Issues: Qualification – Discrimination (Sexual Harassment), Management Actions (Recruitment/Selection), Retaliation (Grievance Activity Participation); Ruling Date: April 2, 2009; Ruling #2009-2248; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2009-2248
April 2, 2009

The grievant has requested a ruling on whether her January 24, 2008 grievance with the Department of Corrections (DOC or Agency) qualifies for a hearing. For the reasons discussed below, the grievant's January 24th grievance does not qualify for a hearing.

FACTS

On November 30, 2007, the grievant interviewed for a Psychology Associate II position with DOC. There were three interviewers present for the group interview for the Psychology Associate II position. The grievant's Applicant Evaluation Forms reveal that two of the three interviewers, Mr. K. and Mr. D., found the grievant to be well qualified for the Psychology Associate II position and recommended her highly for the job. The third interviewer, who was also the appointing authority in this case, Dr. B., however, found her skills to be either good or adequate and did not recommend her for the position.

After the interview process for the Psychology Associate II position was complete, the agency apparently determined that the recruitment and interview processes had failed to present a suitable candidate and as such, it decided to re-advertise the position on or about January 14, 2008. On January 24, 2008, the grievant initiated a grievance challenging her nonselection. She asserts her nonselection was arbitrary and capricious, a misapplication and/or unfair application of policy, discriminatory, and/or retaliatory.

DISCUSSION

By statute and under the grievance procedure, management has the authority to determine who is best suited for a particular position by determining the knowledge, skills, and abilities necessary for the position and by assessing the qualifications of the candidates. Accordingly, claims relating to a selection process do not qualify for a hearing unless the grievant presents evidence raising a sufficient question as to whether

discrimination, retaliation, or discipline may have improperly influenced the process, or whether policy may have been misapplied.[1]

In this case, the grievant alleges that the agency misapplied state and agency selection policies and that her nonselection was motivated by retaliatory and discriminatory intent. The grievant's claims will be discussed below.

Misapplication of 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] Here, the grievant would appear to satisfy the threshold adverse employment action requirement because she is challenging her denial of a promotion.

Moreover, even though the grievance procedure accords much deference to management's exercise of judgment, including management's assessment of applicants during a selection process, 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]

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[1] Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1.
[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] *See, e.g.*, EDR Ruling No. 2007-1651.
[7] *Grievance Procedure Manual* § 9.

The applicable policies in this case are the Department of Human Resource Management (DHRM) Policy 2.10, *Hiring* and the agency's hiring policy, DOC Procedure 5.7. The grievant believes that because two of the members of the interview panel found the grievant to be "well qualified" and recommended her highly for the job, she should have been offered the Psychology Associate II position. However, state and agency hiring policy is designed not only to determine who may be qualified for the position, but also to ascertain which candidate is best-suited for the position. In determining who the best-suited candidate is, an agency has wide discretion. If the agency determines that extending the recruitment period and re-advertising the position would be beneficial, state and agency policy expressly allow the agency to do so.[8]

In addition, despite the favorable recommendations of Mr. D. and Mr. K., it appears that Dr. B., as the appointing authority in this case, acted in accordance with policy in determining that the grievant would not be selected for the Psychology Associate II position. More specifically, according to DOC Procedure 5-7, the appointing authority "is the person who must give final approval for the selection" and "shall make the final decision based on the interviews, related education and experience, related knowledge, skills and abilities, panel recommendation (if applicable), references and, if available, performance evaluations, active disciplinary actions, and recommendations."[9] Moreover, a group interview such as the one at issue here, is "an interview conducted by the appointing authority, or the designated appointing authority, with others assisting but with the appointing authority or designee retaining the responsibility for the selection."[10]

Finally, according to the agency, the Psychology Associate II position is primarily a leadership position that requires a high degree of confidence, assertiveness, poise, diplomacy, flexibility, and the ability to manage novel and stressful situations. According to Dr. B., the grievant did not present herself in a manner that supported this set of skills during her interview and as such, he did not hire her for the position despite the high ratings she received by Mr. K. and Mr. D.[11] Moreover, despite his favorable recommendation of the grievant for the Psychology Associate II position, Mr. D. appears to agree with Dr. B.'s assessment of the grievant's interview. Specifically, in the communication section of the Applicant Evaluation Form,[12] Mr. D. writes the following:

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[8] Department of Human Resources Management (DHRM) Policy 2.10, ("If initial recruitment does not result in an adequate applicant pool, agencies may reopen recruitment as necessary."); DOC Procedure 5-7.9(E), ("The organizational unit may readvertise a vacant position if additional qualified applicants are desired from which to select.") It is true that under DOC policy the agency must readvertise the position if the original advertisement does not produce three qualified applicants, unless an exception to readvertisement is approved by the Employee Relations Unit. However, the fact that the original advertisement yields at least three qualified applicants does not prohibit the agency from re-advertising the position if it believes that doing so may enhance the available applicant pool.

[9] DOC Procedure 5-7.6 and DOC Procedure 5-7.15(A).

[10] DOC Procedure 5-7.6.

[11] It should be noted that Mr. K. and Mr. D. were the grievant's current and former supervisors respectively at the time of the interview. This knowledge of the grievant could have played a role in the high ratings that she received.

[12] In this section of the Applicant Evaluation Form, the rater is asked to assess "[h]ow well does the applicant articulate his qualifications, interest in the job, etc.?"

