

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: September 15, 2009; Ruling #2010-2402; 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. 2010-2402
September 15, 2009

The grievant has requested a ruling on whether his June 10, 2009 grievance with the Department of Veterans Services (the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant initiated his June 10, 2009 grievance to challenge a selection process in which he competed unsuccessfully. He argues that he was better qualified than the successful candidate. The grievant also argues that the successful candidate's promotion to the acting/temporary office manager job allowed her to be selected.¹ As noted in EDR Ruling No. 2009-2041, the grievant has extensive experience with the agency, a Masters degree, and at one time supervised the field office for eight years. The agency disputes the grievant's claims and reiterates that it selected the better qualified candidate.

The grievant additionally alleges that retaliation and discrimination, based on gender, age, and disability, tainted the selection process. In support of his discrimination claim based on gender, the grievant points to certain past personnel actions taken by the agency against the grievant in which, according to the grievant, female accusers were believed, but he was not. The grievant also cites to a position he did not get at some point in the past. To support his discrimination claim based on age and disability, he states that he has a 90% disability rating and is over 70 years old. The grievant asserts that these factors must have been taken into account.

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.² In this case, the grievant alleges

¹ The grievant grieved the selection of the successful candidate for the acting/temporary position, but that grievance did not qualify for a hearing. EDR Ruling No. 2009-2041.

² Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

discrimination, retaliation, and, in fairly reading the grievance, a misapplication and/or unfair application of policy.

Misapplication and/or Unfair Application 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.”³ Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.⁴ 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.”⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁶ For purposes of this ruling only, it will be assumed that the grievant has alleged an “adverse employment action” as to this grievance in that it appears the position he applied for would have been a promotion.

The grievance procedure accords much deference to management’s exercise of judgment, including management’s assessment of applicants during a selection process. Thus, a grievance that challenges an agency’s action like the selection in this case does not qualify for a hearing unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.⁷

The grievant asserts that he was more qualified than the successful candidate. While the grievant appears to have more education than the successful candidate, the difference between the lengths of their respective experience with the agency is negligible. Further, the agency states that, in its assessment, the successful candidate’s proven handling of workload, handling of tense and heated office situations, ability to work under pressure, handling of office personnel issues, experience, and demonstrated leadership qualities led the agency to select her for the position. While the grievant may disagree with the agency’s assessment, he has presented insufficient evidence to suggest that the agency’s selection disregarded the facts or was otherwise arbitrary or capricious. Indeed, in reviewing the two candidates’ application materials, interview notes, and writing samples, this Department can find nothing to indicate that the grievant was so clearly the better candidate that the selection of the successful candidate

³ See *Grievance Procedure Manual* § 4.1(b).

⁴ 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.

⁵ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ See, e.g., *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁷ See *Grievance Procedure Manual* § 9. Arbitrary or capricious is defined as a decision made “[i]n disregard of the facts or without a reasoned basis.”

disregarded the facts. Rather, it appears the agency based its decision on a good faith assessment of the relative qualities of the candidates.

Pre-Selection

The grievance has also fairly raised the issue of pre-selection. 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.⁸ Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.⁹ As such, an agency may not pre-select the successful candidate for a position, without regard to the candidate's merit or suitability, and then merely go through the motions of the selection process.

There is insufficient evidence in this case to raise a question as to whether pre-selection tainted the selection process. The grievant's assertion that the agency's placement of the successful candidate in the acting/temporary position made her the natural choice for the permanent position is understandable, it does not appear that the agency simply went through the motions of the selection process. On the contrary, the agency appears to have acted based on a reasoned analysis of the applicants. The agency determined that the successful candidate was better suited for the position based on her knowledge, skills, and abilities. The grievant has not raised a sufficient question for the issue of pre-selection to qualify for hearing.

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination.¹⁰ 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.¹¹

Although the grievant has asserted three separate bases for his discrimination claim (gender, age, and disability), there is no evidence that any of these issues had any causal relationship with the selection decision. Indeed, the grievant's argument regarding age and disability is mere supposition that the agency must have taken them into account. While the grievant asserts some evidence to support his gender-based discrimination claim, that evidence fails to raise a sufficient question as to whether the selection was the result of discrimination. Further, as noted above, the agency's selection of the successful candidate appears to have been based on a reasonable evaluation of the candidates' knowledge, skills, and abilities. Because

⁸ See Department of Human Resource Management (DHRM) Policy No. 2.10, *Hiring*.

⁹ Va. Code § 2.2-2901 (stating, in part, that “[i]n accordance with the provisions 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).

¹⁰ See *Grievance Procedure Manual* § 4.1(b).

¹¹ 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).

there is no indication that the agency's non-discriminatory reasons for the selection were pretextual, the grievant's claims of discrimination do 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;¹² (2) the employee suffered a materially adverse action;¹³ 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.¹⁴ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹⁵

The grievant has not identified any protected activity in which he engaged from which a retaliation claim might arise.¹⁶ Because there is no claim or evidence of the grievant's having engaged in a protected activity, this grievance does not qualify for a hearing on the basis of retaliation.

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 and file a notice of appeal with the circuit court pursuant to 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 wishes to conclude the grievance and notifies the agency of that desire.

Claudia Farr
Director

¹² 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 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).

¹³ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); see, e.g., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

¹⁴ See, e.g., *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005).

¹⁵ See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

¹⁶ See, e.g., *Grievance Procedure Manual* § 4.1(b).