

Issues: Qualification – Discrimination (Age, Disability and Gender), and Management Actions (Recruitment/Selection); Ruling Date: April 20, 2009; Ruling #2009-2041; Agency: Department of Veterans Services; Outcome: Not Qualified.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Veterans Services  
Ruling No. 2009-2041  
April 20, 2009

The grievant has requested a ruling on whether his April 9, 2008 grievance with the Department of Veterans Services (the agency) qualifies for a hearing. The grievant asserts that the agency selected the successful candidate for the position of acting Office Manager on the basis of popularity rather than merit. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant is a Veterans Claims Representative. The grievant objects to the manner in which the agency selected the acting Office Manager. He asserts that she is a likable person who gets along well with everyone. However, the grievant asserts that he is the most qualified person for the position, having 21 years of experience as a claims agent and 8 plus years of supervising a field office. He also points out that he has a Masters degree, over thirty years of service as a veteran, and a service disability rating of 70%.

The Benefits Director stated that in selecting the Acting Office Manager, he discussed the matter with the Acting District Manager, a Regional Manager, and the Training Coordinator. The qualities that he desired in a candidate included the ability to:

- work under pressure
- handle heated situations in an even tempered manner
- work with and handle the many complexities of a large office
- deal with the tumultuous quantity of personnel issues that may come about
- handle the office claims load; while still managing and supervising the work of others
- dealing with public scrutiny and inquiries

The Benefits Director stated that another factor that had an impact on the grievant's non-selection was that he had an active Group II Written Notice.<sup>1</sup> In sum, the Benefits Director stated that he believed that the selected individual demonstrated the leadership, knowledge, and inter-personal skills needed for the Office Manager position and that she was the best-suited person for that role.

### 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"<sup>2</sup> unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.<sup>3</sup> The grievant seems to assert that he may have been a victim of discrimination or perhaps a misapplication of policy.

#### *Misapplication of Policy*

While not expressly couched as such, the grievant seems to question whether the agency's actions are consistent with state policy. In this case, there is apparently no policy that directly addresses the selection of individuals for acting positions. In conjunction with the investigation for this ruling, this Department contacted the Department of Human Resource Management (DHRM) for guidance on relevant state policy and whether there are any requirements associated with selections for acting positions--for example, announcements or interviews.<sup>4</sup> A DHRM Consultant for Policy stated that "DHRM does not publish any guidance or requirements concerning the selection process for these positions." Furthermore, in response to the question as to whether the veterans hiring preference applies to the "acting positions," DHRM replied that the preference does not apply. Based on the DHRM responses, this Department can find no basis to qualify this grievance on the basis of policy misapplication.

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<sup>1</sup> The Group Notice was for inappropriate touching of a female co-worker. The grievant maintains his innocence and states the touching was inadvertent and occurred when he fell from his chair into an employee. Although he grieved the Notice, it was ultimately upheld by a hearing officer.

<sup>2</sup> Va. Code § 2.2-3004(C).

<sup>3</sup> *Grievance Procedure Manual* § 4.1(c).

<sup>4</sup> See Va. Code § 2.2-1201(13) (Director of the Department of Human Resource Management "shall have the final authority to establish and interpret personnel policies"); *Murray v. Stokes*, 237 Va. 653, 657, 378 S.E.2d 834, 836 (1989) (stating that the " 'final authority' language ... supports and is consistent with a legislative intent ... to preclude judicial review"); *Grievance Procedure Manual* § 7.2(c) (noting that decisions by the Director of Department of Human Resource Management (DHRM) are final and nonappealable).

*Discrimination*

Grievances that may be qualified for a hearing include actions related to discrimination.<sup>5</sup> To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.<sup>6</sup>

In this case, the grievant appears to contend, in his response to the second step respondent, that he may be the victim of age, gender, and/or disability discrimination. However, the grievant's response makes only a bare allegation of discrimination. He concludes that because he was purportedly the most experienced and qualified in all areas, he can only surmise that discrimination entered into the selection equation. To support this contention he points out that he is the oldest employee in the agency, has a 70% disability rating, and the female-to-male ratio in his division is 7:1 (thus, the grievant assumes management wanted a female manager). The agency, on the other hand, has provided a legitimate, non-discriminatory business reason for its nonselection of the grievant: the selected candidate was best-suited for the job based on the leadership, knowledge, and interpersonal skills needed for the job.

Each of the varieties of discrimination alleged here has a unique but not unrelated analytical framework.<sup>7</sup> With each type of discrimination claim, even if the grievant were to establish a prima facie case, he would also have to provide sufficient evidence to rebut the agency's asserted non-discriminatory business reason for his non-selection as pretextual, such that a rational fact-finder could conclude that despite the agency's asserted business reason, the grievant's non-selection was the result of unlawful

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<sup>5</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>6</sup> See *Hutchinson v. INOVA Health System, Inc.*, C.A. No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at \*3-4 (E.D. Va. Apr. 8, 1998).

<sup>7</sup> For example, in a promotion case where a job is filled in an allegedly discriminatory manner, a plaintiff must ultimately show that he or she was subject to an adverse employment action, which was more likely than not motivated by plaintiff's gender. See *Evans v. Technologies Applications & Serv., Co.*, 80 F.3d 954, 959-60 (4th Cir. 1996). A plaintiff raises an inference of discrimination when he proves the following: (1) that he belongs to a protected class; (2) that he applied for and was qualified for a job; (3) that he was rejected for the job; and (4) that he was rejected under circumstances giving rise to an inference of unlawful discrimination. See *id.*; *Holmes v. Bevilacqua*, 794 F.2d 142, 146-147 (4th Cir. 1986). If the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to show a legitimate, nondiscriminatory reason for the challenged decision. See *Page v. Bolger*, 645 F.2d 227, 230-31 (4th Cir. 1981). Then, if the defendant carries this burden, the plaintiff must show that the proffered reasons were a pretext for discrimination. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). A pretext exists only if the plaintiff shows that the defendant's proffered reason is false and that discrimination was the actual reason for the decision. See *Jiminez v. Mary Washington College*, 57 F.3d 369, 378 (4th Cir. 1995) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)).

discrimination.<sup>8</sup> Based on the absence of rebuttal evidence in this case, we cannot conclude that this grievance raised a sufficient question as to whether prohibited discrimination played a role in the grievant's non-selection. Thus, there is no basis to qualify the grievant's discrimination 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 he does not wish to proceed.

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Claudia Farr  
Director

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<sup>8</sup> See *Rowe v. Marley Co.*, 233 F.3d 825, 829-830 (4th Cir. 2000).