

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: January 4, 2010; Ruling #2010-2432; Agency: Department of Behavioral Health and Developmental Services; Outcome: Qualified for Hearing.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Behavioral Health & Developmental Services
Ruling No. 2010-2432
January 4, 2010

The grievant has requested a ruling on whether his June 16, 2009 grievance with the Department of Behavioral Health and Developmental Services (the agency) qualifies for a hearing. For the following reasons, this grievance qualifies for hearing.

FACTS

The grievant initiated his June 16, 2009 grievance primarily to challenge a selection process in which he competed unsuccessfully. Although the grievant was selected for an interview, he was not recommended for the position. One of the grievant's claims is that the agency failed to properly take into account his veteran status.

DISCUSSION

Selection

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 essentially alleges a 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."² Thus, typically, a threshold question is whether the grievant has suffered an adverse

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

² See *Grievance Procedure Manual* § 4.1(b).

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 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.

A central policy at issue in this case is Department of Human Resource Management (DHRM) Policy 2.10, *Hiring*. DHRM Policy 2.10 provides that: “[c]onsistent with the requirements of the Va. Code §§ 2.2-2903⁶ and 15.2-1509, the veteran’s military service shall be taken into consideration by the Commonwealth during the selection process, provided that such veteran⁷ meets all of the knowledge, skill, and ability requirements for the available position. Additional consideration shall also be given to veterans who have a service-connected disability rating fixed by the United States Veterans Administration.”⁸ Further, on April 30, 2009, DHRM provided policy guidance as to the application of this “Veteran’s Preference.” In pertinent part, the policy guide states:

The Code of Virginia requires that state agencies shall give preference in the hiring process to veterans. ... The following guidelines are designed to help agencies achieve this required level of preference.

Initial screening: Applicants are screened to identify those who meet the minimum requirements for the position – the equivalent of achieving a passing score on a test. No preference is given. Applicants must meet the required criteria at a minimum or better level on their own.

Preference applied after initial screening phase: After the initial screening, veteran status is noted for the candidates. The state application provides

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 Va. Code § 2.2-2903(B) states: “[i]n a manner consistent with federal and state law, if any veteran applies for employment with the Commonwealth that is not based on the passing of any examination, such veteran shall be given preference by the Commonwealth during the selection process, provided that such veteran meets all the knowledge, skill, and ability requirements for the available position.”

⁷ DHRM Policy 2.10 defines “veteran” as “[a]ny person who has received an honorable discharge and has (i) provided more than 180 consecutive days of full-time, active-duty service in the armed forces of the United States or reserve components thereof, including the National Guard, or (ii) has a service-connected disability rating fixed by the United States Department of Veterans Affairs.” DHRM Policy 2.10, “Recruitment Management System (RMS).”

⁸ DHRM Policy 2.10, “The Selection Process.”

preliminary notice of veteran status; the agency may need to follow up to identify the exact status of veteran applicants. At this stage, preference shall be given by treating veteran status as a preferred qualification. Further preference shall be given if the veteran applicant also has a service-connected disability rating by treating the veteran's disabled status as a second preferred qualification. Adding a preferred qualification criterion for veteran status and, if applicable, a second preferred criterion for disabled veteran status will therefore result in the veteran applicant and the disabled veteran applicant receiving the additional preference required by Code.⁹

The grievant purportedly meets the policy definition of a "veteran" and asserts that he has a service-connected disability rating.¹⁰ However, based on the documents and information received by this Department, it is unclear whether the agency considered the grievant's veteran status in a manner consistent with state policy. As stated above, it appears that under DHRM policy, each applicant's veteran status *must* be considered during the selection process after the initial screening. In this case, there are varied explanations of how the grievant's veteran status was assessed.

First Step-Respondent

The first step-respondent, who was also a member of the interview panel, indicated without explanation that the grievant's veteran status was appropriately considered. However, her written statement appears to dispute whether the grievant had a service-connected disability rating. Consequently, even if the interview panel considered the grievant's veteran status consistent with the first step-respondent's statement, it does not appear any service-connected disability was taken into account.

Second Step-Respondent

The second step-respondent indicates that the grievant's "veteran and disability status information" was provided to the panel and considered. The second step-respondent appears to indicate that the interview panel considered the grievant to have a service-connected disability rating. However, this statement would appear to be at odds with the statement of the first step-respondent, a member of the interview panel. Nevertheless, the second step-respondent notes that consideration of the grievant's veteran status did not affect the outcome: "the qualitative variance between the two top candidates' interview performances and your own exceeded the quantitative limit of the applicable preference, which is set at 10%."¹¹

⁹ DHRM Policy 2.10, *Hiring*, Policy Guide, Veteran's Preference, April 30, 2009.

¹⁰ For purposes of this ruling, when the grievant's "veteran status" is discussed, this Department is including his presumed service-connected disability rating, which is to be given appropriate consideration as well.

¹¹ The second step-respondent may have adopted this 10% quantitative limit from the statutory and policy language requiring an agency to increase a veteran applicant's score on a test or examination by 5% or by 10% if the veteran also has a service-connected disability. *See* Va. Code § 2.2-2903(A); DHRM Policy 2.10.

