

Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: November 4, 2009; Ruling #2010-2443; Agency: Department of Conservation and Recreation; Outcome: Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Conservation and Recreation
Ruling No. 2010-2443
November 4, 2009

The grievant has requested a ruling on whether his May 27, 2009 grievance with the Department of Conservation and Recreation (the agency) qualifies for a hearing. For the following reasons, this grievance qualifies for hearing.

FACTS

The grievant's May 27, 2009 grievance concerns a selection in which he competed and failed to obtain a supervisory position. The grievant was selected as one of five candidates for the first round of interviews, but was not selected as one of the two candidates for the final round of interviews. The agency selected one of the final two candidates for the position.

According to documentation provided by the agency, the grievant did not make the second round of interviews due to his performance in the interview. For instance, the agency's documentation notes 1) the grievant's answers were not concise, 2) he did not provide sufficient detail of how his knowledge and abilities would allow him to meet the job requirements, 3) his answer on the question about controls for credit card programs did not include a discussion of certain specific controls, 4) his answer to a question about the development of a specific policy or procedure did not include a discussion of the various steps in having a new policy developed and approved, and 5) his answer to a question about resolution of "time-sensitive" problems did not address how he resolved the issues and his example was a "routine" task.

The grievant has challenged the selection on various grounds. He has asserted claims of misapplication of policy, discrimination, and retaliation. His discrimination claim is based on age and/or national origin. His retaliation claim stems from his voluminous history of past grievances and complaints submitted to various entities.

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 discrimination, retaliation, and a misapplication and/or unfair application of policy.

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;² (2) the employee suffered a materially adverse action;³ 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.⁴ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency’s explanation was pretextual.⁵

The grievant has clearly engaged in numerous protected activities and has experienced a materially adverse action in not being selected for the supervisory position.⁶ While this Department has not reviewed any direct evidence that links the grievant’s protected activities to this selection decision, there are questions raised by indirect evidence of potential inconsistencies in how the candidates for this position were evaluated.

The agency found that the grievant had failed to describe certain specific controls of a credit card program in response to a particular question during the interview. While this appears to be supported by the panel’s interview notes, reference to the same interview notes finds that some of these specific controls may not have been mentioned by the successful candidate either. The agency also felt that the grievant failed to articulate the processes for getting a new policy or procedure approved and did not satisfactorily describe resolution of a “time-sensitive” matter. Again, the interview notes do not appear to reflect that the other two successful candidates articulated all the processes for developing a new policy or procedure. Further, the grievant’s and a successful candidate’s answers regarding the “time-sensitive” question do not appear to have identified significantly different issues, as reflected in the interview notes.

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

² 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).

³ *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.

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

⁵ See *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

⁶ In this case, the position was clearly a promotion to a supervisory level. As such, there is a sufficient question raised that this was a materially adverse action.

The agency has stated that the grievant was not advanced to the second interview based on deficiencies in his first interview. However, because the interview notes (on their face at least) appear to indicate that the other two successful candidates may have shared some of the same deficiencies but were not downgraded, there are sufficient questions raised as to whether the agency's explanation could have been pretextual. As such, the grievance raises a sufficient question of retaliation to qualify for a hearing.

This ruling is not meant to indicate that the grievant should have advanced to the second round of interviews or that the agency engaged in retaliation, discrimination, or misapplication policy. Further, no part of this ruling is meant to suggest that this Department has found sufficient evidence to establish the grievant's case at hearing. This ruling only determines that there are sufficient questions raised by the facts, as reflected in the interview notes, to qualify for hearing under a theory of retaliation. The disputed factual questions at issue are more properly assessed by a hearing officer.

Alternative Theories and Claims

The grievant has also asserted claims and theories regarding the selection, such as misapplication and/or unfair application of policy and discrimination. Because the grievant's claim of retaliation 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.

CONCLUSION

For the reasons set forth above, the grievant's May 27, 2009 grievance is qualified for hearing. 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