

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling
Date: January 23, 2009; Ruling #2009-2177; 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. 2009-2177
January 23, 2009

The grievant has requested a ruling on whether his September 22, 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 Sergeant with the agency, requested a transfer to another Sergeant position on June 19, 2008, if an opening occurred in the future. The agency acknowledged his request in a letter dated June 25, 2008. The grievant later learned that there was a vacancy in one such position when the agency advertised the position on July 18, 2008. The grievant competed but was not selected for the position.

The grievant initiated his grievance because he appears to argue that his transfer request should have been honored when the Sergeant vacancy occurred. The agency indicates that the relevant agency policy regarding transfers, General Order 16, was changed to require that interviews take place for filling the particular position the grievant requested. Reference to the history of General Order 16 finds that language requiring interviews was added to the policy in a new paragraph 13 with an effective date of July 1, 2008. It appears, however, that these revisions were not published, through an Informational Bulletin, until July 23, 2008. Other unrelated changes to General Order 16, with an effective date of July 1, 2008, had been published in an earlier Informational Bulletin on July 1, 2008.

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.

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

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

The grievant appears to argue three points: 1) under the prior policy, he should have been transferred to the position without the selection process and interviews; 2) the successful candidate had not satisfied a full year as a Sergeant, which, he alleges, made her ineligible to be transferred; and 3) the interview panel did not comply with the provisions of the new policy.

Policy Changes

Assuming the Informational Bulletin dated July 23, 2008 is correct and the agency made the revisions to General Order 16, paragraph 13 at that time, the position advertisement occurred when the language requiring interviews for the open Sergeant position did not exist in the policy. The agency appears to have made the changes on July 23, 2008 retroactive to July 1, 2008, covering the selection at issue here, which began on July 18, 2008. It is not clear whether this retroactivity was effective under law or policy. However, even under the old version of General Order 16, it does not appear that there was a misapplication of policy.

Although the grievant appears to suggest that he should have been transferred automatically once the Sergeant position became available, the earlier version of General Order 16 only required that his transfer request “be given due consideration.”⁶ Further, the agency’s letter accepting the grievant’s transfer request indicated that the acceptance of the request “does not obligate the Department to transfer you.” Consequently, even under the old version of the policy, there was no specific requirement that the grievant be

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 VSP General Order 16, ¶ 13 (prior version revised July 1, 2008).

transferred to the vacant Sergeant position based on his request. Furthermore, this Department cannot find, and the grievant has not submitted evidence to suggest, that the agency violated the old version of General Order 16 by proceeding with interviews for the position. Indeed, having an interview process would be consistent with Department of Human Resource Management (DHRM) Policy 2.10, *Hiring*. Therefore, because the agency's decision to interview for the open Sergeant position was consistent with the new language of General Order 16 and did not appear to violate any provision of the old version, there is insufficient indication that policy has been misapplied.

Year Requirement

The grievant cites General Order 16, paragraph 2, which states that “[s]worn employees in a supervisory classification may request a transfer after 12 months.” The grievant asserts that the successful candidate in the selection had not been in her former Sergeant position for at least a year before requesting and being granted the transfer. For that reason, he argues she was not eligible for the position.⁷ The new version of General Order 16 revises this requirement for transfers to the particular Sergeant position sought by the grievant. The updated paragraph 13 provides that “[a]ll sergeants are eligible to apply for the vacancy, regardless of how long they have served in their present assignment.”

As the grievant asserts, it would appear that the old version of General Order 16 might have prevented the successful candidate from being eligible for transfer. However, the position advertisement stated that “[n]otwithstanding the provisions of G.O.16, paragraph 2, all interested and qualified sworn supervisors may apply for this position.” This language in the position advertisement appears to have been a temporary modification of the requirements of General Order 16. Indeed, paragraph 2 of General Order 16 allows the agency to opt out of those eligibility restrictions “when a transfer is deemed to be in the best interest of the Department.” Further, it appears that this modification was made in as fair a way as possible, published at the outset in the position announcement. As such, given the totality of the circumstances, this grievance does not raise a sufficient question as to whether the agency misapplied policy.

Interview Panel

Assuming the new version of General Order 16 was effective, it appears the participants on the interview panel were not the specific individuals identified in that policy as the panel. Even though this requirement may not have been followed, this apparent misapplication of policy does not qualify for hearing because it does not appear that the grievant experienced an adverse employment action as a result. The position he sought would have been a lateral transfer for him. Typically, a lateral transfer is not an

⁷ For purposes of this ruling only, it is assumed that the successful candidate had not been in her former position for at least a year before entering the selection process.

adverse employment action unless it results in a significant detrimental effect.⁸ Because there is no indication that the lateral transfer would have entitled the grievant to any other tangible benefit, the denial of that transfer would not appear to be an adverse employment action. Accordingly, this grievance does not 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 he does not wish to proceed.

Claudia Farr
Director

⁸ See, e.g., *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999); see also EDR Ruling No. 2007-1430.