Third Step-Respondent

The third step-respondent appears to discuss the application of the veteran's preference at an earlier screening stage, rather than during the assessment of the candidates during the interview portion of the selection process, as discussed by the previous step-respondents. Further, in the third step-respondent's offer to the grievant of a re-interview, it appears another approach to veteran status is proposed. The third step-respondent indicated that the re-interview would include questions about experience gained by the grievant in his military service to determine how that experience impacted the knowledge, skills, and abilities for the position.¹²

Agency Head

The agency head's qualification determination, similar to the third step-respondent, appears to interpret DHRM's policy guidance as only requiring consideration of the grievant's veteran status as a preferred qualification during screening for interviews, after the initial screening. The agency head states that "there is no specific mandate in the law, policy, or policy guidance that requires agencies to consider veteran status during the final hiring decision." This determination also notes that the "recruitment file for this position does not contain any documentation to conclusively establish that [the grievant's] disabled veteran status was considered." The agency head found, however, that the grievant was not harmed by this because he was granted an interview.

The various explanations provided at each stage raise questions about how the grievant's veteran status was considered and what impact it had or should have had on his candidacy for the position. The step-respondents appear to state differing standards by which the grievant's veteran status was considered and at divergent stages of the process. Indeed, the discrepancies between the first and second step-respondents raises a question as to whether the grievant's service-connected disability was considered at all. However, if the agency head's interpretation of the DHRM policy guidance is correct, and the veteran's preference is only assessed during screening for interviews, there would be no material impact on the grievant by any failure to consider his veteran status in this case.¹³ Another reasonable reading of the DHRM policy guidance is that the preferred qualification of veteran status is considered "after [the] initial screening phase,"¹⁴ which could include later final hiring determinations, not just which candidates are selected for interviews. Given these potentially different results under policy and the, at times, conflicting descriptions of how a veteran's preference was applied by the agency in this case, a hearing officer is in a better position to address the facts and policy issues presented by this grievance.

¹² While this Department is unaware of any provision of state policy that would prevent an agency from taking into account knowledge, skills, and abilities an applicant gained during military service, this Department is also unaware of any provision in law or policy that links the veteran's preference to the specific experience gained by an applicant during military service.

¹³ We note that applying a preference during screening only would seem to provide no advantage to highly qualified individuals in some cases. Those veterans who would have otherwise been screened in absent veteran status because they are so uniquely qualified would appear to receive no veteran's benefit at all.

¹⁴ DHRM Policy 2.10, *Hiring*, Policy Guide, Veteran's Preference, April 30, 2009.

Based on the foregoing, this Department concludes that the grievant has raised a sufficient question as to whether the agency properly considered his veteran status during the selection process as mandated by policy. Accordingly, the grievant's misapplication of policy claim qualifies for a hearing.

Alternative Theories for Non-Selection

The grievant has advanced alternative theories related to the agency's decision not to select him for the position, including allegations of bias, retaliation, and other errors in the selection process. Because the issue of misapplication and/or unfair application of policy qualifies for a hearing, this Department deems it appropriate to send all alternative theories advanced for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

However, while this grievance will proceed to hearing on the matter of the nonselection, a hearing officer will not be able to provide relief for, or uphold, certain other management actions that may be individually challenged in this grievance. The June 16, 2009 grievance is untimely to challenge 1) the grievant's receipt of a counseling memo (February 6, 2009), 2) the grievant's receipt of an interim evaluation (May 1, 2009), and 3) the grievant's transfer to a different unit (May 13, 2009), because those actions occurred more than 30 calendar days prior to the initiation of the grievance.¹⁵ Evidence regarding these matters may still be relevant if related to the grievant's various challenges to the selection process, but due to the timeliness issue, these matters cannot be substantively addressed by the hearing officer for relief on the merits.

Available Relief

The agency head also states in his qualification determination that a grievance hearing is moot because the agency already offered the grievant "a repeat of the process." While the agency head is correct that a hearing officer has no authority to award monetary damages or to direct the agency to promote the grievant, if discrimination, retaliation, or policy violations are found, the hearing officer may order the agency to create an environment free from discrimination, retaliation and/or policy violations, and to take corrective actions necessary to cure the violation and/or minimize its reoccurrence.¹⁶ For instance, if the hearing officer finds that policy has been misapplied, the hearing officer might order the agency to reapply policy from the point at which it became tainted, which might involve a repeat of the selection process in accordance with policy.¹⁷ While the grievant has already rejected the re-interview offered by the agency at the third step, it is not clear that the process outlined by the third step-respondent

¹⁵ The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance. Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4. This Department's rulings on matters of compliance are final and nonappealable. See Va. Code § 2.2-1001(5), 2.2-3003(G).

¹⁶ See *Rules for Conducting Grievance Hearings* § VI(C).

¹⁷ *Id.*

would have remedied all potential policy concerns.¹⁸ Further, a hearing officer's order to create an environment free from discrimination, retaliation and/or policy violations is enforceable by a circuit court.¹⁹ Consequently, a grievance hearing in this matter is not moot.

APPEAL RIGHTS AND OTHER INFORMATION

The grievant's June 16, 2009 grievance is qualified for hearing to the extent discussed above. This qualification ruling in no way determines that the agency's actions were in violation of policy or otherwise improper, only that further exploration of the facts and applicable policy language by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

Claudia Farr
Director

¹⁸ For instance, the third step-respondent's instructions for the re-interview appear to structure a process to gather information about the grievant's experience during his military service as it applies to the knowledge, skills, and abilities for the position, rather than addressing how the veteran's preference was to be reassessed.

¹⁹ See Va. Code § 2.2-3006(D).