"[the grievant] [d]oes not articulate her qualifications as well as they actually are." As stated above, the agency's assessment of the candidates' abilities is due much deference. There is insufficient evidence to support the grievant's contention that the agency's evaluation of her qualifications was in any way arbitrary or capricious. Rather, it appears the agency based its determinations on a reasoned assessment of the grievant's demonstrated knowledge, skills, and abilities. There is insufficient indication that the agency failed to evaluate properly the grievant's work and management experience. Because there is no indication that the agency may have misapplied or unfairly applied policy, this claim does not qualify for a hearing.

Discrimination

Under the grievance procedure, a claim of discrimination arising from membership in a protected class (in other words, on the basis of race, color, religion, political affiliation, age, disability, natural origin, or sex) may qualify for a hearing.[13] In this case, the grievant indicated during this Department's investigation that the appointing authority may have failed to select her for the Psychology Associate II position because she is a female.

For a claim of discrimination in the hiring or selection context to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, an employee must present evidence raising a sufficient question as to whether she: (1) was a member of a protected class;[14] (2) applied for an open position; (3) was qualified for the position; and (4) was denied promotion under circumstances that create an inference of unlawful discrimination. Where the agency, however, presents a legitimate, non-discriminatory reason for the employment action taken, the grievance should not qualify for a hearing, unless there is evidence that raises a sufficient question as to whether the agency's stated reason was merely a pretext or excuse for discrimination.[15]

The grievant's only indication that the selection may have been tainted by gender discrimination is the grievant's assertion that Dr. B. has in at least two prior recruitment processes failed to hire female applicants despite the high recommendations of the other interviewers. As noted above, Dr. B., as the appointing authority, is the final determiner of who will be hired for a particular position and does not have to hire the individual recommended by the other interviewers present during the group interview. More importantly however, the grievant has failed to present any evidence that she, or the other two females she mentions, were not selected because they were female. Moreover, during this Department's investigation, Dr. B. indicated that he has acted contrary to the other interviewers' recommendation on several occasions but has done so to male and

[13] *Grievance Procedure Manual* § 4.1(b).
[14] *See* DHRM Policy 2.05, *Equal Employment Opportunity.*
[15] *See e.g.* Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 268 (4th Cir. 2005).

females alike.[16] Finally, as noted above, the appointing authority's decision in this case appears to have been based on a reasonable evaluation of the grievant's leadership abilities, rather than because she is a female. Because there is no indication that the agency's non-discriminatory reason for the selection was pretextual, the grievant's claim of sex discrimination does not qualify for a hearing.

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[17] (2) the employee suffered a materially adverse action;[18] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[19] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[20]

Here, the grievant alleges that she is concerned about "possible retaliation against her" as a result of initiating her January 24th grievance. In addition, during this Department's investigation, the grievant stated that she felt her nonselection could be the result of the agency's animus toward her boss, Mr. K., because Mr. K. had filed a grievance. Claims of possible future retaliation cannot qualify for a hearing for want of a materially adverse action.[21] However, should the grievant suffer a materially adverse action in the future that she believes is the result of her prior grievance activity, nothing would preclude her from challenging such action through the grievance process so long as she complied with all grievance procedure initiation requirements. Moreover, while Mr. K.'s grievance activity could potentially be used to support the grievant's claim of

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[16] Further, this Department deems it significant to note that Dr. B. hired the grievant for the position of Psychology Associate I at DOC and has overwhelmingly hired females for positions in which he has served as the appointing authority.

[17] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).

[18] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

[19] *See* EEOC v. Navy Fed. Credit Union, 424 F.3d. 397, 405 (4th Cir. 2005).

[20] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (Title VII discrimination case).

[21] Even if the grievant had suffered a materially adverse action subsequent to the initiation of her January 24th grievance, the grievant could not challenge such action by adding the issue to her January 24th grievance. The grievant would have to file a separate grievance challenging the action as retaliatory. *See Grievance Procedure Manual* § 2.4 ("once the grievance is initiated, additional claims may not be added").

retaliation,[22] the grievant has presented insufficient evidence that her nonselection was causally linked to Mr. K.'s grievance activity. In particular, it appears that Mr. K.'s grievance activity occurred after the selection decision was made in this case.[23] Accordingly, this issue does not qualify for a 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 the qualification determination to the circuit court, the grievant 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 agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

[22] *See* United States EEOC v. Bojangles Rests., Inc., 284 F. Supp.2d 320, 330 (M.D.N.C. 2003)(employee could bring a retaliation claim against her employer because the employer perceived the employee as someone who was or who would be assisting someone engage in protected activity, in this case, the employee's fiancé, who was also employed by the employer).

[23] Mr. K. filed a grievance on February 25, 2008, well after the January 14, 2008 decision to re-advertise the Psychology Associate II position at issue in this case. The adverse action(s) must occur after the protected act, rather than before it, in order to create an inference of retaliation. *See* Duncan v. Washington Metropolitan Area Transit Authority, 2006 U.S. Dist. LEXIS 15335, *14-15 (D.C. Cir. 2006) ("the employer decided on a course of action before it could possibly have known about the employee's protected activities. Consequently….the employee cannot establish a causal link between the end result of that decision and the protected activities in which he engaged in the interim."); and Durkin v. City of Chicago, 341 F.3d 606, 615 (7th Cir. 2003) ("An employer cannot retaliate if there is nothing for it to retaliate against."). *See also* Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1234-35 (10th Cir. 2000) (employer's decision to discharge truck driver not retaliatory because employer's decision pre-dated truck driver's filing of a union grievance).