ 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.”⁴ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁵ Because the Program Manager position would have been a promotion for the grievant, failing to select the grievant for the job would clearly be an adverse employment action.

Selection for Interview

The grievance procedure accords much deference to management’s exercise of judgment, including management’s assessment of applicants during a selection process. However, even though agencies are afforded great flexibility in making selection decisions, 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.⁶ Arbitrary or capricious is defined as a decision made “[i]n disregard of the facts or without a reasoned basis.”⁷

The grievant argues that the agency erred by not selecting her for an interview based on her previous experience. While the agency appears to have acknowledged during the initial screening that the grievant had some experience that met certain of the minimum qualifications of the Program Manager position, in the agency’s assessment, the grievant’s application materials did not demonstrate other minimum qualifications to such a degree to place her in the group to be interviewed. The agency had rated the applicants as to each of the minimum qualifications for the position based on the application materials and selected the three highest scoring applicants for interviews.

The agency’s assessment of the candidates’ abilities is due much deference. Based on a review of the selection materials, this Department cannot find that the agency’s assessment of the grievant’s application disregarded the facts or was without a reasoned basis. Further, there is no indication that the agency’s determination was inconsistent with how it assessed other applicants’ submissions. Because there is no indication that the agency misapplied or unfairly

² See *Grievance Procedure Manual* § 4.1(b).

³ 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.

⁴ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁵ *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)).

⁶ See, e.g., EDR Ruling No. 2007-1651.

⁷ See *Grievance Procedure Manual* § 9.

applied policy in not selecting the grievant for an interview, the grievance does not qualify for a 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.⁸ Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.⁹ 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.

There is insufficient evidence in this case that pre-selection may have occurred. The grievant asserts that pre-selection may have tainted the selection process primarily because of the successful applicant's alleged friendship with a senior member of agency management, but also because of her alleged treatment even as "P-14" employee. While some of the grievant's allegations could potentially raise the appearance of questions of pre-selection, the grievant has not presented evidence to show that the agency simply went through the motions of the selection process. On the contrary, the agency appears to have acted based on a reasoned analysis of the applicants' abilities.¹⁰ As such, it is this Department's determination that the grievant has not raised a sufficient question for the issue of pre-selection to qualify for 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 and file a notice of appeal pursuant to the provisions of Va. Code § 2.2-3004(E). 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.

Claudia Farr
Director

⁸ See Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.

⁹ Va. Code § 2.2-2901 (stating, in part, that "in 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).

¹⁰ For example, the successful candidate had held several Director positions including the position of Director of Social Services for a municipality where she had supervised over one hundred employees.