

Issues: Qualification – Management Actions (Recruitment/Selection) and Retaliation (Other Protected Right); Ruling Date: November 2, 2009; Ruling #2009-2333; Agency: College of William and Mary; Outcome: Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the College of William and Mary
Ruling Number 2009-2333
November 2, 2009

The grievant has requested a ruling on whether his February 9, 2009 grievance with the College of William and Mary (the College) qualifies for a hearing. For the reasons discussed below, the grievant's February 9th grievance qualifies for a hearing.

FACTS

The grievant is employed as a Housekeeper with the College. In January 2009, the grievant interviewed for the position of Housekeeping Worker Senior with the College. The grievant was not the selected candidate for the position. Accordingly, the grievant initiated a grievance on February 9, 2009 to challenge his nonselection. In his February 9th grievance, the grievant claims that his nonselection was retaliatory and a misapplication or unfair application of policy.¹ The grievant further alleges that his supervisor has engaged in other retaliatory actions such as "watching" the grievant while he is working overtime.

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.²

¹ Although not specifically designated as such, the grievant's claim that he was the most qualified for the position of Housekeeping Worker Senior can be fairly read as a misapplication and/or unfair application of policy claim.

² Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1.

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

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.³ Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.⁴ 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.

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁵ Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.⁶ 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."⁷ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁸ Here, the grievant would appear to satisfy the threshold adverse employment action requirement because he is challenging his 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

³ See Department of Human Resource Management (DHRM) Policy No. 2.10.

⁴ 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).

⁵ See *Grievance Procedure Manual* § 4.1(b).

⁶ 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.

⁷ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁸ See, e.g., *Holland v. Washington Homes, Inc.* 487 F.3d 208, 219 (4th Cir. 2007).

capricious.⁹ Arbitrary or capricious is defined as a decision made “[i]n disregard of the facts or without a reasoned basis.”¹⁰

The Housekeeping Worker Senior position is primarily a supervisory position whose duties include, but are not limited to, the following: “[p]rovide daily oversight of housekeeping functions” including supervising classified employees, preparing work schedules, and training new employees. In this case, the College asserts that it hired the selected candidate over the grievant because the selected candidate had: (1) more supervisory experience; (2) better communication skills; and (3) displayed more supervisory and leadership qualities during the interview. When comparing the grievant’s application and interview worksheet notes with the selected candidate’s application and interview worksheet notes, it is unclear why the selected candidate received more credit for his supervisory experience than the grievant. For example, on his application, in the section about the selected candidate’s most recent work experience (working for a cleaning company part-time), the box entitled “[n]umber and titles of employees you supervised” was left blank. Moreover, while the selected candidate indicated during his interview that he has 15 years of experience in the cleaning business and had worked at the College for 6 months,¹¹ the interview notes for the selected candidate do not specifically mention any supervisory experience. The grievant likewise noted on his application that he does not currently supervise any employees, however, according to the interview notes, the grievant, who indicated he has 22 years of experience, has, while employed in the housekeeping department at the College, acted as a “shift leader.” In light of these potential inconsistencies in the agency’s stated reasons for hiring the selected candidate over the grievant, the grievant has raised a sufficient question as to whether the agency misapplied and/or unfairly policy or otherwise acted arbitrary and capricious in its selection decision.

Alternative Theory

The grievant has also asserted that his nonselection was motivated by retaliatory intent. Specifically, the grievant claims that he is being retaliated against for his union activity.¹² Because the grievant’s claim regarding the misapplication or unfair application of policy qualifies for hearing, this Department deems it appropriate to send all alternative theories and claims raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

⁹ See, e.g., EDR Ruling No. 2007-1651.

¹⁰ *Grievance Procedure Manual* § 9.

¹¹ The selected candidate worked for the Virginia Institute for Marine Science, the graduate school in marine science for the College.

¹² The grievant’s participation in a labor organization/association constitutes protected activity under state law. See Va. Code § Virginia Code § 40.1-57.3. It should be noted that the selected candidate in this case, unlike the grievant, was not, at the time of hire, a member of the union.

We note, however, that this qualification ruling in no way determines that the agency's actions in fact violated policy or were retaliatory, only that further exploration of the facts by a hearing officer is appropriate.

CONCLUSION

For the reasons set forth above, the grievant's February 9, 2009 grievance is qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.

Claudia Farr
Director