

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling
Date: February 26, 2009; Ruling #2009-2095; Agency: Department of State
Police; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of State Police
Ruling No. 2009-2095
February 26, 2009

The grievant has requested a ruling on whether his July 7, 2008 grievance with the Department of State Police (the agency or VSP) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant, a 21 year veteran of the agency and a First Sergeant, claims that he was passed over for a promotional opportunity in the Northern Virginia (NOVA) area. The grievant asserts that he was next on the promotional ranking list for a Lieutenant position and was ranked higher than the person who was offered the position.

The agency does not contest that the grievant was higher on the list than the individual ultimately promoted. However, it relies on a policy provision that allows the Superintendent to deviate from the list's ranking order when "compelling circumstances or specific need" warrants a departure from the list. The agency has cited to several reasons for its deviation. First, it asserts that the person selected had extensive bomb squad and arson experience. Secondly, the agency cites to a problem of turnover in the NOVA area caused by individuals using the NOVA pay differential (25%) to boost their salaries prior to retirement. Finally, the agency notes that it was able to avoid moving costs by passing over the grievant.

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 alleges a misapplication of agency 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 generally limits grievances that qualify for a hearing to those that involve “adverse employment 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 A failure to promote is clearly an adverse action.

General Order 73-10

The relevant policy in this case is General Order 73-10 (GO-73-10). That order sets forth the promotional process for the agency’s sworn employees. In pertinent part, the policy uses five criteria ((1) a knowledge test, (2) a leadership potential evaluation, (3) a practical exercise examination, (4) an interview, and (5) time-in-grade and educational credits) to rank employees who are eligible for promotion to Lieutenant. Based on the scoring of these factors, candidates seeking promotion are ranked with the candidate receiving the highest combined score heading the list. GO-73-10 states that “[w]hen making a promotion, the Superintendent shall choose from among the top five candidates who have indicated a willingness to accept the position.” GO-73-10 gives the Superintendent the discretion to deviate from the list by stating that: “[i]n the absence of *compelling circumstances or specific need*, the Superintendent shall promote the candidate with the highest score.”⁶ Here, it does not appear to be disputed that the grievant was listed higher on the promotional ranking list than was the individual who was offered the position. However, the agency has cited to several reasons for deviating from the list’s ranking order.

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

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 See, e.g., *Holland v. Washington Homes, Inc.* 487 F.3d 208, 219 (4th Cir. 2007).

⁶ Emphasis added.

First, the agency has explained that the individual promoted to Lieutenant had extensive training and experience as an arson/bomb technician. He had worked in the Bureau of Criminal Investigations and, according to the agency, built a great rapport with other federal law enforcement agencies. Given that Dulles International Airport, Reagan National Airport, and the Pentagon are all located in the NOVA district, the agency has stated that it felt having an individual with the grievant's background and skills in the Lieutenant's position would be beneficial to the agency.

Secondly, the agency has explained that it has had a problem with turnover in NOVA district and needed someone who would stay in the area. The agency claims that it has been hampered by having employees move to the NOVA area to increase their annual compensation. Retirement benefits are based on a formula which includes (1) average of the highest 36 months of compensation, (2) years of creditable service, and (3) age at retirement. Once an employee has earned 36 months of the higher NOVA pay rate, he or she may desire to move to an area where the cost of living is lower. Given that the individual who was promoted has lived in the NOVA area for a considerable time, the agency did not expect that he would subsequently transfer from the area.⁷ The agency asserts that this was not the main reason for the deviation from the list but was a consideration. The agency also noted that by promoting the individual who was already in NOVA, it could save moving costs.

On the other hand, the grievant finds these arguments less than compelling. He points out that the Lieutenant who would supervise the bomb/arson division did not have to be a bomb/arson tech himself. The grievant claims that the Lieutenant position in NOVA is not substantially different from any other Lieutenant position. He also notes that others have been recently moved to NOVA as a result of promotions.

Here, the agency's own policy expressly grants management the discretion to deviate from its promotional ranking list when there are "compelling circumstances or specific need." In such a case, this Department will defer to the agency's business judgment as to what constitutes such "compelling circumstances or specific need," barring any evidence (not apparent here) that the agency's proffered rationale was a mere pretext for an improper motive.⁸ In this case, while reasonable minds might disagree as to whether the grounds advanced by management are truly compelling, we cannot conclude that management's reasons, taken as a whole, are insufficient to justify

⁷ The grievant currently resides in the Hampton area.

⁸ *C.f.* *EEOC v. Clay Printing Co.*, 955 F.2d 936, 946 (4th Cir. 1992) (noting that "[i]t is not for this court or any other governmental agency to direct the business practices of any company.") Courts should not act as "super personnel departments," substituting their judicial judgments for the business judgments of employers." *Bennett v. Saint-Gobain Corp.*, 507 F.3d 23, 32 (1st Cir. 2007) (quoting *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 825 (1st Cir. 1991)); Federal courts "do not sit as a super-personnel department that reexamines an entity's business decisions." *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir.1991) (quoting *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir.1988) (citations omitted)).

deviation from the promotional ranking list. Accordingly, this grievance is not qualified 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.

Claudia T. Farr
Director